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National Reporter System.—State Series.

THE
SOUTHEASTERN REPORTER,
VOLUME 22,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST
VIRGINIA, AND SUPREME COURTS OF NORTH
CAROLINA, SOUTH CAROLINA, GEORGIA.

PERMANENT EDITION.

JUNE 18—OCTOBER 22, 1895.

KF
135
156
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ST. PAUL:
WEST PUBLISHING CO.
1895.

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SOUTHEASTERN REPORTER, VOLUME 22.

JUDGES
OF THE
COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

GEORGIA—Supreme Court

THOMAS J. SIMMONS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SAMUEL LUMPKIN.

SPENCER R. ATKINSON.

NORTH CAROLINA—Supreme Court.

WILLIAM T. FAIRCLOTH, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

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HENRY McIVER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

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JUDGES.

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JOHN A. BUCHANAN.
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WEST VIRGINIA—Supreme Court of Appeals.

HOMER A. HOLT, PRESIDENT.

JUDGES.

HENRY BRANNON.

MARMADUKE H. DENT.

JOHN W. ENGLISH.

RULES OF COURT.

NORTH CAROLINA.

I. RULES OF PRACTICE IN SUPREME COURT.

II. RULES OF PRACTICE IN SUPERIOR COURTS.

I. Rules of Practice in the Supreme Court of North Carolina, Revised and Adopted at February Term, 1895.

APPLICANTS FOR LICENSE.

1. WHEN EXAMINED.

Applicants for license to practice law will be examined on the first Monday of each term, and at no other time.

2. REQUIREMENTS AND COURSE OF STUDY.

Each applicant must have attained the age of twenty-one years, and must have read the constitution of this state and of the United States.

Ewell's Essentials (vol. 1), Cooley's Constitutional Law (student's edition), or Black on Constitutional Law, and Browne's Domestic Relations.

Williams on Real Property (Ewell's Essentials, vol. 2), with the decisions of the supreme court of North Carolina relating to real property, and the statutes altering the common law.

Smith on Contracts (Ewell's Essentials, vol. 2), with cognate decisions of this court.

Pollock (Ewell's Essentials, vol. 3), Bigelow or Cooley on Torts (student's edition), with the decisions of this court on the laws of master and servant, negligence, and fellow-servants.

Angell, or some other work on corporations generally, with chapters 16 and 49 of the Code, and the decisions construing them.

Clark's Code of Civil Procedure and Heard on Pleading.

Best (Ewell's Essentials, vol. 3), with North Carolina decisions, or 1 Greenleaf on Evidence.

Toller (or some other good work) on Executors, with chapters 33 and 54 of the Code, in connection with decisions relating thereto, or Shuler on Executors.

Adam's Equity (Ewell's Essentials, vol. 2), or Fetter's Equity Jurisprudence, or Bispham's Principles of Equity.

Browne on Criminal Law, or Ewell's Essentials, vol. 1, book 4, in connection with chapters 25 and 26 of the Code, upon the decisions of this court relating to them.

The Code of North Carolina, especially the Code of Civil Procedure.

It is advisable that all students should read Creasy on the English constitution. Instructors may excuse students from the study of the law governing advowsons, tithes and other incorporeal hereditaments, not known to the law of this country; of special customs or prerogatives, and of such portions of the law as to prescriptions and forfeiture as are not applicable in the United States.

Each applicant must have read law for twelve months at least, and shall file with the clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this court.

3. DEPOSIT.

Each applicant shall deposit with the clerk a sum of money sufficient to pay the license fee before he shall be examined; and if, upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

APPEALS—WHEN HEARD.

4. DOCKETING.

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the clerk.

5. WHEN HEARD.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this court must be docketed at such term before the completion of the call of the docket of the district to which it belongs and stands for argument in its order. The transcript of the record on appeal from a court in a county in which the court shall be held during a term of this court may be filed at such term or at the next succeeding term. If filed before the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a

civil case, it shall be continued, unless, by consent, it is submitted upon printed argument under rule 10; but appeals in criminal actions shall each be heard at the term at which it is docketed, unless, for cause or by consent, it is continued.

6. APPEALS IN CRIMINAL ACTIONS.

Appeals in criminal cases, docketed before the perusal of the criminal docket for any district, shall be heard before the appeals in civil cases from said district. Criminal appeals docketed after the perusal of the district to which they belong, shall be called immediately at the close of argument of appeals from the Twelfth district, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. CALL OF EACH JUDICIAL DISTRICT.

Causes from the First district will be called on Tuesday of the first week of each term of the court; from the Second district, on Tuesday of the second week; from the Third district, on Tuesday of the third week; from the Fourth district, on Tuesday of the fourth week; from the Fifth district, on Tuesday of the fifth week; from the Sixth district, on Tuesday of the sixth week; from the Seventh district, on Tuesday of the seventh week; from the Eighth district, on Tuesday of the eighth week; from the Ninth district, on Tuesday of the ninth week; from the Tenth district, on Tuesday of the tenth week; from the Eleventh district, on Tuesday of the eleventh week, and from the Twelfth district, on Tuesday of the twelfth week.

8. END OF DOCKET.

The call of causes not reached and disposed of during the period allotted to each district, and those put to the end of the docket, shall begin at the close of argument of appeals from the Twelfth district, and each cause, in its order, tried or continued, subject to rule 6; but at the term of the court held next preceding the end of the year, no civil cause will be called and tried after the expiration of the twelve weeks designated, unless by consent of parties and the assent of the court.

9. CALL OF THE DOCKET.

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to the end of the district, by the consent of counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; except by consent or for cause shown, the first call shall be peremptory. At the first term of the court in the year, a cause may, by consent of the court, be put to the end of the docket; if no counsel

appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties, and if none appear at the second call, it will be continued, unless the court shall otherwise direct. The appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. SUBMISSION ON PRINTED ARGUMENT.

When, by consent of counsel, it is desired to submit a case without oral argument, the court will receive printed arguments, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket, but the court, notwithstanding, can direct an oral argument to be made, if it shall deem best.

11. IF ORALLY ARGUED.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued, or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. IF BRIEF FILED BY EITHER PARTY.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were an appearance by counsel.

13. CASES HEARD OUT OF THEIR ORDER.

In cases where the state is concerned, involving or affecting some matter of general public interest, the court may, upon motion of the attorney general, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the court, at the instance of a party to a cause that directly involves the right to a public office, or a matter of great public interest, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, may make the like assignment in respect to it.

14. CASES HEARD TOGETHER.

Two or more cases involving the same question may, by leave of the court, be heard together, but they must be argued as one

case, the court directing, when the counsel disagree, the course of the argument.

WHEN DISMISSED.

15. IF APPEAL NOT PROSECUTED.

Cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. MOTION TO DISMISS.

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing, signed by the appellee or his counsel, to that effect, or unless the court shall allow appropriate amendments.

17. DISMISSED BY APPELLEE.

If the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded, during the week appropriated to the district, at a term of this court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been filed, and filing said certificate or a certified transcript of the record in this court, may have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

18. WHEN APPEALS DISMISSED.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

TRANSCRIPTS.

19. TRANSCRIPT OF THE RECORD.

(1) The Record.—In every record of an action brought to this court the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable.

(2) Pages Numbered.—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject-matter contained therein.

(3) Index.—On some paper attached to the record, there shall be an index thereto, in the following or some equivalent form:

Summons—Date	Page 1
Complaint—First cause of action.....	2
“ Second cause of action.....	3
Affidavit for Attachment, etc.....	4

20. INSUFFICIENT TRANSCRIPT.

If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued as may be proper. If not dismissed, it shall be referred to the clerk, or some other person, to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

21. MARGINAL REFERENCES.

A case will not be heard until there shall be put in the margin of the record, as required in rule 19 (2), brief references to such parts of the text as are necessary to be considered in a decision of a case.

22. OF UNNECESSARY RECORDS.

The cost of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions or errors assigned, and not constituting a part of the record of the action of the court, taken during the progress of the cause, shall, in all cases, be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

PLEADINGS.

23. MEMORANDA OF.

Memoranda of pleadings will not be received or recognized in the supreme court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. ASSIGNING TWO OR MORE CAUSES OF ACTION.

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. WHEN SCANDALOUS.

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the court to be stricken from the record, or reformed, and for this purpose the court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

26. AMENDMENTS.

The court may "amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the court may deem it necessary and proper for the purpose of justice, and on such terms as the court may prescribe." The Code, § 965.

EXCEPTIONS.

27. HOW ASSIGNED.

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, rulings, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers, and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the clerk's office. No other exceptions than those so set out, or filed, and made part of the case or record, shall be considered by this court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment.

PRINTING RECORDS.

28. WHAT TO BE PRINTED.

Fifteen copies of so much and such parts of the record as may be necessary to a proper understanding of the exceptions and grounds of error assigned as appear in the record in each action shall be printed. Such printed matter shall consist of the statement of the case on appeal, and of the exceptions appearing in the record to be reviewed by the court; or, in case of a demurrer, of such demurrer

and the pleadings to which it is entered. If the jury passed upon issues, the issues and findings thereon shall be printed, as likewise all exhibits and pleadings, or parts of pleadings, referred to in the case on appeal, as necessary to show the contention of the parties. This will not preclude the parties in the argument from referring to the manuscript parts of the record whenever they may deem it incidental to the argument.

29. HOW DESIGNATED.

The counsel for the appellant shall designate such parts of the record as are required to be printed and have the same copied for the printer; if he shall fail to do so, the clerk of this court shall cause the same to be done if the appellant shall request it and deposit the cost thereof.

30. IF NOT PRINTED.

If the record in an appeal shall not be printed, as required by this and the next preceding paragraph, at the time it shall be called in its order for argument, the appeal shall, on motion of the appellee, be dismissed; but the court may after five days' notice at the same term, for good cause shown, reinstate the appeal upon the docket, to be heard at the next succeeding term like other appeals; provided, nevertheless, that this and the next preceding paragraph shall not apply to appeals in forma pauperis, but in all such cases the clerk shall make five typewritten copies of such parts of the record as otherwise would be printed, and furnish same for use of the court on the argument. Should the appellant gain the appeal, the cost of such typewritten copies shall be taxed against the appellee as part of the cost on appeal.

31. COSTS OF PRINTING.

Costs for printing the record shall be allowed to the successful party in the case, at the rate of sixty cents per page of the size of the page in the North Carolina Reports, for each page of one copy of the record printed, not exceeding twenty pages, unless otherwise specially allowed by the court, to be taxed in the bill of costs; and if the clerk of this court shall prepare the manuscript copy of the parts of the record to be printed in any appeal, he shall be allowed ten cents per copy sheet for such service, such allowance to be taxed and paid as other fees and charges allowed to the clerk by law.

32. IF RECORD INSUFFICIENTLY PRINTED.

If, after a case shall be called for argument, it shall be made to appear to the court that it cannot be heard intelligently until additional parts of the record be printed, the court may, on motion of appellee's counsel, continue the cause to the end of the district to give appellant time to print such

additional portions, and dismiss the appeal if such order be not complied with.

After argument, the court may, *ex mero motu*, if it appear that required portions of the record have not been printed, suspend the further consideration of the questions raised by the appeal, and cause the clerk to notify appellant or his counsel to furnish within a reasonable time a sufficient sum to pay for said printing, or the appeal will be continued or dismissed, at the discretion of the court.

ARGUMENT.

33. ORAL ARGUMENTS.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) The counsel for the appellant may be heard for one hour and a half, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour and a half.

(4) The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5) The time for argument may be extended by the court in a case requiring; but application for such extension must be made before the argument begins. The court, however, may direct the argument of such points as it may see fit outside of the time limited.

(6) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the court, so as to avoid tedious and useless repetition.

34. PRINTED ARGUMENT OR BRIEFS.

When the cause is submitted on printed argument under rule 10, or a brief is filed, whether counsel appear or not, such brief or argument, if of appellant, shall set forth a brief statement of the case, embracing so much and such parts of the record as may be necessary to understand the case; the several grounds of exceptions and assignments of error relied upon by the appellant; the authorities relied upon, classified under each assignment, and, if statutes are material, the same shall be cited by the book, chapter and section; but this shall not be understood to prevent the citation of other authorities in the argument.

35. COPIES OF BRIEF TO BE FURNISHED.

Fifteen copies shall be delivered to the clerk of the court, one of which shall be

filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel, when he shall call for the same.

36. BRIEF OF APPELLEE.

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner.

37. COST OF BRIEFS.

The actual cost of printing his brief, not exceeding sixty cents per page of the size of the pages in the North Carolina Reports, and not exceeding ten pages, shall be allowed to the successful party, to be taxed in the bill of costs.

38. RE-ARGUMENT.

The court will, of its own motion, direct a re-argument before deciding any case, if, in its judgment, it is desirable.

39. AGREEMENT OF COUNSEL.

The court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this court.

40. ENTRY OF APPEARANCE.

An attorney shall not be recognized as appearing in any case unless he shall first sign a printed or written request by him, in his own proper handwriting, addressed to the clerk of the court, that he be entered as counsel of record in the case mentioned therein, and such request shall be attached to, and filed with, the transcript of the record in such case; and, upon filing such request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the court.

CERTIORARI AND SUPERSEDEAS.

41. WHEN APPLIED FOR.

Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this court next after the judgment complained of was entered in the court below. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

42. HOW APPLIED FOR.

The writs of certiorari and supersedeas shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

43. NOTICE OF.

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the court may, for just cause shown, shorten the time of such notice.

ADDITIONAL ISSUES.**44. IF OTHER ISSUES NECESSARY.**

If, pending the consideration of an appeal, the supreme court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the court and certified to the court below for trial, and the case will be retained for that purpose.

MOTIONS**45. IN WRITING.**

All motions made to the court shall be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the sessions of the court.

ABATEMENT AND REVIVOR.**46. DEATH OF PARTY.**

Whenever, pending an appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the cases, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other cases; and, if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order

shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined, according to the course of the court: provided, such order shall be served upon the opposing party.

47. WHEN APPEAL ABATES.

When the death of the party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.**48. WHEN CERTIFIED DOWN.**

"The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the superior courts, certificates of the decisions of the supreme court, which shall have been on file ten days, in cases sent from said court." Acts 1887, c. 41.

THE JUDGMENT DOCKET.**49. HOW KEPT.**

The judgment docket of this court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the clerk of the court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or part, the payment of money,—stating the names of the parties, the term at which such judgment was entered, its number on the docket of the court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXECUTIONS.**50. TESTE OF EXECUTIONS.**

When an appeal shall be taken after the commencement of a term of the court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

51. ISSUING AND RETURN OF.

Executions issuing from this court may be directed to the proper officers of any county in the state. At the request of a party in whose favor execution is to be issued, it

may be made returnable on any specified day after the commencement of the term of this court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the superior court of said county held next after the date of its issue, and, thereafter, successive executions will only be issued from said superior court, and, when satisfied, the fact shall be certified to this court, to the end that an entry to this effect be made here.

PETITION TO REHEAR.

52. WHEN FILED.

A petition to rehear may be filed at the same term, or during the vacation succeeding the term, of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the justice to whom it is submitted under rule 53, such justice may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined.

53. WHAT TO CONTAIN.

The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly-discovered evidence, and that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this court, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The petition shall be sent to the clerk of this court, who shall indorse thereon the time when it was received, and deliver the same to the justice designated by the petitioner, who shall be a justice who did not dissent from the opinion; but the petition shall not be docketed unless such justice shall indorse thereon that the case is a proper one to be reheard; and notice of the action had shall be given to the petitioner by the clerk of this court.

The rehearing may be granted as to the whole case, or restricted to specified points, as may be directed by the justice who grants the application.

54. NOTICE OF.

Before applying for an order to restrain the issuing of an execution, or the collection and payment of the same, written notice must be given the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor. The court may, however, grant a temporary restraining order without notice.

CLERKS AND COMMISSIONERS.

55. REPORT IN HAND OF.

The clerk and every commissioner of this court who, by virtue or color of any order, judgment, or decree of the supreme court in any action or matter pending therein, has received, or shall receive, any money or security for money to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said court held next after the first day of January in each year, report to the court a statement of said fund, setting forth the title and number of the action or matter, the term of the court at which the order or orders under which the clerk or such commissioner professes to act, was made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. REPORT RECORDED.

The reports required by the preceding paragraph shall be examined by the court, or some member thereof, and their or his approval indorsed, shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the supreme court, entitled "Record of Funds"; and the cost of recording the same shall be allowed by the court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. BOOKS TAKEN OUT.

No books belonging to the supreme court library shall be taken therefrom except into the supreme court chamber, unless by the justices of the court, the governor, the attorney general, or the head of some department of the executive branch of the state government, without the special permission of the marshal of the court, and then only upon the application in writing of a judge of a superior court holding court or hearing

some matter in the city of Raleigh, the president of the senate, the speaker of the house of representatives, or the chairmen of the several committees of the general assembly; and in such case the marshal shall enter, in a book kept for the purpose, the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

CLERK.

58. MINUTE BOOK.

The clerk shall keep a permanent minute book, containing a brief summary of the proceedings of this court in each appeal disposed of.

59. CLERK TO HAVE OPINIONS TYPE-WRITTEN AND SENT TO JUDGES.

After the court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made, and a copy sent to each member of the court, to the end that the same may be more carefully examined, and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the court and ordered to be filed.

LIBRARIAN.

60. REPORTS BY HIM.

The librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the library of the supreme court, and report to the court on the first day of the spring term of each year what books have been added during the year next preceding his report to the library, by purchase, or

otherwise, and also what books have been lost or disposed off, and in what manner.

61. SITTINGS OF THE COURT.

The court will sit daily, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. CITATION OF REPORTS.

Inasmuch as many of the volumes of Reports prior to 63d have been reprinted by the state with the number of the Report instead of the number of the reporter, and still other volumes will be reprinted and numbered in like manner, counsel can cite the volumes prior to the 63d either as

1 & 2 Martin Tay- lor and Conf.	or 1 N. C.	8 Iredell Law	or 30 N. C.
1 Haywood	" 2 "	9 " "	" 31 "
2 " "	" 3 "	10 " "	" 32 "
1 and 2 Car. Law	" 4 "	11 " "	" 33 "
Repository N.	" 5 "	12 " "	" 34 "
C. Term	" 6 "	13 " "	" 35 "
1 Murphy	" 7 "	1 " Eq.	" 36 "
2 " "	" 8 "	2 " "	" 37 "
3 " "	" 9 "	3 " "	" 38 "
1 Hawks	" 10 "	4 " "	" 39 "
2 " "	" 11 "	5 " "	" 40 "
3 " "	" 12 "	6 " "	" 41 "
4 " "	" 13 "	7 " "	" 42 "
1 Devereux Law	" 14 "	8 " "	" 43 "
2 " "	" 15 "	Busbee Law	" 44 "
3 " "	" 16 "	" Eq.	" 45 "
4 " "	" 17 "	1 Jones Law	" 46 "
1 " Eq.	" 18 "	2 " "	" 47 "
2 " "	" 19 "	3 " "	" 48 "
1 Dev. & Bat. Law	" 20 "	4 " "	" 49 "
2 " "	" 21 "	5 " "	" 50 "
3 & 4 Dev. & Bat.	" 22 "	6 " "	" 51 "
Law	" 23 "	7 " "	" 52 "
1 Dev. & Bat. Eq.	" 24 "	8 " "	" 53 "
2 " "	" 25 "	1 " Eq.	" 54 "
1 Iredell Law	" 26 "	2 " "	" 55 "
2 " "	" 27 "	3 " "	" 56 "
3 " "	" 28 "	4 " "	" 57 "
4 " "	" 29 "	5 " "	" 58 "
5 " "	" 30 "	6 " "	" 59 "
6 " "	" 31 "	1 & 2 Winston	" 60 "
7 " "	" 32 "	Phillips Law	" 61 "
		" Eq.	" 62 "

II. Rules of Practice in the Superior Courts of North Carolina, Revised and Adopted by the Justices of the Supreme Court, at February Term, 1895, by Virtue of the Code, § 961.

RULES.

1. ENTRIES ON RECORDS.

No entry shall be made on the records of the superior courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. SURETY ON PROSECUTION BOND AND BAIL.

No person who is bail in any action or proceeding, either civil or criminal, or who

is security for the prosecution of any suit, or upon appeal from a justice of the peace, or is security in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several superior courts to state, in the docket for the court, the names of the bail, if any, and security for the prosecution in each case, or upon appeal from a justice of the peace.

3. OPENING AND CONCLUSION.

In all cases, civil or criminal, when no evi-

dence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. EXAMINATION OF WITNESSES.

When several counsel are employed on the same side, the examination or cross-examination of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection, and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. MOTION FOR CONTINUANCE.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the opposite party may file his counter-affidavit, whereupon the motion shall be decided without debate, unless permitted by the court.

(The above rules substantially prescribed by the supreme court at January term, 1815, the last being amended by Acts 1885, c. 394.)

6. DECISION OF RIGHT TO CONCLUDE NOT APPEALABLE.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument except in the cases mentioned in rule 3, the court shall decide who is so entitled, and its decision shall be final and not reviewable.

7. ISSUES.

Issues shall be made up as provided and directed in the Code, §§ 395 and 396.

8. JUDGMENTS.

Judgments shall be docketed as provided and directed in the Code, § 433.

9. TRANSCRIPT OF JUDGMENTS.

Clerks of the superior courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. DOCKETING MAGISTRATES' JUDGMENTS.

Judgments rendered by a justice of the peace upon a summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the superior court shall be furnished to applicants at the same time after such rendition of judgment, and, if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. TRANSCRIPT ON APPEAL TO SUPREME COURT.

In every case of appeal to the supreme court, or in which a case is taken to the supreme court by means of the writ of certiorari as a substitute for an appeal, it shall be the duty of the clerk of the superior court, in preparing the transcript of the record for the supreme court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same.

On some paper attached to the transcript of the record there shall be an index to the record in the following or some equivalent form:

Summons—Date	Page 1
Complaint—First cause of action.....	" 2
" " Second cause of action.....	" 3
Affidavit for Attachment.....	" 4

—and so on to the end.

12. TRANSCRIPT ON APPEAL—WHEN SENT UP.

Transcripts on appeal to the supreme court shall be forwarded to that court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the superior court.

13. REPORTS OF CLERKS AND COMMISSIONERS.

Every clerk of superior court, and every commissioner appointed by such court, who, by virtue or color of any order, judgment, or decree of the court in any action or proceedings pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said

fund, setting forth the title and number of the action and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the judge of the superior court holding the first term of the court in each and every year, who shall examine or cause the same to be examined, and, if found correct, and so certified by him, shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. RECORDARI.

The superior court shall grant the writ of recordari only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice. If with notice, the petition shall be heard upon answer thereto duly verified, and upon affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases. If granted without notice, the petitioner shall first give the undertaking for costs, and for writ of supersedeas, if prayed for as required by the Code, § 545. In such case, the writ shall be made returnable to the term of the superior court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of court to which the writ shall be made returnable. The defendant in the petition, at the term of the superior court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of certiorari in like manner, except that, in case of the suggestion of a diminution of the record it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. JUDGMENT—WHEN TO REQUIRE BONDS TO BE FILED.

In no case shall the court make or sign any order, decree, or judgment directing the

payment of any money or securities for money belonging to any infant or to any person, until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payment shall be directed only when such bonds as required by law shall have been given, and accepted by competent authority.

16. NEXT FRIEND—HOW APPOINTED.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend upon the written application of a reputable disinterested person closely connected with such infant; but, if such person will not apply, then upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. GUARDIAN AD LITEM—HOW APPOINTED.

All motions for a guardian ad litem shall be made in writing, and the court shall appoint such guardian only after due inquiry as to fitness of the person to be appointed, and such guardian must file an answer in every case.

18. CASES PUT AT FOOT OF DOCKET.

All civil actions that have been at issue for two years, and that may be continued, by consent, at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When the continuance shall be ordered, and when a civil action shall be continued, on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. WHEN OPINION IS CERTIFIED.

When the opinion of the supreme court in any cause which has been appealed to that court has been certified to the superior court, such cause shall stand on docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed.

20. CALENDAR.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court, or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. CASES SET FOR A DAY CERTAIN.

Neither civil nor criminal actions will be set for trial on a day certain, or not be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. CALENDAR UNDER CONTROL OF COURT.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the dispositions of causes placed upon the calendar and not reached on the day for which they may be set.

23. NON-JURY CASES.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. APPEALS FROM JUSTICES OF THE PEACE.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. ON CONSENT CONTINUANCE—JUDGMENT FOR COSTS.

When civil actions shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. TIME TO FILE PLEADINGS—HOW COMPUTED.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. COUNSEL NOT SENT FOR.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. CRIMINAL DOCKETS.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at the term. Third—All presentments made at preceding terms undisposed of. Fourth—All cases wherein judgments nisi have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the state.

29. CIVIL AND CRIMINAL DOCKETS—WHAT TO CONTAIN.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

30. BOOKS.

The clerks of the superior courts shall be chargeable with the care and preservation of the volumes of Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

SUPREME AND CIRCUIT COURTS OF SOUTH CAROLINA.

Amendments to rules of court since the publication of these rules in 1894 in 2 Revised Statutes.

SUPREME COURT RULES.

Rule XI. If, on the call of cause, either party fail to appear, or shall neglect to furnish and deliver the papers required by rule VIII., the opposite party may proceed as follows: The appellant may agree or submit the cause in his behalf, the respondent may have an order dismissing the appeal: provided, however, that the court, in its discretion, may reinstate an appeal dismissed for such default, if good cause be shown therefor, under a motion to that effect, of which at least one day's notice shall be given to the attorney of the opposite party; such motion to be made during the time assigned for the call of cases from the circuit from which such appeal comes, or as soon thereafter as is practicable to give the required notice. When neither party appear to argue, on the call of a cause, it will stand continued at the first term.

[Of force from July 1, 1894.]

Rule XVI. No affidavit will be considered by this court, or the clerk thereof, which has been sworn to before any party interested

in the cause or proceeding in which such affidavit may be affirmed.

[Of force from July 1, 1894.]

CIRCUIT COURT RULES.

Rule XII. All original pleadings and other proceedings shall be written on each side of legal cap paper, or printed (with a margin of one and a half inch on the left). If more than two pages are used, they shall be fastened at the top, so as to read continuously. Papers shall be folded from the bottom in four equal folds, and endorsed with the style of the court, the names of the parties, the nature of the paper, and the name of the attorney. The above rule to take effect on and after the first day of June, 1895.

[This rule was adopted at the convention of judges held during the November term of 1894, and is applicable to papers served or filed prior to 1st June, 1895. The effect of the rule is to prevent original pleadings and other proceedings in the circuit courts from being typewritten.]

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THE
SOUTHEASTERN REPORTER.
VOLUME 22.

(44 S. C. 315)

NORRIS v. CLINKSCALES et al.

(Supreme Court of South Carolina. May 30,
1895.)

**NONSUIT—CLAIM AND DELIVERY BY MORTGAGEE—
DEATH OF MORTGAGOR.**

1. A nonsuit should not be ordered when there is any competent testimony offered to prove the allegations of the complaint.

2. In an action of claim and delivery by chattel mortgagee, the fact that the mortgagor died before the suit, and that the mortgaged property was in the hands of one of defendants, as executor of the mortgagor, is no ground for a nonsuit, as the executor has no greater claims than his testator had, and the claim of plaintiff could in no way be affected by the death of the mortgagor.

3. In an action of claim and delivery, the fact that plaintiff admitted signing a receipt, under circumstances tending to establish duress, on which defendants relied to show an acceptance by her of certain property in lieu of the property claimed in the suit, is no ground for nonsuit; duress, under the circumstances, being a question for the jury.

Appeal from common pleas circuit court of Abbeville county; O. W. Buchanan, Judge.

Action by E. B. Norris, as executor of Jane E. Clinkscales, against A. Jefferson Clinkscales and another, of claim and delivery of personal property. From an order of nonsuit, plaintiff appeals. Reversed.

Graydon & Graydon, for appellant. Frank B. Gary, for respondents.

EARLE, Acting Associate Judge. This is an action of claim and delivery of personal property. At the conclusion of the testimony for the plaintiff, his honor, the circuit judge, granted an order of nonsuit. The appellant appeals to this court from said order, upon the following exceptions: (1) Because it was error to hold that the testimony offered by the plaintiff failed to make out a case, up to the time the plaintiff called A. J. Clinkscales, one of the defendants, as a witness, and in holding that upon that testimony the court would be compelled to grant a nonsuit; thus forcing the plaintiff to put up the defendant A. J. Clinkscales to prove that the defendants were in possession of the property, when the answer filed by them admitted the possession of the property, and demand made upon them for the property. (2) Because it was error to

allow the witness A. J. Clinkscales to testify what appraisers of his brother's estate valued the property at, and in allowing a copy of the appraisement to be offered in evidence. (3) Because it was error to allow the witness A. J. Clinkscales to testify, over the objection of the plaintiff, that he was holding the property in dispute as executor of J. P. Clinkscales, such defense having been made in the answer. (4) Because it was error to allow the witness A. J. Clinkscales to testify that Mrs. Estelle Clinkscales gave him a receipt, or to allow him to testify as to any other transaction or communication between him and Mrs. Estelle Clinkscales, deceased. (5) Because it was error to hold that the plaintiff had failed to offer sufficient testimony to go to the jury, and error to grant an order of nonsuit. (6) Because there was testimony offered by the plaintiff upon every material allegation in the complaint, and the presiding judge erred in granting a nonsuit on defendants' motion.

The fourth exception has been abandoned, and it is unnecessary, from the view which we take of this case, to consider the questions raised by the second and third exceptions. The other exceptions may be considered together, as they all relate to the same matter. Did his honor, the circuit judge, err in granting a nonsuit? It is scarcely necessary, in the light of the many decisions of this court, to cite authority to show that a nonsuit should never be ordered when there is any testimony tending to prove the material allegations of the complaint. As the late Chief Justice Simpson said in *Davis v. Railroad Co.*, 21 S. C. 101: "There are some loose expressions in some of the cases to the effect that insufficient testimony will sustain a nonsuit. These expressions should not be understood, however, as giving power to the trial judges to determine the quantum of testimony sufficient to prove an alleged fact, or to decide as to the truth, force, or effect of such testimony; but they should be interpreted in the sense, rather, of pertinency or relevancy. In fine, the rule is that when there is any competent, pertinent, and relevant testimony offered to the facts in dispute, the case passes into the hands of the jury and beyond

the judge; but where no such testimony is offered it is the province and the duty of the judge to nonsuit." The testimony might be insufficient to support a verdict for the plaintiff, and the judge might be constrained to set it aside and to grant a new trial, but the apprehension that a jury might render a verdict upon insufficient testimony would not justify the granting of a nonsuit. If the plaintiff makes out a *prima facie* case, however insufficient, unsatisfactory, and conflicting the testimony might be, the judge has no power to grant a nonsuit.

Now, apply this rule to the case under consideration. Did the plaintiff produce any evidence to support her cause of action? The plaintiff alleges in her complaint, in substance, that she is entitled to the immediate possession of the chattels therein described, under and by virtue of certain mortgages executed by the owner of said chattels to secure the payment of certain notes which became due and payable before the commencement of this action; that said notes and mortgages had been duly assigned to her, for value; and that the defendants have wrongfully and unlawfully taken possession of said property, and refuse to deliver the same to the plaintiff. The answer of the defendants admits the execution of the notes and mortgages, the demand made upon them by the plaintiff, their refusal to deliver possession to the plaintiff, and that they "took possession of a part of the property." So that, in order to make out a *prima facie* case, it only remained for the plaintiff to prove that the notes and mortgages had been assigned to her for value; that the defendants had possession of the property covered by the mortgages, and the value thereof. Referring to the case, we find that the plaintiff offered some testimony to support each of these allegations. Mrs. Clinkscales, the plaintiff, testified that the mortgages had been duly assigned to her, for value, and that the defendants got the following property: "One 6 horse power Tozer engine, 1 60-saw Pratt gin and condenser, 1 bay horse, 1 hand-power cotton press, and wagon." A. J. Clinkscales, one of the defendants, testified that he had in his possession a Tozer engine, a Pratt gin and condenser, and a De Loach mill, which were the same chattels described in said mortgages; and C. W. Norris testified as to the value of the property.

But the respondents' attorneys have insisted that the order of nonsuit should be sustained because it appears that the mortgagor died before the commencement of this action, and the mortgaged property was in the hands of one of the defendants, as executor of the mortgagor. It might be sufficient to say, in answer to this contention, that no such defense was interposed by the answer, and that the parties must be restricted to the issues raised by the pleadings. But, waiving this, we could not hold with the respondent, for the executor has no greater rights than his

testator; and if the appellant had a cause of action against the testator, during his life, for the possession of the property to which she had the legal title under the mortgages, that right could in no way be affected by the death of the mortgagor, and can be prosecuted against his executor, to whom the possession of the property has been transferred.

The respondents' attorneys have also earnestly argued that the nonsuit should be sustained because a good defense to the action has been made out by the plaintiff's own witnesses. This result would follow if we agreed with the respondent that a good defense was thus made out. As was said by the late chief justice, speaking for the court, in *Pool v. Railroad Co.*, 23 S. C. 289: "But it may be true that when a plaintiff alleges in his complaint facts constituting a cause of action, and offers testimony sufficient to entitle him to go to the jury thereon in the first instance, yet if he admits the defense relied on, and that defense be one which, if true, would, as matter of law, defeat his action, his case becomes a case where there is a total failure of evidence as to his legal right, and subjecting him to a nonsuit." To the same point is *Slater v. Railroad Co.*, 29 S. C. 96, 6 S. E. 936. But in the case now in consideration, while the plaintiff made certain admissions as to signing the receipt introduced in evidence, which, unexplained, might have subjected her to a nonsuit, yet, when her whole testimony is read, it will be discovered that she testified that she did not sign the receipt (which is relied on by the respondents to show her election to accept certain property bequeathed to her by her husband's will in lieu of the property covered by said mortgages) with knowledge of its effect upon her rights under the mortgages, or with the understanding or intention that it would debar her from claiming the property now in suit, but that she signed the same under duress. There was therefore no good defense admitted or made out by the plaintiff's witnesses. The fact as to the receipt, and the circumstances under which it was signed, together with all the other facts in the case, should have been submitted to the jury, and his honor erred in granting a nonsuit. It is therefore the judgment of this court that the order appealed from be reversed, and that the case be remanded to the court of common pleas for Abbeville county for a new trial.

GARY, J., did not hear this case.

(116 N. C. 684)

NATIONAL BANK OF GREENSBORO et al. v. GILMER et al.

(Supreme Court of North Carolina. May 17, 1895.)

FRAUDULENT CONVEYANCE—CONSIDERATION—ASSIGNMENT FOR CREDITORS—VALIDITY—OPENING REGULAR TERM—CONTINUING SPECIAL TERM.

1. The fact that while the jury were considering their verdict in a case the trial of

which was begun on Wednesday of the last week of a special term, the judge opened and conducted the regular term of court at the same place, continuing the special term to receive the verdict of the jury, did not prejudice the rights of the parties.

2. Where the evidence in an action to set aside a deed for fraud showed that the grantor, prior to the purchase of the land by him, was indebted to his wife on certain notes; that he entered into a verbal agreement with her to buy a lot, and build a factory thereon, and hold such property in trust for her sons; that he did buy a lot, and build a factory on it, but with the money of a firm of which he was a member, and the entire property of which he afterwards purchased; that the agreement with his wife remained executory, and the notes unpaid at the time of the death of the wife; and that subsequently he became insolvent, and executed a deed to such lot and factory to his sons,—it was error to refuse to charge that such deed was without consideration, and void as to creditors.

3. Evidence that the defendant was embarrassed by debt at the time he sold the property in controversy, which embarrassment soon after resulted in insolvency, and that he sold such property on long credit to his son, who was irresponsible, accepting his note without security for the purchase price, did not amount to prima facie proof of fraud.

4. But it was error to refuse to charge to the effect that such facts, when established, were badges of fraud, and should be scrutinized with care in determining whether the sale was in fact fraudulent.

5. A mortgage of all but an insignificant portion of the debtor's property to secure pre-existing debts is, in effect, an assignment for the benefit of the creditors secured by such mortgage.

6. Where the defendant had admitted that a certain trust deed given by him covered all but a very unimportant remnant of his property, and that in giving it he had not complied with the requirements of Act 1893, c. 453, regulating assignments and deeds of trust, it was error to refuse to declare such deed void.

Appeal from superior court, Forsyth county; Battle, Judge.

Action by the National Bank of Greensboro and others against J. E. Gilmer and others to set aside deeds of defendant J. E. Gilmer to other defendants as in fraud of creditors and for other relief. From a judgment for defendants, plaintiffs appeal. Reversed.

Dillard & King and D. L. Russell, for appellants. Watson & Buxton, Jones & Patterson, and Glenn & Manly, for appellees.

AVERY, J. The exception to the judge's remarks to the jury is without merit. Almost the same expressions were used in Osborne v. Wilkes, 108 N. C. 653, 13 S. E. 285, and were found unobjectionable on appeal, citing State v. Grizzard, 89 N. C. 115. Nor was there error in continuing the term to conclude the trial or to receive the verdict. This is authorized as to felonies by Code, § 1229 (State v. Adair, 66 N. C. 298), and was extended to all other cases by chapter 226, Acts 1893, except that it would not apply to civil cases begun after Thursday of the last week of the term. The trial of this action began on Wednesday. At common law, when the jury in a capital case did not agree during the term, they were carried to the next court,

where, of course, the business went on during their deliberations. 2 Hale, P. C. 297; State v. Bullock, 63 N. C. 570. Certainly it could in no wise prejudice the parties that, while the jury were out considering their verdict, the judge opened and conducted another term at the same place. It could in no wise have benefited the parties to have had the judge idle, nor could it be expected that the public business should thus, without cause, have been suspended. The court erred in holding that the evidence offered to establish a trust in favor of the sons was sufficient to be submitted to the jury. The relation of debtor and creditor had existed between J. E. Gilmer and wife many years prior to the purchase by him of the land in 1890 for the firm of which he was the senior member. He bought the land with the firm's money, and constructed the building thereon also with funds of the firm. He subsequently, in 1891, bought his partner out, and took title to himself, without any directions or instructions from his wife, who was not consulted. In 1892 he executed more notes to his wife, and entered credits on those then existing. At the death of his wife, these notes became the property of J. E. Gilmer. Code, § 1479. If there was any agreement between him and his wife that he, being indebted to her, was to buy a lot and build a factory, charging the cost on her notes, the property to be held in trust for his sons, it is the evidence of himself and partner that in fact the lot was bought and the factory built with the funds of the firm. The verbal agreement with his wife was executory, and, the notes becoming the property of J. E. Gilmer by his wife's death, the deed thereafter to his sons was without consideration and void as to creditors. The fourth prayer of instructions asked by the plaintiffs should therefore have been given, and the instruction given in lieu thereof was erroneous, being based upon an hypothetical state of facts, not appearing in the evidence.

But if the testimony offered for the plaintiffs was believed by the jury, there were a number of badges of fraud which can scarcely be accurately described, except by so denominating them, though they are sometimes designated as circumstances calculated to excite suspicion and challenge scrutiny in order to ascertain whether a conveyance was executed with fraudulent intent. Among the evidences of fraud relied upon by the plaintiffs were the following: (1) That Gilmer owed a debt when he sold the goods; (2) that he sold on a credit of 6, 12, 18, and 24 months; (3) that the purchaser was not worth over \$500; (4) the purchaser gave his note without security; (5) Gilmer was embarrassed with debt; (6) though not then insolvent, his embarrassment soon after resulted in insolvency; (7) the sale was to a son.

In Beasley v. Bray, 98 N. C. 266, 3 S. E. 497, the court held that an absolute conveyance by an insolvent debtor to an insolvent

vendee, who was not fixed with a fraudulent intent, even upon a long credit and without security, was merely evidence of fraud to be considered by the jury. It will be observed that in *Beasley's Case* it was admitted that the debtor was not only embarrassed with debt, but was actually insolvent. If in this case it had been admitted that the elder Gilmer was insolvent, and conveyed to a son for an insufficient consideration, such a combination of circumstances would have raised a presumption of fraud. "But father and son may deal with each other in good faith, just as others, not so related, may do." *Banking Co. v. Whitaker*, 110 N. C. 345, 14 S. E. 920. If the conveyance to the son by an embarrassed father had been made, when only mere relatives were present, and explanation had been withheld, these circumstances would have raised a presumption which could be rebutted in no other way than by a full disclosure. *Helms v. Green*, 105 N. C. 264, 11 S. E. 470. But in *Bank v. Bridgers*, 114 N. C. 383, 19 S. E. 666, the court said, "The existence of near relationship between the parties to a suspicious transaction often constitutes additional evidence of fraud for the jury"; but that it was error to instruct the jury that the existence of such relationship was *prima facie* evidence of fraud. Had the conveyance been made by an insolvent husband to his wife, the burden would have rested upon those who claimed under it to rebut the presumption of fraud raised by those circumstances. *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59; *Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702. This court has recently held that mere inadequacy of price, however gross, and whether considered alone or in connection with other suspicious badges, was only a circumstance tending to prove fraud. *Berry v. Hall*, 105 N. C. 154, 10 S. E. 903; *Orrender v. Chaffin*, 109 N. C. 422, 13 S. E. 911. In *Berry v. Hall*, *supra*, following *Ferrall v. Broadway*, 95 N. C. 551, the court held that a trial judge was not at liberty to say to the jury that any fact proved or admitted, that does not in law raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to establish it. In the same opinion, referring to the reasons assigned by the judges when acting as chancellors and passing upon the facts, the court said: "The reasons assigned in these opinions for giving more or less weight to any testimony were not intended to be, and cannot, without invading the province of the jury by violating Code, § 413, be adopted as rules to be laid down in the charge of the court for their guidance." In *Stoneburner v. Jeffreys* (decided at this term) 21 S. E. 30, the court has held that "the burden of proof is sometimes shifted in the progress of the trial, but it is only by the introduction of testimony which the law has declared to be *prima facie* proof of fraud, but which may be rebutted by evidence deemed by the jury sufficient to explain such suspicious circumstan-

ces, and thereby overcome the artificial weight which the law has attached to them as evidence. *McLeod v. Bullard*, 84 N. C. 515; *Lee v. Pearce*, 68 N. C. 77."

It thus appears that in recent cases every single circumstance admitted in this case has been declared only a badge of fraud of itself, or, where it has been associated with others of the number, the same conclusion has been reached. The application of the abstract proposition (in *Brown v. Mitchell*), which it is proposed to so apply as to make every new issue of fraud that may arise a law unto itself, was made with reference to the rule that, where the husband transfers property to his wife in payment of an alleged debt, the rule is different from the case of father and son, and that circumstance, in combination with his insolvency, shifts the burden upon the wife to show a bona fide indebtedness from the husband. But I can imagine nothing that could introduce greater uncertainty into the law than the proposition that some indefinite combinations of the hundreds of circumstances which are deemed sufficient to throw suspicion upon a business transaction will hereafter be held to raise a presumption of fraud. In the case at bar, we have eight suspicious circumstances grouped together, and it is proposed to declare them sufficient, as a rule of evidence, to amount to *prima facie* proof of fraud. Suppose we take these eight badges of fraud and a dozen additional ones, making 20 in all, that have never been heretofore held to be more than suspicious circumstances challenging scrutiny by the jury, and see how many hundred of different combinations may be made and presented to this court, and we will be able to form some faint conception of the sea of uncertainty upon which we would embark, were we to make such a vague application of the abstract proposition referred to.

Upon the testimony tending to prove all of these suspicious circumstances, however, the duty devolved upon the court, in view of the requests made by counsel, to speak of them, not as evidential facts bearing upon the issue, but as badges of fraud to be considered by the jury in passing upon the issue involving the fraud. The prayers in which the plaintiffs asked the court to tell the jury that certain evidence, if believed, raised a presumption of a fraudulent intent in the execution of the deed, were properly refused by the court; but they demanded, in lieu of what was asked, some more specific instruction to the jury in order to enable them to comprehend the bearing of the circumstances proved upon their findings. Parties who seek to set aside deeds are required, not only to allege the existence of facts which constitute fraud, but to prove what they allege. Where a plaintiff charges the fraud according to the prescribed practice, and an issue, involving it, is framed and submitted, he has a right to insist that circumstances, which his testi-

mony tends to prove and which the law designates badges of fraud, shall be so called, and that scrutiny upon the part of the jury shall be invited by bestowing upon them their proper designation. Whenever a charge is excepted to, and it appears to the court that it was calculated to mislead instead of enlightening the jury, a new trial should be granted. It would have necessitated the presence of a jury of lawyers in the box in order to comprehend fully what was the fact in issue, and the evidential facts tending to support the affirmative or the negative view of the proposition, because the language was technical. Such philosophical discussions are addressed, in opinions of courts, to the bar; but instructions to juries are intended, in contemplation of law, to enable men of fair intelligence, but without any technical learning, to apply the law to the evidence. The portion of the instruction which we think amenable to the charge that it was not responsive to the requests, and was calculated to mislead the jury, is as follows: "In a case of circumstantial evidence, there are two inquiries for the jury: First. The evidential facts,—that is, the facts relevant to the issue,—are they true? Second. Do you infer from such facts that the fact in issue exists? For example, in regard to the sixth issue, the fact in issue (alleged by plaintiffs and denied by defendants) is that the goods were sold on July 1, 1893, by J. E. Gilmer to John L. Gilmer with intent to defeat or to hinder or to delay the creditors of J. E. Gilmer, or some one or more of them; or, putting this in other words, that his purpose, or some part of his purpose, in making this sale, was to promote his own ease and favor, at the expense of, or to the prejudice of, the rights of his creditors. The evidential facts on which the plaintiffs rely, and which the defendants do not contradict, are the following." Then follows the judge's enumeration of the circumstances already mentioned, which counsel had insisted either established or raised a presumption of the fraud, but which the court nowhere calls by the comprehensive designation of badges of fraud, or circumstances tending to show fraud, or that call for scrutiny in the consideration of their findings in response to the particular issue. When the plaintiffs took the burden, which the law imposes, of proving the fraud alleged, the court, having refused the instruction that the testimony in any aspect raised a presumption of fraud, should have told the jury, in language calculated to be understood by laymen, the nature and the bearing of the evidence relied upon by the plaintiffs to establish the affirmative of the issue. It was error, in lieu thereof, to recite these admitted facts, and the explanatory evidence offered by the defendants, and merely instruct the jury: "The question is whether these facts are true, and then whether, from the whole evidence, you infer the

existence or nonexistence of the fact in issue, remembering that on the whole case the burden of proof is on the plaintiffs." Nowhere in the charge is there an instruction that any of the facts proven or admitted were a badge of fraud, and that evidence explanatory of such badge "must be scrutinized with care." Act 1893, c. 453, does not prohibit bona fide mortgages to secure one or more pre-existing debts; but when, as here, a mortgage is made of the entirety of a large estate for a pre-existing debt, omitting only an insignificant remnant of property, such mortgage is, in effect, an assignment for the benefit of the creditors secured therein. To hold otherwise would be, in effect, to nullify the act. The court erred, therefore, after the grantor's admission of the above fact, in refusing to grant the plaintiff's motion to declare the deed of trust void as inconsistent with the act of 1893 regulating assignments and deeds of trust, and void on the admitted fact that the grantor had not complied with the said act. Chapter 453, Acts 1893, is not a mere recommendation from the legislature to insolvents as to the form of assignments and proceedings thereunder, but in its very nature the act is imperative. If not complied with by the assignor by filing schedules as required, the assignment is invalid. The fact that the failure to observe any of its provisions makes the assignee indictable, of itself indicates that the requirements of the act are mandatory. The assignor is not indictable. The assignment is simply invalid, if he did not follow the act. No authority is necessary for this proposition, but there are precedents to support it. *Juland v. Rathbone*, 39 N. Y. 369 (where the statute is almost identical with ours); *Jaffray v. McGehee*, 107 U. S. 361, 2 Sup. Ct. 367; *French v. Edwards*, 13 Wall. 506; *Suth. St. Const. § 459*; *Harkrader v. Leiby*, 4 Ohio St. 602; *Fecheimer v. Baum*, 43 Fed. 719. For these errors there must be a new trial.

(116 N. C. 806)

HOWELL et al. v. BOYD MANUF'G CO.

(Supreme Court of North Carolina. May 16, 1895.)

ASSIGNMENT OF CLAIM—INDORSEMENT OF DRAFT.

B. was a member and officer of two firms.—the B. Co. and the H. Co. The B. Co. was indebted to the H. Co., and the latter was indebted to plaintiffs in about the same amount. After the dissolution of the B. Co. by the death of one member thereof, B., as secretary of the H. Co., gave the plaintiffs drafts on the B. Co., which he accepted as manager for the latter company, the drafts being payable to the H. Co., and indorsed to plaintiffs "for value," and "to pay a debt and close up an open account." *Held*, that the transaction was a valid assignment to plaintiffs of the claim of the H. Co. against the B. Co. *Clark, J., dissenting.*

Appeal from superior court, Mecklenburg county; Graham, Judge.

Action by Howell, Orr & Co. against the Boyd Manufacturing Company to recover

amounts due on drafts. From a judgment for defendants, plaintiffs appeal. Reversed.

This was an action to recover the amount expressed in a certain draft as set out in the complaint. From the case on appeal tendered by plaintiffs, and accepted by the defendants, the following facts are gathered: In 1893, and prior to August 17, 1893, the defendants were engaged in partnership business under the name of the Boyd Manufacturing Company, and the plaintiffs were engaged in partnership business also, and at the same time the Hermitage Cotton Mills were engaged in partnership business under that name and style. The Boyd Company was composed of A. J. Boyd, T. A. Richardson, S. H. Boyd, and George D. Boyd. On August 17, 1893, A. J. Boyd died. S. H. Boyd was a member and the manager of the Boyd Company, and was secretary and treasurer of the Hermitage Company. On August 17, 1893, the Boyd Company was indebted to the Hermitage Company on account in an amount about \$5,500, and the Hermitage Company was indebted to the plaintiffs about the same amount. For this amount, S. H. Boyd, as treasurer and secretary of the Hermitage Company, on September 1, 1893, gave to the plaintiffs three drafts for said amount, drawn on the Boyd Company, of which he was a member and manager, payable to the Hermitage Company, and accepted the drafts, and indorsed them to the plaintiffs as secretary, etc., of the Hermitage Company. Two of the drafts have been paid by the latter company. The drafts were renewed one or two times, and the first, when renewed, was for the original \$1,470.92, with some new transactions included, amounting to \$2,000 or more, on which was still due, when this action commenced, \$1,738.54 and some interest. All these drafts were payable at some future day, say 30, 60, or 90 days.

S. H. Boyd testified, as plaintiffs' witness: "This draft [the one sued on] was indorsed to the order of Howell, Orr & Co. for value, to pay a debt and close up an open account due by Hermitage Cotton Mills to Howell, Orr & Co., and the draft was given in part renewal of a former draft." Again he says that "Sanders [one of the plaintiffs], on September 1, 1893, came to see me, and brought a statement of plaintiffs' account against the Hermitage Company, so as to get bankable paper for the account, as the cotton season would soon open, and he wanted to get his account into shape. * * * I did not accept the said drafts on account of the said indebtedness to the Hermitage Mills, though the Boyd Company was indebted to the Hermitage Company at the time. I accepted the draft in order to give Sanders a paper he could use, on my own responsibility, without consultation with any others." Sanders testified: "I had been trying to get him [S. H. Boyd] to settle our account, and he promised to settle in 30 days. I told him we wanted our money, etc. I took the drafts." The Boyd Company did some

new business, but closed up its business early in 1894.

Burwell, Walker & Cansler, for appellants. Maxwell & Keerans, for appellees.

FAIRCLOTH, C. J. At common law, an assignment is the transferring and setting over to another of some right, title, or interest in things in which a third party, not a party to the assignment, has a concern and interest. 1 Bac. Abr. 329. And the term implies the relation of debtor and creditor. By our Code, all things in action arising out of contract are assignable. Upon the death of A. J. Boyd, the firm of the Boyd Company was dissolved, and the survivors had no authority to create or contract new debts binding on the original company. It then became their duty to close out and wind up the firm business by collecting its assets, and paying its debts, and finally distributing the balance to the parties entitled to it. The survivors, however, have the right to purchase new material and make new debts so far as may be necessary to work up unfinished material and sell the same. This is for the benefit of the creditors, and the estate itself, and this, to some extent, was done in this case. Now, what was the effect of the conduct of S. H. Boyd and the plaintiffs in the matter? The Boyd Company was indebted by account to the Hermitage Company, and the latter was indebted to the plaintiffs by account, the former being dissolved by death, and the duty of settling its affairs devolved upon the survivors. The plaintiffs, on September 1, 1893, applied to the Hermitage Company to have their account settled, stating that they wanted their money, and they received the drafts in question, with a promise that they should be paid in 30 days, etc. S. H. Boyd says: "The draft was indorsed to the plaintiffs 'for value.' * * * It was indorsed to pay a debt and close up an open account due by Hermitage Company to plaintiffs, and the draft was given in part renewal of a former draft." Of these transactions the defendants had full notice on September 1, 1893, when the company was solvent, and, so far as appears, is still solvent.

To this court it appears that something more than accommodation paper was intended. The demand for payment of plaintiffs' account, the indorsement of draft "for value" and "to pay a debt and close up an open account" due the plaintiffs, certainly have a significant meaning, all of which was known to the defendants. Was it not a plain transferring and setting over of the account against the Boyd Company to the plaintiffs, and thus paying a debt and closing up of the account due by the Hermitage Company? It was simply using the account against the Boyd Company, instead of money, to pay the plaintiffs. The case is not similar to banking operations where promptness in daily transactions is required, where the bank pays out its deposits upon checks, drafts, etc., for they owe no debt to any one except the depositor, and are not

liable on such paper to any one until they have accepted it. Let it be admitted that S. H. Boyd had no authority after dissolution to accept drafts and assume new obligations for the Boyd Company; still he had authority, as manager of the Hermitage Company, to use its paper and credits to discharge its debts. This is no affair of the defendants. They owed a debt, and were in duty bound to pay it to whomsoever it might belong, and here they were served with notice of the true ownership.

It is suggested that, as the drafts drawn were payable at a future day, they were therefore new debts. Not so, because they were upon the original consideration, and that fact could not affect the defendants, because their debt was due, and they had the privilege of paying it any day at will, regardless of a proffered indulgence by other parties. If the holder had declined, the defendants could have made a legal tender and deposit of the money, and at once discharged their liability and stopped interest and cost. *Parker v. Beasley* (at this term) 21 S. E. 855.

We are of opinion that plaintiffs are entitled to recover \$1,470.92, with interest, and no more, because we cannot see certainly that any of the balance was a debt proper against the defendants at A. J. Boyd's death. His honor's refusal to give plaintiffs' prayer for instruction, to the extent above indicated, was error, and this conclusion makes it unnecessary to consider other exceptions. Reversed.

CLARK, J. (dissenting). The defendant, the Boyd Manufacturing Company, was not incorporated, but was a partnership, and was dissolved by the death of A. J. Boyd, in August, 1893. Subsequently thereto, S. H. Boyd, secretary and treasurer of the Hermitage Cotton Mills, and who was also a surviving partner in the firm known as the Boyd Manufacturing Company, drew a draft on the latter at 90 days, on May 3, 1894, in favor of the plaintiffs, for \$2,075.49, and attempted to accept the same himself, as manager of the Boyd Manufacturing Company. At the time of the draft, the Boyd Manufacturing Company was indebted to the Hermitage Cotton Mills in an amount considerably less than that. Before the draft fell due, the Hermitage Cotton Mills collected of the Boyd Manufacturing Company the entire amount due. This is an action by the plaintiffs, in whose favor the draft was drawn, to collect it over again of the drawee, on the ground that it paid the Hermitage Cotton Mills in its own wrong. S. H. Boyd, surviving partner, had no authority to accept the draft so as to bind the Boyd Manufacturing Company, as it had been dissolved. The attempted acceptance was a nullity, except as to S. H. Boyd individually, and against him a judgment has been entered up, and not appealed from. The position of the plaintiffs, therefore, as to the Boyd Manufacturing Company, is that of a holder of a draft not accepted, and the plaintiffs have by virtue of such paper no claim

against the drawee. Their claim is valid, of course, against the drawer.

The plaintiffs claim, however, that they are assignees of the debt which the Hermitage Cotton Mills Company held against the Boyd Manufacturing Company, and, therefore, that the latter is still liable to them, notwithstanding it has paid the debt in full to the Hermitage Company. The answer to this is that the witness of the plaintiffs, who is uncontradicted, testifies that in fact it was not an assignment, and was not intended to be, but was merely "accommodation paper." Another witness for plaintiffs, L. W. Sanders, testifies: "We received these papers as the acceptances of the Hermitage Company and the Boyd Manufacturing Company, and as bankable paper." It could not therefore have been an assignment of a claim. The evidence is uncontradicted that, in point of fact, there was no assignment of the debt, and the claim of the plaintiffs against the Boyd Manufacturing Company is simply that of the holder of an unaccepted draft, since the attempted acceptance by an unauthorized surviving partner is a nullity. *Kahnweiler v. Anderson*, 78 N. C. 133.

It is contended, however, that such paper may be treated as an assignment of the debt, though not so intended between the parties at the time. The question is a very important one, affecting materially the course of dealings in commercial paper, and the following principle seems well settled: To make an order operate as an assignment, it must be upon a particular fund; it is not enough that it is drawn upon a debtor. *Hall v. Flanders*, 83 Me. 242, 22 Atl. 158, and numerous cases and other authorities there cited. See, also, *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283, and *Holbrook v. Payne* (Mass.), 24 N. E. 210. Besides, an unaccepted draft or check is never held to be a claim against the drawee in the nature of an assignment of the debt, unless it was due at the time when presented, and the drawee at that time had funds in his hands due the drawer. *Hawes v. Blackwell*, 107 N. C. 196, 12 S. E. 245; *Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644. When this paper fell due, the drawee had no funds in hand due the drawer, and was not indebted to it, having paid to it, or on its sight drafts, the full amount due. It is true there had been a former draft on the Boyd Manufacturing Company in favor of the plaintiffs, but the plaintiffs had taken in its stead a new draft at 90 days. This was notice to the Boyd Manufacturing Company that the plaintiffs held no claim against it which could be presented till the end of 90 days, and it could not till the maturity and presentation of the check lock up the drawer's debt, and refuse to pay the drawer or its sight drafts the amount due, unless it had accepted the drawer's time draft, which it was disabled in law to do. It is this which distinguishes this case from *Brem v. Covington*, 104 N. C. 589, 10 S. E. 706. The 90 days' draft, unaccepted,

was not a lien on the funds of the drawer in the hands of the drawee, but was simply a request to the Boyd Manufacturing Company to pay the plaintiffs \$2,075.29 at the end of that time; and this, in the absence of the uncontradicted evidence that it was not an assignment at all, would have been an assignment of whatever funds the drawer had in the hands of the drawee at the maturity of the draft. The plaintiffs, doubtless, would not have taken such paper, but it is certain that it was relying, not upon an assignment, but upon the acceptance of the Boyd Manufacturing Company, which, unfortunately for it, was a nullity. The claim that it is an assignment is a second thought, which was only conceived when the bankable paper the plaintiffs thought they were taking proved worthless as to the drawee, because of the invalidity of an acceptance by a member of an extinct partnership to bind it. Even if it had been an assignment, by the terms of the paper itself and on its face, it was an assignment which, in the absence of an acceptance, was not to take effect till 90 days from May 3d, at which time there was no debt due the Hermitage Company on which it could take effect. Though the drawee had notice of the assignment, it had notice, too, that it was not payable for 90 days; and in the meantime it had notice also of drafts payable at sight, or by the creditor's own demand, which it could not refuse to pay. It could not pay both, and, not having accepted the time draft, it had no ground to refuse payment of the sight drafts.

Wherein is the advantage or effect of the acceptance of a time draft if mere notice of it to the drawee, without acceptance by him, is a lien on the funds of the drawer in the hands of the drawee, so that the latter cannot, except at his own peril (as in this case), pay the drawer himself or his sight drafts prior to the date when the unaccepted draft shall fall due?

(116 N. C. 877)

ROWLAND v. OLD DOMINION BUILDING & LOAN ASS'N.

(Supreme Court of North Carolina. May 14, 1895.)

BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE OF MORTGAGES.

1. A contract by which the stock taken out by a borrower, and assigned to the association, when the mortgage is executed, is forfeited to the association on default, without allowance of credit on the mortgage for the payments made on the stock, is unconscionable, and, though upheld by the laws of the association's own state, would not be enforced in North Carolina. 18 S. E. 965, affirmed.

2. When the foreclosure has realized enough to pay the sum borrowed, with interest at the rate stipulated on the face of the mortgage, and expenses, and the association has allowed nothing for payments made by the borrower on his stock, which he assigned to the association when he made the mortgage, such assignment is to be treated as merely a pledge of additional

security for the loan, and the borrower is entitled to a return of the stock. 18 S. E. 965, affirmed.

Avery, J., dissenting.

Petition for rehearing. Dismissed.

For former report, see 18 S. E. 965.

MONTGOMERY, J. The matter before the court arises upon an application to rehear the case of Rowland v. Association, reported in 115 N. C. 825, 18 S. E. 965. We have given each and all of the grounds specified in the application a thorough and careful examination. Indeed, we have gone over the whole case, as it appears in the record, and as it was presented to the court; and we have considered anew the opinion of the court, in all its bearings. In addition, we have also thought over the effect and the meaning of the act of 1893 and that of 1895, amendatory of chapter 7, vol. 2, of the Code (Building & Loan Associations). We were urged in the last argument, by counsel for the defendants, to regard these acts as interpreting the original one, and as confirming the power of these corporations to charge for money loaned by them amounts, under the names of "dues," "fines," "fees," in addition to the rate of interest allowed by law. If this be conceded to be the intention of the law-making power, it does not follow necessarily that this court will, in construing these statutes, give effect to such intention. Laws must be consistent with each other, and uniform in their bearing upon all the people of the state. The courts cannot, and must not, in their interpretation of the law, violate this principle. "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." Const. art. 1, § 7. We have a general law fixing the rate of interest at 6 per cent. per annum, and no act of the general assembly can be allowed to alter or change the general law in this respect. We reiterate what this court said in the case of Mills v. Association, 75 N. C. 292: "We know of no device or cover by which these associations can take from those who borrow their money more than the legal rate of interest, without incurring the penalties of our usury laws. Calling the borrower 'a partner,' or substituting 'redeeming' for 'lending,' or 'premium' or 'bonus' for an amount which they profess to have advanced, and yet withhold; or 'dues' for 'interest,' or any like subterfuges, will not avail. We look at the substance." And, too, where the state undertakes to make such special grants to special interests, we must adopt the meaning most favorable to the grantor, "for," as Chief Justice Pearson said in the case of Railroad Co. v. Reid, 64 N. C., at page 158, "it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant,

and that 'the promoters,' as they are styled in England, or the 'lobby members,' as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes; and a matter of this kind, instead of being, in its strict sense, a contract, is more like the act of an indulgent head of a family dispensing favors to its different members, and yielding to importunity." If corporations combining the capital of individuals are allowed to charge more than the legal rate of interest, by imposing fines and penalties upon those who borrow from them, on their failure to meet their obligations, the general law regulating interest will be defeated, and our legitimate banking institutions and private capitalists, who lend money on interest, will be greatly prejudiced in their rights, unless they resolve themselves into building and loan associations, and thus make a dead letter of our usury laws. Counsel for the defendants called our attention to the magnitude of the business and the immense amount of capital of these associations, their aggregated capital doubling many times the combined capital of all the national banks of the country. This is a strong reason, to our minds, why the power of these corporations should be watched with a jealous eye. Justice Reade, in delivering the opinion in *Mills' Case*, supra, well said: "They are numerous and influential. They influence legislation. By their liberal advertising, they influence the press. And even the courts may be insensibly affected." The enormous profits which the defendant association derives in the conduct of its business, as set forth in their by-laws, and as demonstrated in the opinion in this case delivered by Justice BURWELL, make it clear that the laws should not grant them such favors as they claim from the state. In conclusion we are satisfied that the unanimous decision of this court, made and published in 115 N. C. 825, 18 S. E. 965, is sound in all respects, and is the law of the land. Upon the application for the rehearing of this case, Mr. Justice BURWELL discovered that the court had overlooked a credit of \$130, a part of the money paid by defendant Noell, which the plaintiff had given to Noell. The following is the language of Judge BURWELL upon discovering the oversight: "In the statement of the account made by the referee occurs this item: 'By cash paid on loan, \$130.' In the petition for a rehearing it is stated that this credit was placed on the account as the value of the stock and that we overlooked that fact. This is true. If, therefore, the assignee, Pittman, is declared to be the owner of the stock, this credit should be stricken from the account; for, as we have held, the defendant association is entitled to have all that it loaned Noell, with 6% interest thereon. Indeed, its counsel states that it asks no more. The proceeds of the sale of the mortgaged property are sufficient,

it appears, for that; and therefore there is no necessity, in order to satisfy the association's claim, that payments on stock should be applied on the debt. Hence we may, without encroachment on the rights of the building and loan association, direct that it be paid in full out of the proceeds of sale, and thus leave the stock for him to whom Noell assigned it, the defendant Pittman. The property in court consists of the proceeds of sale and the stock. Under the circumstances, it is but just and proper that the mortgage loan (and we hold it to be) should be paid out of the first, the proceeds of the sale. This will produce an equitable result." The petition to rehear is therefore dismissed, and the former judgment modified in respect to the \$130 credit.

AVERY, J., dissents.

(115 N. C. 815)

FARTHING v. CARRINGTON et al.

(Supreme Court of North Carolina. April 5, 1896.)

SUBMISSION OF CONTROVERSY WITHOUT ACTION—
REVIEW ON APPEAL—CONDITIONAL SALES AND
MORTGAGES—VALIDITY—CONSTRUCTION OF STAT-
UTE.

1. Where a controversy involving a question of importance to the public is submitted without action under Code, § 567, providing for such submission upon an agreed statement of facts and an affidavit that the controversy is real, the supreme court, upon appeal, may properly determine the question of law raised, although the statement of facts is not full enough to enable it to render judgment between the parties. *Clark, J., and Avery, J., dissenting.*

2. Act March 18, 1896, § 1, regulating assignments, which provides that all conditional sales, assignments, mortgages, or deeds in trust executed to secure any obligation giving preference to any creditor of the maker shall be void as to existing creditors, applies only to conveyances made to secure pre-existing debts, and not to those which are made to secure debts created by the same transaction in which the conveyance is executed.

Appeal from superior court, Durham county; Green, Judge.

Appeal by G. C. Farthing from a judgment rendered upon an agreed statement of facts between the appellant and W. T. Carrington and others, submitted under the provisions of Code, § 567. Affirmed.

Boone & Boone, for plaintiff. Fuller, Winston & Fuller, for defendants.

MONTGOMERY, J. This case was submitted to the court below under section 567 of the Code, and is here by appeal. This section of the Code answers a most excellent and useful purpose, in that it enables parties to have their questions in difference settled upon an agreed state of facts, without delay, and without the costs of witnesses and a trial below. It disregards forms, as such, and the perplexities of pleadings. It requires only that, by affidavit, it shall be made to appear that a real case exists, and that the

controversy is submitted in good faith to determine the rights of the parties. One of the long standing rules of practice of this court (No. 10, 12 S. E. vi.) provides that "when by consent of counsel it is desired to submit a case without oral argument, the court will receive printed arguments without regard to the number of the case on the docket, or date of docketing the appeal. * * *" Rule 13, 12 S. E. vi., among other things, provides that the court, at the instance of a party to a cause directly involving a matter of great public interest, may assign an earlier place in the calendar, or fix a day for the argument thereof which shall take precedence of other business. Under these rules, we have felt it to be our duty to give an early hearing to the matters involved in the case before us, because of its public and general interest.

Upon examination of the proceeding before us, we are not satisfied that the facts are stated with sufficient fullness to entirely comply with the statute under which the matter is submitted; but the question of law which is submitted is presented with entire distinctness. And while, ordinarily, we might dismiss the proceeding because the case is not full enough as to its statement of facts, yet where a matter involves a great public interest, as does this matter, we have concluded to follow a late precedent of this court,—treat the case as "in the nature of a submission of the controversy without a formal action." The precedent to which we refer will be found in Appendix A, 114 N. C., 21 S. E. 963, and is as follows:

"Executive Department, Mar. 29, 1894. To the Justices of the Supreme Court—Sirs. There exists a difference of opinion in the minds of the citizens of the state in regard to the term of office of a judge elected by virtue of the provisions of section 25, art. 4, of the constitution. The attorney general, in an opinion filed at my request in this office, has advised me that every judge elected under that section is elected for a full term of eight years. A considerable number of able members of the legal profession differ from him in his construction, and contend that a judge so elected is only elected for the unexpired term of his predecessor in office. It is all important that the question should be determined by the highest court in the state before the election of judges shall take place in 1894. The importance of having this matter determined will be apparent from section 2689 of the Code, which is as follows: 'When the election shall be finished the registrars and judges of election, in the presence of such of the electors as may choose to attend, shall open the boxes and count the ballots, reading aloud the names of the persons who shall appear on each ticket; and if there shall be two or more tickets rolled up together, or any ticket shall contain the names of more persons than such elector has a right to vote for, or shall have a device upon it, in either of these cases

such ticket shall not be numbered in taking the ballots, but shall be void, and the counting of votes shall be continued without adjournment until completed, and the result thereof declared.' I am informed by the attorney general that this section has been construed by the supreme court in the case of Deloatch v. Rogers, 86 N. C. 357, to mean that, if a ticket contains the names of more persons than the elector has a right to vote for, 'it is not only inoperative as to the person improperly voted for, but as to all others for whom the elector may vote. The entire ballot for all is vitiated, and must be rejected from the count.' This section has not been modified or repealed, and is a part of our present election law. By virtue of its provisions, the whole judicial ticket may be void if it should contain more names than the elector has a right to vote for. It will contain more names than the elector has a right to vote for, if upon it is printed or written the name of a candidate for the office of judge when the term of such office will not have expired by January 1, 1895. It is manifest that this result will occur if the attorney general's opinion contains a correct construction of section 25, art. 4, of the constitution, and the electors of the state vote for judges upon a ticket printed or written in accordance with the opposite construction. In view of the importance of determining the doubt prevailing upon the subject, I respectfully request you to indicate what is your construction of the constitutional provisions relating thereto. I have the honor to be, very respectfully, yours, [Signed] Elias Carr, Governor."

"Raleigh, N. C. April 3, 1894. To the Governor: Your communication of the 29th ult., requesting an opinion respecting the term of office of the judges elected under the provision of section 25, art. 4, of the constitution, has been received, and duly considered by us. We beg to assure your excellency that we appreciate the importance of the question you have submitted for our consideration, and that we would at once give to it the thorough investigation which its solution would require if we could feel that, in expressing an opinion upon the subject, we were not overstepping the bounds which a proper sense of propriety prescribes for our action. As you are aware, Justices Clark and MacRae, of this court, and Judges Armfield, Bynum, Shuford, Whitaker, and Boykin, of the superior court, have rights of property in offices which would be affected by a judicial determination of the question which you ask us to answer, and we find our perplexity increased by the fact that these gentlemen do not join your excellency in requesting us to examine into the matter and express an opinion thereon. If we could be assured that such is their desire, we should feel less embarrassed in coming to a conclusion as to what action we should take in this emergency. We desire to state that Justices Clark and

MacRae have deemed it proper that they should abstain from taking any part whatever in this correspondence. We are, yours, very respectfully, [Signed by Shepherd, C. J., and Avery and Burwell, JJ.]”

The associate justices of the supreme court and the judges of the superior court whose tenures of office were affected by the question involved joined in a request that the matter should be left to the decision of Chief Justice Shepherd and Associate Justices Avery and Burwell, and the following reply to the governor contains their opinion: “Raleigh, May 11, 1894. To the Governor—Dear Sir: The communication from our associates and the judges of the superior court which has been forwarded by your excellency to us relieves us of embarrassment in complying with your request, since it is in the nature of a submission of the controversy in reference to their terms of office, without a formal action. * * * [Signed by Shepherd, C. J., and Avery and Burwell, JJ.]”

The controversy arises upon a state of facts which brings before us the construction of the act of the general assembly of March 13, 1895, entitled “An act to regulate assignments and other conveyances of like nature in North Carolina.” Section 1 is as follows: “That all conditional sales, assignments, mortgages, or deeds in trust, which are executed to secure any debt, obligation, note or bond which gives preference to any creditor of the maker, shall be absolutely void as to existing creditors.” The plaintiff contends that the mortgage in this case is void under the provisions of the act. We are of the opinion that the mortgage is valid, and that the act is limited to conditional sales, assignments, mortgages, and deeds in trust made to secure pre-existing debts and obligations, and that mortgages of the nature of the one before the court, growing out of the transaction itself, and executed for a present consideration, do not come within the operations of the statute referred to, and that it (the statute) evidently refers to pre-existing debts, and was not intended to embrace transactions of this kind, where the debt grows out of the transaction itself, and is for a present consideration. We are supported in this position by an opinion of this court at its January term, 1871, delivered by Chief Justice Pearson in the case of McKay v. Gilliam, 65 N. C. 130, construing the act of 1861 (chapter 4, § 12), which act is substantially like the one now under consideration. The same principle of construction is also recognized in Reese v. Cole, 93 N. C. 90, although that case arose on the construction of the statute concerning agricultural supplies. However, after deciding the point raised in that case, Chief Justice Smith, for the court, further said: “A similar method of construction was pursued in ascertaining the meaning and giving effect to a section in the act of September 11, 1861, which declared that ‘all deeds of trust and mortgages hereafter made and judgments

confessed to secure debts shall be void as to creditors,’ unless providing for the payment pro rata of all the debts and liabilities of the maker. It was held in McKay v. Gilliam, *supra*, that, notwithstanding the broad terms of the act, its purpose was ‘to take from debtors the right to give preference to some creditors to the exclusion of others’; and its operation was confined to pre-existing debts, and did not include a loan contracted at the time of the execution of the deed and secured by it.” We are therefore further of the opinion that the act before us is intended only to prevent a preference in favor of pre-existing creditors in the cases specified in the act itself. The appellant will pay the costs of this proceeding.

CLARK, J. (concurring in the result). As the court holds that the question of the construction of the act is properly raised by the record, I express my concurrence in the opinion that the act only applies to “assignments and other conveyances of like nature,” as is stated in the title, and forbids preferences being given by such to existing creditors, and that it has no application to mortgages, crop liens, or other conveyances which may be executed to secure a debt or loan created at the same time with the execution of such conveyance, nor where the conveyance is executed to secure advances thereafter to be made. McKay v. Gilliam, 65 N. C. 130. But I regret I cannot concur with the majority of the court that the question is properly before us in this proceeding. The submission of a “controversy without action” under the Code (section 567) is simply an inexpensive and prompt proceeding to obtain the decision of the court as to the rights of the parties in a matter where the facts are not disputed. It dispenses with summons and pleadings, and can be submitted to the judge at chambers as well as at term. But it is not intended as a mode of propounding queries to the court to settle abstract questions of law, when no judgment can be rendered directing the defendant to do or not to do some particular act. McKethan v. Ray, 71 N. C. 165; Little v. Thorne, 93 N. C. 69; Millikan v. Fox, 84 N. C. 107. It is a substitute for a civil action, and must state facts sufficient to constitute a cause of action, and upon which the court could have rendered a judgment if presented by complaint and demurrer. The question here sought to be decided could, of course, be presented in this manner of proceeding, but only upon sufficient facts stated. In the present case all the facts agreed are that Carrington, being indebted to the plaintiff, executed a mortgage to his codefendant to secure a loan made at the time of the execution of the mortgage, and the plaintiff asks a decree that such mortgage be declared void as to him. Suppose the plaintiff had been correct in alleging that the mortgage was void, does the bare fact that a debtor executes a void mortgage entitle any creditor to obtain a decree

that the mortgage is void? How is he hurt by it? The creditor whose debt has not been reduced to judgment has no lien on any particular land of the debtor. He has no ground even to ask that the mortgage be removed as a cloud on his title. There is no allegation or agreement here that the defendant Carrington has included in this mortgage property above his homestead, which would otherwise have been liable to execution for the plaintiff's debt, and that the defendant has none other property liable to the plaintiff's execution. Nor is it averred that the plaintiff has judgment and execution, and, if he had, no reason is shown why he could not sell under it, and buy the property embraced in the alleged mortgage, treating it as void. It does not appear even that the mortgage has been registered. It is true the affidavit sets out that this is a bona fide action, but it does not appear that the plaintiff has suffered or will suffer any detriment, nor that the courts can render him any aid. Indeed, on the facts agreed, there is no judgment that the court could render, unless it is that of passing upon the abstract question of the construction of the act. Nor can I concur that the response of the court (114 N. C. 923, 21 S. E. 963) to the inquiry of the governor as to the tenure of judicial office is a precedent in this case, which concerns merely the rights of parties litigant in a civil action of a private nature.

FURCHES, J. Concurring in the opinion of the court delivered by Justice MONTGOMERY, I regret that there is any reason why any member of the court should feel that he was not authorized in this proceeding to give his opinion as to the proper construction of the act of March 13, 1895. We are bound to see from the proceeding before us (if we close our eyes to all other sources of information) that it involves a matter of great interest to the business of the state. The main question, and the one intended to be presented for our consideration, is the construction of the act of March 13, 1895, and four members of the court have given their opinion, construing this act to apply only to pre-existing debts at the time of making the mortgage or other security, and not to debts made contemporaneous with and agreed at the time of their making to be thus secured. The other member of the court, for reasons which he assigns, declines to express any opinion as to the construction of the act. Then, I take it that the construction of the act is settled, so far as the opinion of four of the justices of this court can settle a question. But, while this is so, two of the justices are of the opinion that the question is not presented in such a way as to justify the court in giving any opinion as to its construction, and this is the reason for my writing this opinion.

The majority of the court were not inad-
vertent to the objections made by the mi-

nority, and for these reasons did not undertake to render a formal judgment, affirming or overruling the judgment of the court below, but simply expressed their opinion as to the construction of the act. And in doing this we thought we were fully warranted by the precedents of this court, and the matter of the tenure of the judges (114 N. C. 923, 21 S. E. 963) is cited in the opinion of the court as authority for the action of the majority. The learned members of the court, Chief Justice Shepherd and Justices Avery and Burwell, who rendered the opinion in that matter, put it upon the ground that it was "in the nature of a submission of the controversy in reference to their terms of office, without a formal action." This seems to be authority for the action of the majority of the court in this proceeding. But the minority say not, for the reason that it was in response to a letter from the governor as to a grave constitutional question, in which the public was interested; that it was not an adjudication as to the rights of the officers whose terms were in question. But the court felt that they would voluntarily accept the advice as decisive. It is true that the governor's letter to the court suggested an important question for its decision, and we think one proper for them to act upon; but he, as governor, had no interest in it. His election or term of office was in no way involved. He did not order the election, or hold the election. These were provided for by the legislature. He could not add to or take one day from the terms of the judges, with or without the opinion of this court. And it is conceded that the opinion of this court in that proceeding could not do so. But the opinion was given because it involved a grave constitutional question, in which the public was interested, and because the court had reasons for thinking that the parties really interested wished the opinion of the court and would be governed by it. This was, as I have said, an important question, and one, as I think, proper to be decided by this court. But it was not necessary to the administration of the courts. It is most probable there would have been elections held for these offices without this opinion, and if there had not been, and in this way a vacancy had occurred, the governor was authorized by the constitution to fill it; so the administration of justice would have gone on.

But, again, it is contended by the minority that section 567 of the Code is only intended to do away with the formalities of pleading, and, to properly constitute a case under this section, it ought to contain sufficient averments to constitute a cause of action upon which the court could go to judgment. I agree to this proposition, but I do not agree that *Webb v. Hicks* (decided at this term) 21 S. E. 672, is in conflict with the action of the majority of the court in this case. In *Webb v. Hicks*, *supra*, the court below held

that the plaintiffs were not entitled to recover, and this court, in reviewing the appeal of plaintiffs, were of the opinion that plaintiffs' complaint did not state a cause of action, and "affirmed" the judgment of the court below. It is not in point in this case, as I think. But, admitting, as I do, that there should be sufficient averments to enable the court to proceed to judgment, this does not prevent the court from giving its opinion in a case of such importance as this; and I think the court is sustained in so doing, not only by the case in 114 N. C. 923, 21 S. E. 963, but also by such cases as the following: In *McBryde v. Patterson*, 78 N. C. 412, which was a contest between children of the same mother, some legitimate and some illegitimate, as to property, this court (Smith, C. J., delivering the opinion) discusses and decides the case upon its merits, and then holds that the appeal was prematurely taken, and dismisses the appeal. In *State v. Divine*, 98 N. C. 778, 4 S. E. 477, a case coming up by successive appeals from a justice's court to this court upon the construction of a statute changing the presumption of evidence, this court fully discusses the case upon the merits, and declares the act unconstitutional and void. Smith, C. J., delivering the opinion of the court, says: "We have gone into the question in order to settle the question of the validity of the statute in its application to the case before us, and because it will practically put an end to the litigation." The case was then dismissed, for the reason that the special verdict appealed from was not sufficient to found a judgment upon. In *Guilford Co. v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861, which was before this court simply upon a motion for a certiorari, as a substitute for an appeal, in which the court discussed and decided the case upon its merits (Clark, J., delivering the opinion of the court), and then refused the motion of defendant for the certiorari to bring the case to this court. In *State v. Tyler*, 85 N. C. 569, a case involving the question as to whether a solicitor was entitled to a \$4 or \$10 tax fee, this court went into a full discussion of the case upon its merits (Ashe, J., delivering the opinion of the court), and closes the opinion as follows: "But as the state has no right to appeal in this case, and has no interest in the question, the case is dismissed." In *Milling Co. v. Findley*, 110 N. C. 411, 15 S. E. 4, the court (Clark, J., delivering the opinion) discusses the case on its merits, and sustains the judgment below, and then says the appeal is premature, and cannot be sustained. In *State v. Wylde*, 110 N. C. 500, 15 S. E. 5, being an indictment for bigamy, the court discusses and decides the case upon its merits (Clark, J., delivering the opinion), and then dismisses the appeal upon the ground that the affidavit upon which defendant appealed was insufficient to bring the case to this court. In

State v. Lockyear, 95 N. C. 633, which was an indictment for selling liquor by the Capital Club of the City of Raleigh, the court thought it of sufficient public importance (Smith, C. J., delivering the opinion) to discuss and decide the case upon its merits, in which he gives the following reason for deciding a case not properly before the court: "The wish of the parties that it should be settled, and the law declared, so that it might be observed in its integrity;" and then proceeded to dismiss the case because there was no judgment in the court below, and none could be pronounced by this court.

There was no difficulty in understanding the point intended to be presented to the court by this case. No one has complained of it on that account. Then, I repeat, treating this case as in no better condition than it would have been in a regular action, with a complaint alleging all the facts contained in this submission, with a demurrer to the complaint, will not the cases cited above justify the court in giving its opinion upon the merits of the controversy? If it was of sufficient importance to decide whether a solicitor was entitled to a \$4 fee or a \$10 fee to induce the court to decide the case upon its merits, though it was before the court on the appeal of the state, which the court say had no interest in the question and no right to appeal, is not the question presented by this case of sufficient importance to justify the court in giving its opinion upon the construction of this act? If the construction of an act of the legislature changing the rule of evidence, as in *Divine's Case*, supra, was of sufficient importance to justify the court to pass upon it, and declare an act of the legislature unconstitutional "because it will practically put an end to the litigation," is not the matter now before the court, which must seriously affect the whole business interest of the state, sufficient to justify the court in giving its opinion as to the construction of this statute? Or if the question as to whether the Capital Club had the right to retail liquor was of sufficient public importance to justify the court in considering and passing upon the merits of that case, when it was not before the court in such a way as to authorize the court to pronounce any judgment, is not this case of sufficient public importance to justify the court in giving its opinion as to the construction of the act of March 13, 1895?

But it is contended these cases do not apply, for the reason that, although the court gave its opinion when it had no case properly constituted before it, the court, after giving the opinions in the cases referred to, then dismissed the appeals; and as to whether this was more consistent with the views of my brethren who differ with the majority I will not pretend to say, as I am not dealing with that question. But it is said the court should have reversed or affirmed the judgment below; that there is no middle

ground. Did the court, in the cases cited above, reverse or affirm the judgments below? But supposing this may not be considered an answer to this position; that the court should have reversed or affirmed the judgment in the court below. I wish to give my own answer to this proposition. It is contended by the minority that the case does not state facts sufficient to authorize a judgment, and the judgment pronounced thereon is a nullity. If they are correct in this position, then no judgment we could have pronounced here would have made it valid. There was no use in shooting at a dead duck. And, if there is a sufficient statement of facts to authorize the judgment below, then their whole theory that the court was wrong in passing upon the question fails and falls to the ground. Which horn do they take? But, again, if the court had the right to consider it, and then dismiss it, as in *Divine's Case*, in *Tyler's Case*, in *Lockyear's Case*, supra, or in the case of *County of Guilford v. Georgia Co.*, supra, when it was only before the court on an application for a certiorari to bring it to this court, did not the court have the right to consider this case without dismissing it? Does not the greater include the less, whether it is called middle ground or not?

I have not undertaken to argue the construction of the act as given by the court. So far as I know, there is no difference of opinion as to this. I say so far as I know, as I am not authorized to speak for Justice AVERY on this point. But I have only endeavored to show that the court is justified by precedent in the action it has taken in this case. But I will say, in passing from this case, that, in my opinion, the act of March 13, 1895, is so little like the statute of 13 Eliz. (Code, § 1545) that it would hardly be safe to reason from the analogy of that statute, to construe the act of the 13th of March. The statute of Elizabeth does not avoid any conveyance, unless there is an intent to defraud or delay the payment of the creditors of the maker, and then such creditors must be defrauded, hindered, and delayed, or the conveyance is valid. This statute, without regard to intent or as to whether any one is damaged or not, declares the conveyance utterly void if the maker is indebted to any one else at the time of making the same.

AVERY, J. (dissenting). The statute (Code, § 567) was enacted in order (said Pearson, C. J., in *McKethan v. Ray*, 71 N. C. 170) "to dispense with the formality of summons, complaint, and answer." It would manifestly lead to absurdity to hold that the "controversy without action" was intended to include any other than a legal controversy, if the statute did not relieve us of discussing the general principle by declaring in plain terms that it must be between "parties to a question in difference, which might be the

subject of a civil action." It follows, necessarily, that, before the court can consider such a proceeding, it must be satisfied from the statement that a cause of action exists, and this can only appear when from the sworn statement, however informally or inartistically drawn, the court can gather facts sufficient to constitute "the subject of a civil action." Hence it has been held that, where the "case containing the facts" does not show that the court has jurisdiction, the proposed controversy must be dismissed. *Little v. Thorne*, 93 N. C. 69. Following numberless precedents, beginning with *Tucker v. Baker*, 86 N. C. 1, this court has held during the present term, in the case of *Webb v. Hicks* (Justice Furches delivering the opinion of the court), that where facts cannot be gathered from the whole complaint that would, if true, entitle a plaintiff to recover, the action must be dismissed. *Lassiter v. Roper*, 114 N. C. 17, 18 S. E. 943.

In the case at bar it is set forth in the sworn statement that Hiram Jones, one of the parties, borrowed \$100 from another party, W. T. Carrington, on the 23d of March, 1895. The mortgage, with the probate and certificate of registration, is set forth in full, and then follows the portion of the affidavit upon which the status of the case in court depends, which is as follows:

"That, at the time of and before the execution of said mortgage, said Hiram Jones was indebted, by note, to G. C. Farthing, above named, in the sum of one hundred dollars; and said Farthing contends that said mortgage is void, for the reason that at the date of its execution he was a creditor of said Jones, as above stated, whereas said W. T. Carrington and Hiram Jones contend that neither the letter nor the spirit of the new antipreference law embraces a case of this kind, in which one person, however much indebted at the time, creates a new debt, and seeks to secure the same by mortgage, trust deed, or other security. And, so desiring to save costs and trouble, they ask the decision of the court upon the state of facts. W. T. Carrington. Hiram Jones. G. C. Farthing."

"W. T. Carrington and G. C. Farthing, being duly sworn, state that this controversy is real and the proceedings in good faith, to determine the rights of the parties. W. T. Carrington.

"Sworn to and subscribed before me, this April 1, 1895. Witness my hand and notarial seal. Chas. K. Faucette, Notary Public."

The act of March 13, 1895, provides that "all conditional sales, mortgages or deeds in trust, which are executed to secure any debt, obligation, note or bond which gives preference to any creditor of the maker, shall be absolutely void as to existing creditors." The statute of 13th Elizabeth (Code, § 1545) declared all conveyances executed "to delay, hinder and defraud creditors and others of their just and lawful actions," etc.,

"only as to that person, his heirs," etc., "to be utterly void and of no effect." Before the enactment of that statute, it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud; and where, by that or any other statute, deeds are pronounced void as against creditors, in order to secure a formal declaration of their invalidity, the moving party must ask relief that would have been administered formerly solely in a court of equity. It does not appear that the creditor Farthing has sued upon the note due him, or that, if he had obtained judgment and issued execution thereon, he could not have realized his debt by the sale of other property. Unless the creditor has the right, upon the state of facts presented, to demand a formal declaration of the court that the mortgage is void, no cause of action is stated upon which he can demand any judgment whatever. *Southerland v. Harper*, 83 N. C. 200. Farthing has shown no shadow of a claim to either the specific personal property or the land covered by the mortgage to Carrington, and there is not the slightest ground, therefore, for invoking the aid of the court to remove a cloud from property to which he has shown no apparent right or title. *Browning v. Lavender*, 104 N. C. 69, 10 S. E. 77; *Peacock v. Stott*, 104 N. C. 154, 10 S. E. 456. "A cause of action is generally held to be a union of the right of the plaintiff and its infringement by the defendant." 1 Enc. Pl. & Prac. p. 116. The two elements are the right of the plaintiff and omission of duty or wrong on the part of the defendant. *Hayes v. Clinkscales*, 9 S. C. 441. Here the only right shown to be in Farthing, in whose favor an attempt is made to state a cause of action if any exists, is that to sue for and recover the sum of \$100 due him, but there is an utter failure to indicate how the mortgage, without further explanation, interferes with that right. There must be an allegation of a breach or of a neglect of duty, and a damage resulting, in order to properly constitute the suit in court. *Cooley, J., in Post v. Campan*, 42 Mich. 96, 3 N. W. 272. The Codes of Civil Procedure create no new causes of action. Rights are entirely independent of remedies. Whatever was a cause of action at law or a ground of relief in equity before Codes is now remediable in a civil action, and whatever was remediless before is now remediless under the Codes. 1 Enc. Pl. & Prac. p. 145.

There must be some limit to the exercise of jurisdiction under section 567. It is well settled that a respectful letter from the learned members of the bar, who represent the parties to this proceeding, asking the court to advise them as to some controversy that had not but might in the near future arise, would give the subject-matter of the communication no standing in the superior court, or by appeal here. I am at a loss to

know how the line can be drawn so as to guide the legal profession and protect the courts against being forced to spend their time in deciding speculative questions, between the rule that the statement of facts sufficient to constitute a cause of action shall be regarded as an essential prerequisite to the consideration of a controversy submitted without action, and the loose practice of allowing affidavits suggesting that a question of vital interest to the public is about to arise, and requesting the court to relieve the parties of the trouble and expense of proceeding in the prescribed way, and to give it a proper status in court. I cannot concur with my brethren in the view that the letter of advice to the head of a co-ordinate branch of the government (114 N. C. 925, 21 S. E. 963) is a precedent for entertaining and deciding this case. There the court followed a former precedent in advising a co-ordinate department (the legislature) about a matter that confronted it at the moment, and involved a grave constitutional question upon which that department was called upon to act immediately. There the court gave advice in order to point out the line of duty, which was prescribed by the constitution, and it was not necessary to render a judgment. Here we must either render a judgment or dismiss the case for want of jurisdiction. There is no middle ground. If we have no jurisdiction, as the modified opinion of the court seems to concede, then our judgment is a nullity. It is familiar learning that a judgment, where the court has no jurisdiction, is not conclusive. It seems to me that, where it is conceded that a case is *coram non iudice*, the court can render no judgment; and it is manifestly our duty to dismiss, unless we mean to hold that any two private citizens have the same right to ask for advice about their differences that the legislature or the governor has to invoke our aid in acting upon a grave constitutional question, upon which immediate action is inevitable. To this proposition I cannot give my assent, and, in my view of the case, I cannot concur with my brethren without assenting to it.

The letter to the governor which is referred to was not an adjudication as to the rights of the judicial officers whose terms were in question. But, feeling that they would voluntarily accept the advice as decisive, the court simply endeavored to exhibit a proper appreciation of the rights of the judges, and at the same time to show courtesy to the chief executive of the state that had been considered due both departments when similar requests had been theretofore made. It has never been once suggested that the frequent designations of actions for possession, since feigned actions and forms of action were abolished, in 1868, as in the nature of actions of ejectment, warrant this court in entertaining a suit be-

gun by declaration instead of by summons, and thus disregarding the requirement of the statute. Code, § 161. I see no more reason for attaching greater significance to the expression "in the nature of a controversy without action." I cannot concur in the view that statutes enacted in derogation of general law, and heretofore construed strictly by this court, shall be deemed modified as a mere inference from the use of such illustrations. But the judgment of the court below that Jones' mortgage is not void is, as I understand the opinion of the court, left undisturbed, and is allowed to conclude the parties, though the court had no jurisdiction to try it.

Whatever may be the magnitude of the question involved, I deem it my duty to refrain from the expression of an opinion upon it, just as it would be proper to decline to respond to a written request, accompanied by a solemn affidavit, and sent in an informal way by some other highly respectable citizens of the state. I therefore dissent from the opinion of a majority of the court that there is a properly constituted case before us. If the majority of the court had ordered that the appeal be dismissed for want of jurisdiction, thus vacating the judgment below, which will now remain conclusive on the parties, the question whether I should give expression to my opinion on the merits might have been considered, according to the precedents, one of propriety. But where the court, as the conclusion deduced from an argument to sustain the jurisdiction, simply ordered that the appellant pay the costs, then, with great deference to the views of others, it seems to me that my course should be dictated by a sense of duty, rather than of propriety. When the letter of advice referred to in the opinion of the court was sent to the governor; it must be remembered that there was no judgment appealed from the validity of which depended upon the opinion of the court, and the letter concluded no one as to his rights. It subverted the purpose of pointing out to the executive department the method of conducting the approaching election,—a matter upon which that department was required by law to take action forthwith.

(116 N. C. 223)

CARR v. COKE, Secretary of State.

(Supreme Court of North Carolina. May 18, 1895.)

ENACTMENT OF STATUTES — FRAUDULENT ENROLLMENT.

Where a bill is duly signed by the president of the senate and speaker of the house, a court cannot go behind this record, and inquire whether, in the passage of the bill, it was fraudulently enrolled before it had been read before each house the number of times required by the constitution, though such fact is apparent on the face of the journal which each house is required by the constitution to keep of its proceedings. Avery and Clark, JJ., dissenting.

Appeal from superior court, Wake county; Henry R. Starbuck, Judge.

Action by Elias Carr against Octavius Coke, secretary of state, for a writ of mandamus. There was a judgment for defendant, and plaintiff appeals. Affirmed.

F. H. Busbee and Graham, Boone & Boone, for appellant. J. B. Batchelor and Armistead Jones, for appellee.

FAIRCLOTH, C. J. The plaintiff, as a citizen and taxpayer of the state, brings this action against the defendant, as secretary of state, who, by virtue of his office, is the custodian of all acts passed by the legislature, or which purport to have been passed, whose duty it is to deliver certified copies of said acts to the public printer for publication. The prayer is that the defendant show cause why a peremptory mandamus shall not issue to compel him to remove the act in consideration from his files, and why he should not be enjoined from delivering a certified copy of the same to the public printer. An act to regulate assignments and other conveyances of like nature in North Carolina, ratified March 13, 1895, is the one under consideration. The complaint alleges that the act was signed by the president of the senate and the speaker of the house of representatives on the said 13th of March, in the presence of each house, and purports to have been ratified upon that day; that, upon information and belief, the act did not become law according to the constitution of the state; that the journals of both houses show that it was not read three times in either; that it was never read in the senate, and was tabled in the house on its second reading; and that by some unknown fraudulent means the bill was enrolled by some person, unknown to the plaintiff, and signed by the said president and speaker by mistake. The defendant answered, denying the material allegations. At the hearing the defendant moved to dismiss the action on the ground that the court had no jurisdiction to grant the relief prayed for by the plaintiff. The motion was heard, and his honor dismissed the action for want of jurisdiction to grant the relief, on the ground that the court cannot go behind the ratification of the act as the same appeared in the office of the secretary of state. With the act before us, on its face regular and in due form, ratified by the genuine signatures of the president of the senate and speaker of the house, the question is presented: Can the court, as a co-ordinate branch of the government, look behind this record, and investigate by inquiry and proof the manner in which this record was established by the legislative branch of the government, for any of the causes alleged in the complaint? It may be stated in the outset that it is an important question, and one that has not been heretofore presented di-

rectly to this court. The court cannot be blind to the consequences that will flow from a decision either way. On the one hand, if we cannot look behind the record, then paid and corrupt men, lobbyists, and other interested ones in and around the legislative halls, will feel more confident and safer in their disreputable work. On the other hand, if we can open the door, and permit every act of the legislature to be inquired into, behind the record, for any of the causes alleged in the complaint, then the state will be plagued with all the evils of a veritable Pandora's box. By an examination of the decisions of the courts of the different states, we find some diversity among the decisions and the opinions of eminent jurists. Those courts holding the affirmative of the question as a rule have done so by reason of some provision in their state constitutions, or some pre-existing statutes. In one or more states the negative was held, and, after a change in their constitutions, the reverse was held by reason of some new clause in the organic law. We find in no state constitution the exact wording as it is in ours. We are therefore left to reason with ourselves, and construe the true meaning of our organic law, aided by the best authorities at our command.

Let it now be understood that it is not a question of fraud or wrongdoing in the legislative halls, as alleged in the complaint, with which we are confronted, but simply a question of power. It cannot be said that this court, from its origin until now, has ever failed to lay its hands upon fraud or any wrongdoing, whenever authorized by law and requested to do so. If crimes are perpetrated in legislation, the authors are liable, and can be punished as other violators of the law; and possibly a reasonable and honest effort by the proper authorities would bring to light the authors of the wrong, if any has been done. There is now before the court in this proceeding no one who is in the slightest degree alleged or supposed to be connected with wrongdoing in this matter. So, then, we are considering a question of power, and not of investigation behind the record of a co-ordinate branch of the state government. Our constitution (article 2, § 16) declares that "each house shall keep a journal of its proceedings which shall be printed and made public immediately after the adjournment of the general assembly"; and in section 23: "All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws; and shall be signed by the presiding officers of both houses." What shall be the entries on the journals is not indicated by the constitution, except as above. It is the province and duty of the court to construe and interpret legislative acts, and see if they disregard or violate any provision of the constitution, and, if so found, to declare them in-

valid, and this is done upon the face of the act itself. Beyond this duty arises the question of power in the court to look behind the legislative record, and inquire into its proceedings for any cause set out in the complaint. Our decision upon this question is based upon the "reason of the thing," upon public policy for the best interests of the state, and upon the decisions of other courts and our own, which commend themselves to our minds, some of which are now cited. At common law the ratification and approval of an act of parliament was conclusive and unimpeachable, etc. "An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth." "And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament; for it is a maxim in law that it requires the same strength to dissolve as to create an obligation." 1 Bl. Comm. 185, 186. "The journal is of good use for the intercourses between the two houses, and the like, but when the act is passed the journal is expired. The journals of parliament are not records, and cannot weaken or control a statute, which is a record, and to be tried only by itself." *Rex v. Arundel* (Trinity Term, 14 Jac.) Hob. 100-111. *Brodnax v. Groom*, 64 N. C. 244, was a question upon a private act requiring 30 days' notice of application, required by article 11, § 4, of the constitution, and the motion was to prove that the notice had not been given. Pearson, C. J., said: "We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. Lord Coke says, 'A record until reversed importeth verity.' There can be no doubt that acts of the legislature, like judgments of courts, are matters of record; and the idea that the verity of the record can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim, 'Omnia praesumuntur,' etc. Suppose an act of congress is returned by the president with his objection, and the vice president and the speaker of the house certify that it passed afterwards by the constitutional majority, is it open for the courts to go behind the record, and hear proof to the contrary?" In *Scarborough v. Robinson*, 81 N. C. 409, in which this question was not directly before the court, Smith, C. J., in the discussion, uses this language on page 426: "The constitution declares that the legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other. Article 1, § 8. And if the nature and effect of an enrolled bill, duly certified and deposited in the proper office, be such as we have attributed to it, it unavoidably follows that the compulsory or-

der demanded in the action would be an interference with the legitimate exercise of the lawmaking power, and an obstruction to the harmonious working of the 'separate and distinct' co-ordinate departments of the government, and must consequently be denied." We quote this extract in order to show the trend of the judicial mind of the court as then constituted. In *Field v. Clark* (1891) 143 U. S. 649, 12 Sup. Ct. 495, the question was elaborately argued and considered in an able opinion. The allegation was that an important section in the bill as it passed was not in the enrolled bill authenticated by the signatures of the speakers and deposited in the office of the secretary of state. After full consideration of the numerous points argued, the court held as follows: "The signing by the speaker and by the president of the senate, in open session, of an enrolled bill is an official attestation by the two houses of such bill as one that has passed congress; and when the bill, thus attested, receives the approval of the president, and is deposited in the department of state according to law, its authentication as a bill that has passed congress is complete and unimpeachable. It is not competent to show from the journals of either house of congress that an act so authenticated, approved, and deposited did not pass in the precise form in which it was signed by the presiding officers of the two houses and approved by the president." The argument was pressed that a bill signed by the speakers and approved by the president and deposited with the secretary as an act does not become a law if it had not in fact been passed by congress. The court said, in view of the express requirements of the constitution, the correctness of this general principle cannot be doubted. "But," said the court, "this concession of the general principle does not determine the precise question before the court, for it remains to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, asserted to have become a law, was or was not passed by congress. This question is now presented for the first time in this court. We cannot be unmindful of the consequences that must result if this court should feel obliged to declare that an enrolled bill, on which depend public and private interests of vast magnitude, which has been duly authenticated by the presiding officers, and deposited in the archives as an act of congress, was not in fact passed, and therefore did not become a law." Page 670, 143 U. S., and page 495, 12 Sup. Ct. Although the constitution does not require that acts of congress shall be authenticated by the speakers' signatures, the court said that: "Usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication"; and when a

bill is so authenticated "it carries on its face a solemn assurance by the legislative and executive departments that it was passed by congress. The respect due to coequal and independent departments requires the judicial department to act on that assurance, leaving the courts to determine whether the act so authenticated is in conformity with the constitution." Page 672, 143 U. S., and page 495, 12 Sup. Ct. "It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself, nothing to the contrary appearing upon its face, that it passed congress." *Id.* In *Pangborn v. Young*, 32 N. J. Law, 29, Beasley, C. J., delivered a strong opinion against the affirmative of the present question; and Judge Harlan says: "The conclusion was that, upon grounds of public policy, as well as upon the ancient and well-settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses, * * * and in custody of the secretary of state, was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals, or in any other mode." Page 674, 145 U. S., and page 495, 12 Sup. Ct., and other cases. In *Ex parte Wren*, 63 Miss. 512, is found a case much in point, in which Campbell, J., in an able and vigorous opinion, said that an enrolled act, such as we are considering, "is the sole exposition of its contents, and the conclusive evidence of its existence according to its purport; and that it is not allowable to look further to discover the history of the act or ascertain its provisions. Every other view subordinates the legislature, and disregards that coequal position in our system of the three departments of government." He then shows that, if such a rule should prevail, a justice of the peace and all other judicial officers would be compellable and would have the right to investigate the question whether any legislative act was passed according to the requirements of the constitution, and whether it was procured by mistake, fraud, or otherwise, and upon the complaint of any resident taxpayer.

With these authorities we are content. There are numerous others, but it would be useless to pursue them. We are considering the main and important question which we understand the plaintiff intended to bring to the attention of the court, without any remarks on the pleadings. It seems to be conceded that the main allegation cannot be established by the journals as evidence, and that, consequently, it must be done by some other kind of proof. It is urged that fraud vitiates everything; but, if we can go behind the record, would not mistake, bribery, etc., serve equally as well? It is also argued that the fraud alleged is admitted, and is therefore to be taken as a fact for the purposes of this action. Admitted by whom? The respondent does not admit it in his answer. The motion was to dismiss

for want of jurisdiction, and the court rendered its decision expressly on that ground. The defendant is a mere ministerial state officer, who was not a member of the legislature, and has no authority from it to plead or admit anything for it. Is he authorized by the speakers of the two houses to admit that they signed the bill by mistake? They have made no such admission, so far as this record discloses, and they have no opportunity to admit or deny anything. Is the defendant authorized to admit that by some unknown and fraudulent means the bill was enrolled? If so, who authorized him to admit it? The defendant might have ignored this proceeding entirely without the slightest dereliction of duty. Who, then, defends the legislature or its speakers when this grave question is under consideration? The executive does not feel it his duty to defend in the matter, presumably because he is not authorized by any one to do so. Then, is there such admission of fraud or any other wrong as to enable the court to treat the allegations of the complaint as facts? But, however these matters are, we have seen that we have no power to make the order asked for by the plaintiff, and that the remedy, if any is needed, is with the legislative branch of the state government. We are of opinion that his honor committed no error, and his judgment is affirmed.

MONTGOMERY, J. (concurring). The single question for decision is, can this court inquire into and pass upon the history of a paper writing which purports to be an act of the general assembly, and which is authenticated by the undisputed and genuine signatures of the president of the senate and the speaker of the house of representatives? It is to be always kept in mind that the point is not as to the powers of the supreme court to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality. Our jurisdiction in that case would be complete and unchallenged. But the question is, when the legislature has solemnly certified to a fact,—that is, to the passage and ratification of an act which is within its own sphere,—will the judiciary be permitted to inquire into or dispute that certification? The case is of the very first impression, and it ought to be settled upon the principles of sound reason and well-considered authority. This is a strictly legal question, and ought to be settled according to the principles of the law. The court is aware that its judgment in this case may be attended with dangers in the future, but it is not our province to provide against dangers to the commonwealth further than to construe honestly, and as intelligently as we can, the laws which the legislative department of the government has enacted. It may be said, however, in this connection, that if policy ought to have governed the

court in this matter, if results ought to have been anticipated, we feel that in the decision of the court we have chosen the lesser of the two evils to be dreaded. The question at issue brought to the light the more than possibilities of two most serious menaces to popular government: The first one, that of the power of a corruptible or incompetent clerical force, or that of a depraved and hired set of lobbyists, or both together, to tamper with the acts and proceedings of the legislature and have that certified to be law which was never in fact enacted; the second, that of the power of defeated and unscrupulous politicians, when stung by loss of office or a desire for revenge on their political enemies, to practically repeal the legislation of their successful opponents by resorts to the courts upon mere allegations that there was fraud in the passage of the acts or in their ratification, and by procuring injunctions upon affidavits obtained possibly through bribery, or through the ignorance or carelessness of the oath maker. By the decision of the court, the latter danger—the far most to be dreaded—is avoided. The presiding officers of the two houses may, by taking a sufficiency of time, and by close scrutiny and rigid examination of the bills and wrappers, prevent fraud and error in ratification, if such a thing be attempted; while for the latter danger no limit or restraint can be found except in the conscience of men who have never cultivated a sense of either generosity or justice. The motives and purposes of the plaintiffs in this action are not intended to be reflected on, neither are the character or official conduct of any officer or clerk of the last general assembly. No testimony has been heard in the case, and this court knows nothing of the facts or motives. We have simply discussed dangers in the future in this connection. In the conclusions to which I have arrived I have tried to keep before me the great importance of the legal question involved, and to keep out of mind, as an utterly insignificant feature of the case, the wretched creatures who would commit such a detestable piece of meanness as the complaint charges. They, when detected, will receive the execration of all good men, and most richly will they deserve it. It would have been well for the people and for the cause of good government if they had, or could have been, ferreted out, and named in the complaint, that they might have been pilloried in an indignant public sentiment. But to the law in the case:

Of the three coequal departments of our government, the legislative is of the most importance. It is sovereign as long as it keeps within the bounds of the constitution. The powers of the judicial department are clearly defined and limited in the constitution. Except to hear claims against the state (and then only to recommend action to the general assembly), the whole power of

this court is embraced in these words: "The supreme court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference." Const. art. 4, § 8. This means, in plain English, that this court can construe the laws when their meaning is a matter of contention between litigants, and that it can determine, in cases properly before it, whether or not statutory enactments are constitutional. The writer of this knows of no other instances in which this court can, directly or indirectly, pass upon the conduct of the general assembly. As to the formulae that are necessary to convert a bill into a law, we cannot inquire, if the ratification in proper form appears, and the signatures of the proper officers are duly attached. However, in the case before us, the plaintiff alleges that what he styles the "pretended act" is not a law, because it was not read three times in each house before it received the signatures of the presiding officers of both, as the constitution requires. That instrument certainly does require that "all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses"; and it is as equally certain, under the decisions of this court, that the certificate of ratification, attested by the signatures of the presiding officers, carries with it the presumption conclusive that all such bills and resolutions have been duly passed by the bodies, and cannot be questioned by the courts. Suppose, as individuals, we admit—which the answer does not—that this bill did not pass its several readings, can that fact be shown in a court of law in the face of ratification and the genuine signatures of the presiding officers certifying to the contrary? This is the naked question. Ratification gives authority to the act. The presiding officers who, upon ratification, attach their signatures to a bill, do it in open session, calling the attention of the members to the fact that the same is about to be signed, and reading the title of the bill. When it is signed, ratification is thereupon made of it by the body through their agent, the presiding officer. It is their act and deed, and nothing, not even the journal itself, can contradict it, or be used as evidence against it. Ratification is of higher dignity and of more authority than the journals kept by the clerks. Ratification and the signatures of the proper officers presume a passage of the bill by the legislature according to the requirements of the constitution, and the courts of law—the judicial department, a coequal department—are not allowed to go behind or question them. We have clear authority for this in our own reports. In the case of *Brodnax v. Groom*, 64 N. C. 244, certain taxpayers in Rockingham county, in their complaint, sought an injunction against the col-

lection of a tax levied by the commissioners under an act of the general assembly, on the ground that the act was private, and was passed without the 30-days notice of application required by the constitution. That case presented the very question which we have before us now. Could the plaintiffs in that case be allowed to go behind the ratification of the act, and show by any kind of proof—by the journals or otherwise—that the constitutional requirement had not been complied with? The constitution provides that "the general assembly shall not pass any private law unless it shall be made to appear that 30 days' notice of application to pass such a law shall have been given." The constitution provides that "all bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws." The constitutional requirement in both these instances is specific and definite and positive, and yet this court held in the *Brodnax Case*, *supra*, that, the act having been certified by the presiding officers of both houses as duly ratified, it was not competent for the judiciary to go behind the ratification. Chief Justice Pearson, who delivered the opinion of the court in that case, said: "We do not think it necessary to enter into the question whether this is a public act or a private one, in regard to which 30 days' notice of the application must be given; for, taking it to be a mere private act, we are of the opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. Lord Coke says, 'A record until reversed importeth verity.' There can be no doubt that acts of the general assembly, like judgments of courts, are matters of record, and the idea that the 'verity of the record' can be averred against in a collateral proceeding is opposed to all of the authorities. The courts must act on the maxim 'omnia praesumuntur.' Suppose an act of congress is returned by the president with his objections, and the vice president and the speaker of the house certify that it passed afterwards by the constitutional majority, is it open for the courts to go behind the record, and hear proof to the contrary?" It is clear from the above that the meaning of the chief justice when he said, "We are of opinion that the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record which cannot be impeached before the courts in a collateral way," was that all attacks in the courts upon legislation which appeared to be ratified, and had the signatures of the presiding officers attached, were collateral attacks, and that any direct impeachment of such acts must arise in and be conducted by that jurisdiction which has power in the

matter,—the legislative department. If he only meant to say that the courts could afford a remedy in such matters, but that they would not do so in the case then before the court, because the attack was collateral, then it would have to be admitted that he expressed himself most confusedly in one of the most important questions ever brought before the court. That would be a bold assertion to make of Judge Pearson. And besides, if the proceeding in that case was not direct, but only collateral, then it is not saying too much to declare that no direct method of attacking an act of the legislature through the courts can be devised. Certainly that was a more direct impeachment than the one now before the court.

We are not without direct authorities from other courts than our own. In the case of *Ex parte Wren*, 63 Miss. 512, this same question is discussed, and decided upon the same principle as was *Brodnax v. Groom*, supra, that court holding that an enrolled act of the legislature, having been signed by the presiding officer of the two houses and the governor, is the sole expositor of its contents, and is conclusive evidence that the act so signed contains the provisions of the bill as passed by the two houses. And the journals of those houses cannot be resorted to to show that such act does not contain amendments to the bill which were adopted by the two branches of the legislature. The court said, "Every other view subordinates the legislature and disregards the co-equal position in our system of the three departments of government." The opinion in *Wren's Case* is comparatively of recent date, is a very able one, and reviews the decisions of many of the state courts on the question. It mentions that the courts of many of the states, including that of North Carolina in the case of *Brodnax v. Groom*, held the same opinion as did the supreme court of Mississippi. In *Pangborn v. Young*, 32 N. J. Law, 29, the principle laid down in the *Brodnax Case* is more than indorsed. The supreme court of New Jersey in that case decided: First. That when an act has been passed by the legislature and signed by the speaker of each house, approved by the governor, and filed in the office of the secretary of state, an exemplification of it under the great seal is conclusive evidence of its existence and contents. Second. It is not competent for the court to go behind this attestation, or to admit evidence to show that the law, as actually voted on and passed, and approved by the governor, was variant from that filed in the office of the secretary of state. Third. The minutes of the two houses, or either of them, although kept under the requirements of the constitution, cannot be received as evidence for such purpose. In that case the court said that: "The body which passes a law must of necessity promulgate it in some form. In point

of fact the legislative power over the certification of its own laws is of necessity almost unlimited, as will appear from the circumstance that, with regard to the body of an act, there is no evidence of any kind but that which the legislature itself furnishes in the copy deposited in the state archives. We are also to reflect that it is the power which passes the law, which can best determine what the law is which itself has created. The legislature in this case has certified to this court by the hands of its two principal officers that the act now before us is the identical statute which it approved, and, in my opinion, it is not competent for the court to institute an inquiry into the truth of the fact thus solemnly attested." The above-cited authorities seem to me to be founded on experience and the law, and on a wise public policy; and, as Justice Avery well said, in substance, in *Logan v. Railroad Co.* (at this term) 21 S. E. 959, we ought to be influenced, when looking for assistance from the decisions of other courts, by those opinions which embody sound principles and just reasoning, rather than by a simple numerical array of decided cases.

I have tried to show that the decision of the court in this case is in harmony with its former decisions, and that the court is sustained by the opinions of some of the ablest courts of other states. *State v. Glasgow*, 1 N. C. 176, was not even cited as an authority by the counsel for plaintiff in the argument before us. It has no bearing, that I can see, on this case, as a law authority, though interesting as a bit of early official corruption. No legislative act or power was questioned. It was simply the case where a former secretary of state himself fraudulently issued a land warrant, was indicted, and convicted for the offense, and stripped of his official honors. In addition, there is, to my mind, another insuperable objection to the adoption by the court of the plaintiff's view of this case. It is this: There could, in that event, be no unity of decision even in our own courts. If the certificate of ratification can be inquired into by the courts, then the trial courts, with the same matter in issue,—that is, whether an act properly certified as having been ratified had duly passed its several readings,—might and could arrive at different verdicts and judgments, as the proof varied in each trial. To-day a statute might be declared void because a jury had determined that it had not passed its several readings, and to-morrow the same statute, in a new trial, with additional testimony, or in a different court, might be declared good and valid. And again, if ratification be not conclusive, how are the stability and integrity of our statutory laws to be maintained in other states and abroad? From the position I have taken in this concurring opinion, it is not necessary for me to discuss the other allegations of the complaint

that the signatures of the presiding officers were procured by fraud. If the certificate of ratification cannot be impeached in a court of law, even by the journals themselves as evidence, it is certain that by all the rules of evidence parol proof cannot be introduced for that purpose. In conclusion I desire to emphasize that the court has not made a decision upon a mere matter of fraud. It is a question of jurisdiction,—of power,—whether one coequal department of the government can invade the province of another, and question or dispute the solemn act of the latter, attested by the genuine signatures of those officers who are empowered and required to attest and certify those acts. I insist that the decision of the court in this case upholds the integrity and independence of one of the coequal departments of the government, and preserves the power and jurisdiction of the two involved in this suit. It is better for us, and will be better for posterity, if in cases where fraud and deceit have been or shall be practiced upon the presiding officers of the senate and house, by means of which their signatures to spurious bills have been obtained, for the legislature to be convened (if an adjournment was had before discovery), and allowed to correct such own errors or mistakes, than that the court should assume a jurisdiction which does not belong to it, and thereby begin an encroachment upon the rights of the legislative department, to end, possibly, in judicial tyranny, the basest and the most detestable species of oppression.

EVERY, J. (dissenting). The plaintiff alleges, on behalf of the people of North Carolina, that a forged paper, purporting to be an enrolled bill, that had passed both houses of the general assembly was placed before the presiding officers of the senate and house of representatives, and that, being misled by fraudulent misrepresentations, they were induced to attach their official signatures to it, and give to it the force and effect of a law. Upon these facts, the plaintiff, as a citizen, and in the name of the people of the state, prays the court to declare that this paper, which by such covinous trickery has been placed upon the files in the office of the secretary of state, is not a part of the statute law, and to restrain that officer from furnishing it for publication among the acts of the legislature. The judge who presided in the court below holds that, admitting the paper ratified in this way to have been a forgery, the courts are powerless to remedy this great wrong, and the people can have no relief till the legislature shall again assemble. If it be asked how this admission was made, I answer that it was made by the judge who heard the case below when he held, on motion of defendant's counsel, that the plaintiff was not entitled to the relief demanded upon the face of the complaint unanswered; or, in other

words, if there were no denial by answer of the allegation that the enrollment of the bill was procured by fraud, and the signatures made by mistake, the court had no authority to remedy the wrong done to the public. If authority be demanded to sustain this proposition, then I refer, as the last of an indefinite line of decisions sustaining this familiar doctrine, to *Bank v. Adrian* (decided at this term) 21 S. E. 792, in which the present chief justice, in a very elaborate opinion, declared that when a plaintiff insisted that the answer did not state facts sufficient to constitute a defense, just as the defendant contends here that the complaint fails to state facts constituting a cause of action, it was a case "in which one party alleged fraud and the other admitted it." In my opinion, to admit that an adroit forger can fraudulently convert his own handiwork into a statute which the courts, with full knowledge of its character, must enforce as law, is to confess before the world that government of the people and by the people is an egregious failure. I am not prepared to admit that courts of equity, which have dealt deathblows to fraud wherever it has reared its hydra head for hundreds of years, must desist from unearthing and undoing such iniquity because the perpetrator attempts to take refuge in the purlieus of the temple, where a co-ordinate department of the government is in council. The arm of the law is not so shortened that it cannot right such wrong wherever done. No precincts are too sacred to be invaded by its process when such an end is in view. We cannot forget the fact that this is a case of the first impression. The judicial annals of the states of this Union have been searched in vain to find a parallel for it, and any argument founded upon the authorities cited is misleading, in that it assumes an analogy where none exists. As this is the first case in the history of Anglo-Saxon civilization where a forger has attempted to play the role of lawmaker, it seems to me a fitting opportunity to vindicate the truth of the axiom that our system of jurisprudence affords an adequate remedy for every wrong done to a citizen, either as individual or as a representative of the public. Courts of equity (says a leading law writer) have been confidently resorted to in order to sift the consciences of men, and trace out fraud, so that titles founded upon it might be declared void. When the plaintiff comes into court to demand this probing of the consciences of those who know the history of this admitted fraud and forgery, counsel for the defense meet him with the objection that the clause of the constitution which guaranties the independence of three co-ordinate branches of the state government is an insuperable barrier to any action on the part of the courts. Section 8 of article 1 of the constitution provides that "the legislative, executive, and supreme judicial powers of the state ought to be forever sepa-

rate and distinct." Is it an invasion of the domain of either of the other two departments to draw in question before the courts the validity of an instrument duly attested by the chief officers of either of them? The organic law, it will be observed, couples the executive with the legislative department. Where a private citizen of North Carolina records an entry upon the entry taker's books, containing a specific description of a tract of land, or by a survey makes an indefinite description certain, before his neighbor makes an entry of the same land, though the latter may procure an older grant, signed by the governor of the state, the courts, in the exercise of their equitable jurisdiction, have never hesitated, upon application of the senior enterer, to declare the older grant issued by the head of the executive department null and void, and to compel the junior enterer to convey the legal title to him, who has the better right, because, with notice that his neighbor had expended his money for an entry of the same land, the junior enterer is guilty of fraud in procuring the first title from the state. *Johnston v. Shelton*, 4 Ired. Eq. 85; *Harris v. Ewing*, 1 Dev. & B. 374; *Currie v. Gibson*, 4 Jones, Eq. 25; *Munroe v. McCormick*, 6 Ired. Eq. 85; *Grayson v. English*, 115 N. C. 361, 20 S. E. 478. Though grants for land are signed by the chief officer of a co-ordinate branch of the government, it has never been suggested during the century in which the courts have been setting aside these solemn patents, under the great seal of state, on the ground that they were procured by fraud, that the courts were invading the independent domain of the governor, as the head of the executive department. This being a case of the first impression here, the issue must not be obscured by remote analogies, drawn from precedents not in point. If section 8 of article 1 of the constitution is invoked to prevent this investigation demanded by the people through that one of their number whom they have chosen as their executive chief, it will be seen at a glance by layman as well as lawyer that the constitution affords the same protection to the independence of the executive as of the legislative and judicial departments. If it is an impenetrable shield, behind which fraud may stalk secure, and mock with ghoulisn glee the anger of an injured people when suit is brought to show that the signatures of the two presiding officers of the two branches of the legislature were procured by fraud, and attached by mistake to an instrument affecting the rights of the whole body of the people, how is it that it has never occurred to the long line of illustrious men, who have preceded us in this court, that it was an invasion of the distinct power of the executive department to set aside its great seal, which, above all things, imports verity at home and abroad, and the signature of its chief officer, where a single citizen complains that an-

other procured that solemn attestation in fraud of the complainant's individual right? The single issue of law presented by this appeal is whether a forged paper, purporting to be an enrolled bill that had passed both houses, when presented to the presiding officers, and signed by them under the mistaken belief that it is genuine, is open to attack for fraud like a grant signed by the governor. The gravamen of the complaint is embodied in section 3, subd. 11, where it is alleged that "by some means unknown to this plaintiff, but which he is informed and believes to be fraudulent, the said bill was enrolled by some person to the plaintiff unknown, in the office of the enrolling clerk, and signed by mistake by the president of the senate and speaker of the house of representatives, upon the day upon which it purports to have been ratified." Equity vacates a patent which the governor signs, not by mistake, but in accordance with the requirements of law, because it is procured in fraud of the superior right of a single citizen. Why, then, shall the same tribunal declare itself powerless to rectify a fraud upon the rights of the whole people of the state, accomplished by imposition practiced in the most specious way, directly upon the chiefs of the two branches of the legislative department? When the people met in convention and framed a constitution, they expressly delegated certain powers to each of the three departments, and prohibited one or all of these agencies, for the most part, in article 1, in terms quite as clear, from exercising certain other sovereign authority. The result was that, while the legislature, as the representative of the popular will, is still clothed with the residuary power, or that which is not expressly granted to either of the other departments, and that does not fall within the prohibitions mentioned, it is, in the exercise of its own delegated authority, coequal, not superior, to the other co-ordinate branches, acting within the purview of their powers. All three are mere agents of the people, acting under an express power of attorney. When, therefore, it is provided in section 16, art. 3, of the constitution, that "all grants and commissions shall be issued in the name and by authority of the state of North Carolina, sealed with the great seal of the state, signed by the governor and countersigned by the secretary of state," and in section 23, art. 2, that "all bills," etc., "shall be signed by the presiding officers of the two houses," the one clause is hedged about with no more of the divinity of sovereignty than the other. *Battle, J.*, says in *State v. Glen*, 7 Jones (N. C.) 323: "Our predecessors were the first of any judges in any state in the Union to assume and exercise the jurisdiction of deciding that legislative enactment was forbidden by the constitution, and was therefore null and void. See *Bayard v. Singleton*, Mart. (N. C.) 42, decided in November, 1787, which was four or five years anterior

to the earliest case on the subject referred to by Chancellor Kent. 1 Kent, Comm. 450." Since that early day this court has never hesitated to assume this authority to pronounce a statute passed by the legislature with all of the forms of law, null and void because repugnant to the constitution. Indeed, at this term, an act which had not been published in the laws, but which was regularly passed at the last session of the legislature, has been, in effect, declared unconstitutional, because the right of exacting more than 6 per cent. as interest, allowed therein, was held to fall within the constitutional inhibition against granting special privileges. No one questions the right of this court in a proper case to pronounce an act, which is admitted to embody the true sentiment of the legislature, void on the ground that it had no right to pass it. Yet, if what now purports to be the statute before us had provided that the lawful rate of interest in this state should be 3 per cent. a month, or 36 per annum, and its passage had been procured by speculators and note shavers, it would nevertheless be contended, if the opinion of the court is founded upon the correct interpretation of the organic law, that the people would be placed in the dreadful dilemma of groaning under such a burden until another general assembly should meet, or of asking the governor to call an extraordinary session, at a heavy expense, of the same legislature that, according to the admissions in the pleadings, failed at its last session to close some of its clerks' rooms against forgery and fraud. I do not believe that the law, properly interpreted, reduces us to this dire extremity. There would be a prospect of a much more economical and satisfactory settlement of this controversy by the trial before a jury of an issue of fraud, as demanded by the plaintiff, than by inviting the same bodies, with the same lobbyists lurking around them, to remedy the great wrong that the public have suffered through some agency that was, at its last session, able to reach its employees. With due deference for the views of others, I am of opinion that we ought on this question, which has been presented to us first of all the courts of America, to follow the example of our predecessors more than a century ago, and assert for the courts the power to unravel fraud, even if the tangled skein should take us behind the solemn act of ratification by presiding officers, as did the determination of the early judges to prevent violations of the sacred instrument which they had sworn to support.

The clear-cut issue of law raised by admitting the truth of the charge of fraud must not be obscured by discussing the preceding allegations in reference to a bill in the same words, the legislative history of which is traced till it is found tabled in the house, and turned over to the state librarian, who is the custodian of bills which are thus

strangled in the earlier stages of their existence. These allegations are, at most, but an attempt to negative the idea in advance, that the forged paper had a legislative history leading up to its ratification, which the defendant might contend could not be contradicted. It does not seem to me had pleading to have inserted these allegations, when the relief demanded was a perpetual restraining order against the defendant, although the plaintiff relied solely upon the ground that the paper presented to the presiding officers was falsely and fraudulently represented to them to be an enrolled bill, and its ratification procured in that way. Counsel for the defendant cannot be allowed "to blow hot and cold" to induce the court, on motion, to hold that it cannot hear proof of the allegation of fraud, if true, and then to say by way of breaking the force of the ruling invoked that they could disprove the charge of forgery and fraud, if they would. The fact that the bill was enrolled without authority, and signed by mistake, is not, for the purposes of this appeal, denied by any one. That it was fraudulently enrolled and presented for signature is alleged in the complaint, and his honor holds that, even though all this is true, the court has no jurisdiction to hear evidence to show its truth. The argument deduced from supposed future inconvenience is always the most specious and unsatisfactory kind of reasoning. To the suggestion that possible evils may ensue from sustaining the power of the courts to impeach the validity of a statute, it may be answered that the announcement that the constitution is a shield for manufacturers of forged law will indeed open a Pandora's box, out of which will issue invitations to those who are capable of such crime to throng the lobbies of our legislative halls, and make, by bribery, forgery, and other fraudulent practices, the laws which should be framed to afford remedies for the grievances and protection to the rights of the people. A free government like ours must always be dependent for its stability more upon the virtue and integrity than upon the intelligence of its citizens. As well might we insist that the statute which allows any person in the state to make affidavit that any other person has, as he is informed and believes, committed murder, and demand a warrant for his arrest, should be repealed, because it opens a way for the arrest of every innocent man in the state, as that to permit investigation of the allegation that what purports to be a law regularly ratified is not in reality an expression of the will of the people through their representatives, but the work of a forger, would raise a doubt as to the validity of every statute passed by the legislature. Where a plaintiff asks, on behalf of the people, an order restraining the secretary of state from publishing a ratified act on file in his office he is required to make an

oath, which, if made falsely, and without probable cause, subjects him to punishment for perjury. It is not to be supposed that such risks will be taken inconsiderately, and, if the perpetrators of this disgraceful crime could be impaled before the world, and held up to public execration, it is to be hoped that another century of our history would glide by without such a flagrant instance of corrupt interference with legislation.

I understand my brethren to concede—that cannot be denied—that not one of the cases cited to sustain the opinion of the court is exactly in point here, for the reason that it has never before been charged, much less proved, that the ratification of a forged bill was fraudulently procured, when it had not in fact passed. The question raised in the cases relied upon by the majority of the court to sustain their position was whether the journals of the two legislative houses could be used to show that an enrolled bill did not pass. No such thing is proposed by the plaintiff here. In the complaint he says that a paper purporting to be an act of the legislature was fraudulently enrolled and signed by mistake, and, as introductory to this allegation, he avers, in substance, that the journals not only do not contradict, but tend to confirm, it. A similar bill passed its first reading in the house of representatives, was tabled on its second reading, and can now be adduced in evidence from the office of the lawful custodian of such papers. The journal of the senate fails to show that any such bill was ever before that body. So that the record of the one body, as far as it goes, tends to corroborate, while there is no recorded history of any such bill in the journals of the other to contradict, what is relied upon by the plaintiff as the basis of his action,—the fact that a forged paper, signed by the presiding officers by mistake, is now being enforced to restrict the right of the citizen in the interest of the procurers of this monumental fraud. Looking at the case from the standpoint of my brethren, it appears from a brief of cases involving the question whether the ratification journals can be contradicted by the journal, which will be found in the notes on pages 661–667 of volume 143 of the United States Reports (*Feld v. Clark*, 12 Sup. Ct. 495), that in 28 of the states the courts have held that it is competent to impeach the ratification by the journals directly; while it is held to the contrary in but 9 states. The conceded fact that in some of those states there are constitutional amendments providing that the ratification may be contradicted by the journal, shows conclusively that we have no reason to fear the threatened ills which are prophesied as probable results of going behind the ratification of an act to show that it did not pass, and that its enrollment was procured by fraud, when 28 states still afford good government to their citizens, after permitting the journals to be used to show not fraud,

but that the ratified bill did not pass. Indeed, it is worthy of special notice that the forgery of what purports to be an enrolled bill has been first attempted where the people had never been permitted to go behind the ratification, and when it was hoped by the perpetrators of the fraud that their covinous work would prove, as it has done, effectual. When the courts of more than three-fourths of the states have ventured to go behind the ratification of statutes to call in question the regularity of the successive steps preceding the signing by presiding officers, it seems to me that we may venture, when the first attempt is made to impeach for fraud instead of irregularity, to look, for an analogy to govern us, rather to the views of the 28 than to the opinions of the 9 courts.

The position of the court, in my opinion, finds no support in the case of *Brodnax v. Groom*, 64 N. C. 247, where Chief Justice Pearson, speaking for the court, holds that “the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record, which cannot be impeached before the courts in a collateral way.” But the plaintiff is making not a collateral, but a direct, attack, and the court in that opinion concedes that even a record can be successfully avoided and reversed, where it is directly attacked for fraud or irregularity. It is true that where there is a want of jurisdiction apparent upon the face of a record it may be impeached without any direct proceeding, just as the validity of a ratified statute may be questioned for repugnance to the constitution. *Springer v. Shavender* (decided at this term) 21 S. E. 397. If the constitution does not forbid, why should public policy prohibit a citizen on behalf of the whole people from impeaching a statute for fraud, when, for his own protection, he may attack a judgment regular upon its face. It was said obiter in *Scarborough v. Robinson*, 81 N. C. 413, that the journals could not be introduced to attack the existence and validity of a statute regularly filed among the records in the office of the secretary of state. If that doctrine is conceded to have the force of law, it in no wise affects a case where the plaintiff relies upon proving that the enrollment of the bill was procured by fraud, and where, if the defendant resorts to the journals to disprove it, he finds that they tend rather to corroborate than to contradict the allegation. The opinion of the majority of the court in the case of *State v. Meares* (decided at this term) 21 S. E. 973, intimates very broadly that the opinion in *Scarborough v. Robinson* ought to be overruled upon the point really involved, because it conceded to the presiding officers, if corrupt or unmindful of their duty, the power, by refusing to sign, to in reality veto bills regularly passed by the representatives of the people. Should we, then, standing in a position to make a precedent for the courts of America, hesitate to declare

invalid an act which we must assume both of these officials would declare to have been done by mistake on their part, and to have been procured by fraud on the part of others? I deeply regret that the majority of the court have deemed it their duty to hold that the courts have no power to investigate and remedy the great wrong which has been done to the public. I regret it because it gives immunity to the wrongdoers in this case, and, in my judgment, encouragement to others to attempt like frauds in the future.

CLARK, J. (dissenting). A demurrer ore tenus was entered, and the action dismissed, because a cause of action was not stated. For the purposes of this proceeding, therefore, the allegations of the complaint are admitted to be true. It is thereby admitted that a bill was introduced into the lower house of the general assembly; that this bill, on its second reading, was voted down by the representatives of the people; that the journal also shows that fact, and the bill itself was stamped "Tabled" and placed in the package of "tabled" bills, where it still remains. It is further admitted that the bill was not introduced in the senate at all, but that, notwithstanding the bill was defeated in one house, and never presented for consideration in the other, a fraudulent copy of a bill of similar tenor was procured to be made by a subcopyist of the enrolling clerk, and by mistake on the part of the two speakers, who were made to believe that it was a bill which had been duly read three times in each house, it was signed by them. The purport of the bill is to prohibit debtors from preferring any creditor in making assignments. The plaintiff alleges that as a taxpayer he has a right to be protected from paying the expenses of printing the fraudulent bill and distributing it among the laws of the state; that, as a citizen, he has a right to be excused from including it among the laws which, as a voter, he has sworn to support; and that, as a creditor, the right he has had by our laws, time out of time, to have his debtors prefer him, should they see fit, should not be taken away from him against the will of the people, as expressed by their representatives in this legislature, as likewise in many previous ones. The constitution under which we live, and which every officer of the state, from the highest to the least, and every registered voter has sworn to support, provides that "all bills shall be read three times in each house before they pass into laws." It is admitted here that this pretended law has not been read three times in each house. It is admitted that it has not been read three times in either house. It is admitted that it was read in only one house, and in that the people, through their representatives, defeated it and refused to let it pass. It is admitted that subsequently the speakers were im-

posed upon, and erroneously certified that the bill had passed three readings in each house. It is contended, however, that we cannot go behind the signatures of the speakers. But the signatures of the speakers, procured by fraud, are not their signatures. Fraud vitiates them as it vitiates everything it touches. But it is urged that it is dangerous to open up the acts of the legislature to be set aside for fraud, and that this would unsettle the laws. The fraud alleged is not in procuring the passage of an act, but in procuring an untrue certificate that it has been passed. If the alleged statute is not the will of the people, expressed in a constitutional way by three readings in each house of the general assembly, there is no power to make it a law, and no consideration of danger should prevent a declaration that the laws heretofore made by the people, in the constitutional mode, cannot be repealed, revoked, and set aside in this mode. If there could be any danger in refusing to admit as a law a bill, which, without having been passed, is untruly certified as having been passed, it is to be remembered that among a free people no other danger is comparable to that of substituting in the enactment of laws for the will of the people the power of money in securing, by shifty devices, a false certificate of the passage of an act, and a holding by the courts that such villainy is conclusive, and above the power of the people to correct through their courts. Deeds signed, sealed, and delivered bind the parties, but it has never been considered that land titles would be unsettled if deeds procured by fraud were set aside. This rather tends to settle land titles. So, rejecting from the statute book a surreptitious bill, not enacted by the votes of the people's representatives, is not to unsettle the laws, but to establish them "broad-based upon the people's will." If a judgment of this or any other court under seal should be procured by mistake or fraud, it can be set aside.

It is urged, however, that this touches a co-ordinate department of the government. But the judiciary is the only body authorized to investigate and ascertain whether it is the act of the general assembly, or a measure which, rejected by that body, has nevertheless been fraudulently palmed off on the speakers, and their signatures thereto procured by a fraud practiced on them. The executive is also a co-ordinate department. It is matter of history that towards the close of the last century certain land warrants were fraudulently issued by the secretary of state, the broad seal of the state was affixed, and the governor, being misled, honestly affixed his signature (as the speakers did here); but the court went behind the great seal, behind the admittedly genuine signature of the governor, set the fraudulent land warrants aside, and jailed the agent of the fraud, and the next legislature changed

the name of the county (Glasgow), which had been named in honor of the dishonest secretary of state. The supreme court of this state had its origin in the organization by law of a temporary tribunal created to investigate and set aside this fraud perpetrated on the executive department, and, indeed, by one of its heads, and to punish its perpetrators. *State v. Glasgow*, 1 N. C. 38. It would be singular if, after the lapse of nearly a century, the developed court, with larger powers, and chosen by the people, should be powerless to set aside and annul a greater fraud upon popular rights, perpetrated by simulating the people's imprimatur in passing off as a law of the state a bill which their representatives rejected, and which some corrupt hireling of interested parties procured to be falsely certified as an act of the general assembly by the officers of that body, who were deceived, in the rush and hurry of the closing hours of the session, into believing it a genuine bill. Failing for many sessions to procure the passage of the act from the popular assembly, the interested parties fraudulently procured this bill to be certified as having been passed. To give it currency as law is to pass off "the buzzard in the eagle's nest" as the imperial eagle itself. We acknowledge as laws only the legal expression of the people's will. This bill is not the people's will. It is what their representatives have declared by a vote was not their will. It is not such as this that the men of North Carolina have sworn to support as "laws." It is such as this which we have sworn not to support as laws, by our oath to a constitution which says nothing shall be a law till it has been adopted by having received the assent of our representatives on three several occasions in each house of the general assembly. This has not only not received such assent, but has received their refusal.

The power to construe a law necessarily carries with it the power to investigate whether a pretended law is really a law duly enacted or a fraudulent simulation which in fact was never enacted into law. In the presence of so vital and so plain a principle, precedents are not needed, but we have them. The constitution provides that, before becoming laws, bills shall be read three times in each house, and shall be signed by the speakers. In *Scarborough v. Robinson*, 81 N. C. 409, it was held that if the latter requirement was lacking, the bill was not a law, even though it had the other and far more important requirement of having been passed three times in each house. A fortiori, if the bill has not received the assent of the three constitutional readings, it cannot be the will of the general assembly. To hold otherwise would be to sacrifice form to substance, and to say that the certificate of the speakers is sufficient without a vote of the general assembly, and (as in this case) in spite of an adverse vote of that body.

Again, the constitution requires that the style of an act shall be, "The general assembly of North Carolina do enact." In *State v. Patterson*, 98 N. C. 660, 4 S. E. 350, it was held that, although the speakers had signed and certified a bill as ratified, yet, if this formula was omitted therefrom, it was a nullity, because the constitution required it. But we are in the presence of a greater and more important constitutional requirement than the formula which begins an act, or the certificate of the speakers. These are matters of form, and essential only because required by the constitution. We are now face to face with the constitutional requirement that the bill shall three times receive the assent of each house "before it shall become a law," and the principle, greater than the constitution itself, that the lawmaking power resides in the sovereign people, to be exercised by their representatives, and that nothing shall be law unless voted by them, and especially nothing shall be law which (as in this case) has been refused by their vote. Even the common law itself is law in this state only by virtue of an enactment of the general assembly. In other states, questions have come up as to the power to go behind the certificate of ratification signed by the speakers, in cases of mere irregularities, and it has been held in 28 states that this can be done, as this court has already held in *State v. Patterson*, supra. In 9 states only it has been held that the certificate of ratification is conclusive against irregularities. These cases need not be here recited and reviewed. They are easily accessible in the 23 Am. & Eng. Enc. Law, 196 et seq. But in none of these cases have we the bold and glaring and admitted fraud upon popular sovereignty which is here presented.

The requirement that 30 days' notice must be given of a private law is a condition precedent which the legislature passes upon, but a constitutional provision that the bill must be read three times in each house before it passes into law goes into the essential matter which a court must determine in passing upon the question whether a printed piece of paper laid before it is a legislative enactment. The certificate of the speakers is certainly *prima facie* and very strong presumption that it is, but when the very matter at issue is the allegation that the certificate of the speaker was procured by fraud (and this is admitted by the demurrer), then it is begging the question to say that such piece of paper is conclusively the law of the land without the vote, nay, against the vote, of the lawmaking power. It is also begging the question to say that the legislature certifies to us, over the signatures of their two principal officers, that this act was passed. The very issue is, did the two officers so certify, or were their signatures procured by fraud? If so, they are in law not their signatures, and this is admitted by the demurrer, which admits the allegations that in truth the bill

did not pass, but was defeated, and that the certificate of the presiding officers is false, and was procured by fraud practiced on them, an allegation which those officers, in justice to themselves, should have been permitted to prove by their own testimony in court. The people are the source of all power, but, if there is fraud in certifying untruly to the declaration of their will at the ballot box, the courts can and will right the wrong and declare the true result. Whence comes it that the legislative department is so superior or so inferior that a certificate fraudulently procured, which falsely certifies that it has passed a bill, cannot be set aside on proof that in truth the opposite result was declared? The courts have the same power to investigate in one case as in the other. It is not the declaration of the result of a vote by the legislature itself which is in question, for that would be conclusive, but the false certificate that it had so declared, when it is admitted that the legislature declared just the opposite by tabling the bill. In this proceeding, if the jury found that the certificate was false and was fraudulently procured, the judgment would be to strike the fraudulent bill out of the files and out of the printed laws, and to declare it what it is, a nullity as to all the world.

This being an equitable jurisdiction, the action can only be maintained in the superior court, and one action is conclusive. It is not open to the objection that such proceedings might, if allowed, be brought before a justice of the peace, nor that there might be different verdicts before different juries. That could be urged against a proceeding as in *Wyatt v. Manufacturing Co.* (at this term) 22 S. E. 120, where the invalidity of an act is attempted to be set up, collaterally as it were, in litigation between parties. But it cannot apply where the proceeding is brought against the secretary of state directly, to have the act which is fraudulently procured to be certified struck out of the files of enrolled bills in his office, and declared a nullity.

The constitution does not require that the presiding officers shall sign bills in the presence of the houses, or with their assent; and neither the certificate itself nor the complaint indicates that this was done. It may be the usual practice, but it is not required, nor does it appear to have been done. There is no presumption that it was done upon which an argument can be based. The signing has no lawmaking power in itself, but is a mere certification of what the lawmaking body has decided, and, like all certificates, may be impeached for fraud or mistake; otherwise the certificate is more powerful than the authority doing the act which is certified. If we could conceive that the two presiding officers of any legislature should purposely certify that a bill has passed which had in fact been defeated, this could not nullify the

action of the two houses. If it could, then they, and not the general assembly, are the lawmaking power. Certainly, for a stronger reason, when the signatures of the presiding officers are procured by a trick and fraud practiced on them, there cannot be such virtue therein as to make a law against the vote of the body. The case most strongly relied on by the defendant is *Field v. Clark*, 143 U. S. 695, 12 Sup. Ct. 495, but in that case it was admitted that the act had passed both houses and had been approved by the president, and the point decided by the court was that the act would not be vitiated because a section, which was in it when passed by the houses, was omitted in the enrolled act on file. It must be noted also that the United States constitution does not contain the essential provision which is in our constitution that "each bill must be read three times in each house before it becomes a law," and that, in addition to the signatures of the speakers, there is the further safeguard that the bill is subject to the supervision and approval of the president, which the bill in question had. Notwithstanding these vital differences in the two constitutions, and the remote bearing the actual point there decided has upon this case, the court nevertheless takes occasion to say (Harlan, J.) in that very opinion: "A bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, and delivered by the latter to the secretary of state as an act passed by congress, does not become a law of the United States if it had not in fact been passed by congress. In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted." An enunciation more exactly in point in its application to the controversy before us cannot be found. Here the bill was not voted in either house, but was expressly negatived by a vote, and this fact appears by the journals (which are required by the constitution to be kept), and is also admittedly beyond controversy. The certificate of ratification was not purposely and knowingly appended by the speakers. They never knowingly intended to certify that this bill had been read three times in each house. Their signatures were inadvertently appended, and were procured by a gross fraud. They, in law, are not their signatures. This is not the "signing" which the constitution requires to bills which have three times before such signing been read with the approval of each house.

The conflicting decisions from other states as to whether the signatures of the speakers can be contradicted by the journals have no application to this case, where the allegation is of fraud in procuring their signatures. The facts of this great fraud are admitted for the purpose of this appeal. It is lawful to allege and to prove such fraud if "govern-

ment by the people and for the people" is to continue; otherwise government by fraud has begun, the sure and unfailing sign in all history that the end of representative government is at hand. The judgment below should be reversed.

(35 Ga. 129)

LOVE v. CITY OF ATLANTA.

(Supreme Court of Georgia. Dec. 4, 1894.)

LIABILITY OF CITY FOR FAILURE OF DUTY BY BOARD OF HEALTH.

The duty of keeping the streets clear of putrid and other substance offensive to the sense of smell, and which tends to imperil the public health, devolves, under the charter of the city of Atlanta, upon the board of health of that city; and, the functions of this department of the city government being governmental, and not purely administrative, in their character, it follows that if, in the exercise of such functions, and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by W. A. Love against the city of Atlanta. Defendant had judgment, and plaintiff brings error. Affirmed.

Dorsey, Brewster & Howell, for plaintiff in error. J. A. Anderson and Fulton Colville, for defendant in error.

ATKINSON, J. Love brought against the city of Atlanta an action for damages, alleging, in substance, that while he was passing along the streets of the city, in the exercise of proper care, without fault upon his part, by, through, and because of the negligence of a servant of the defendant, an animal attached to one of the garbage carts of the city was permitted to run away, and while so running collided with the buggy of the plaintiff, causing serious injury. It was also alleged that the driver of the cart was a small negro boy, wholly incompetent to the discharge of the duty, and that the mule employed was vicious, dangerous, and liable to run away. The evidence proved the plaintiff's cause of action as laid in the declaration, and in reply it was shown that the mule and cart causing the damage were in use by the city under the direction of the health board of the city, and that the servant of the city charged with driving said cart was then employed in cleaning the streets, and removing therefrom such putrid and offensive substances as usually accumulate in the streets of densely populated cities, and which were necessary to be removed, because, remaining, they endangered the public health. At the conclusion of the evidence the trial judge directed a verdict for the defendant, instructing the jury that, inasmuch as the uncontroverted testimony showed that the injury complained of was

inflicted by servants of the city employed by that department of the city government whose duty it was to look after and preserve the public health, and inasmuch as it appeared that this injury was inflicted by the defendant's servants while engaged in the performance of work essential to the discharge of that particular duty, the city was not liable, and they should return a verdict for the defendant. Exception is taken to this instruction, and we are now to consider whether the court erred. Distinctions do not appear to have been at all times accurately drawn between the classes of cases in which a municipal corporation would be liable and those in which it would not be liable for the misfeasance or nonfeasance of a public servant employed under municipal authority in the discharge of duties relating to corporate affairs. One general proposition, however, seems to have received general recognition at the hands of courts of last resort wherever that class of cases has been considered, and that class of cases is that, where an injury sustained is inflicted because of the misfeasance of an agent of a corporation while engaged in a duty pertinent to the exercise of what are termed "governmental functions of a corporation," the city is not liable. Where injuries under similar circumstances are inflicted by the agent of a corporation acting for it in the discharge of a duty on behalf of a municipal corporation where it is engaged in the exercise of some private franchise, or some franchise conferred upon it by law which it may exercise for the private profit or convenience of the corporation or for the convenience of its citizens alone, in which the general public has no interest, for such injuries a right of recovery lies against the city. Some difficulty has arisen in the application of these general principles to the facts of particular cases which from time to time have arisen. Some difficulty has arisen in the proper classification of cases in order to assign each to its appropriate position with reference to the liability or nonliability of a corporation, and the courts have not been altogether happy nor entirely consistent at all times in this regard. As an illustration of this, it is held that cities are liable for damages resulting from the nonrepair or from the dangerous condition of public streets, and this in the absence of strict statutory liability imposed by law. It has been held that they are not liable for damages occasioned by their fire departments for injuries to person or property in going to or from fires. The former case is one that might properly have been originally classified among the cases of nonliability. The duty of keeping its streets in repair is a public duty, in which the general public is interested. The state commits to it the discharge of those governmental duties incident to the sovereign power, by which it is required to maintain for the use of the gen-

eral public and for the public convenience a system of roads throughout the state, and the assignment of this particular duty to municipal corporations within their limits may fairly be said to be a delegation of what appears to us to be one of the functions of the government. The latter case, referring to the fire department, is a case of nonliability, and, if not the exercise of a private power for the benefit of the corporation itself and the inhabitants thereof, in which the general public in no way participates, it reaches the verge upon that line. We cite these as simple illustrations of our statement that the courts have not at all times been consistent, but with no purpose either to disturb the precedents established by repeated rulings of respectable courts of last resort in nearly all the states, or to intimate that there is such a doubt as to their soundness as would in any sense justify the adoption of other rules. With respect to matters concerning the public health, however, there is no serious conflict of reason, opinion, or authority upon the correctness of the proposition that the preservation of the public health is one of the duties that devolve upon the state as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain, and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it, within its limits, the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys. Such a duty would stand upon the same footing as its duty to preserve the public peace, and its liability or nonliability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty. It will be observed, however, that, in order to exempt a city from liability, it is not sufficient to show that the particular work from the negligent performance of which by the servants of the city a citizen was injured was being performed under the direction of the health authorities, but it must be shown that the particular work so being done was connected with, or had reference to, the preserva-

tion of the public health. If the health department were engaged in clearing away or removing obstructions from the street which in no way endangered the public health, the responsibility of the city then would rest upon the rule of liability for the work connected with repairing and keeping in order the public highways. It can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health. The principle of nonliability rests upon the broad ground that in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power is not liable for torts committed in the discharge of such duties and in the execution of such powers. It can be no more liable because of the fault to select competent drivers of garbage carts than a city could be held liable for failing to elect a wise, conservative, and discreet mayor.

Let us inquire, then, whether the particular service being performed by this particular servant of the corporation had special reference to the preservation of the public health. The accumulation of garbage, of substances offensive to the sense of smell, of substances which, if permitted to remain, would poison the atmosphere, and breed diseases infectious and contagious among the inhabitants of the city, may well be said to endanger the public health. The preservation of the public health involves the removal of those causes which are calculated to produce disease. According to the undisputed testimony in the case, the driver of this garbage cart and the alleged refractory mule were engaged actually in the removal from the streets of substances similar to those described above. However incongruous it may appear to be to say that this diminutive darkey and this refractory mule were engaged in the performance of some of the functions of government, it is nevertheless true, and illustrates how even the humblest of its citizens, under the operations of its laws, may become, in Georgia, an important public functionary. Judgment affirmed.

(95 Ga. 8)

WILLIAMS v. MOODY.

(Supreme Court of Georgia. Nov. 12, 1894.)

CONVEYANCE OF MORTGAGED LAND—LIABILITY OF GRANTEE.

1. Where a deed of conveyance recited that it was made subject to a mortgage upon the property conveyed, given by the grantor to a third person to secure a specified sum, with interest, "which said mortgage and interest said grantee assumed as part of purchase price" of the property, the grantee, upon failing to pay off the mortgage at its maturity, became liable to the grantor for the amount due thereon.

2. Although the mortgage of which the grantee had thus assumed payment did not, upon its face, disclose that a given default in the payment of interest would render the principal of the note

secured by the mortgage due at a date earlier than that otherwise fixed for its maturity, yet where that note, as described in the mortgage, referred to an "interest coupons note," which, though not so stated in the mortgage, was in fact attached to the note for the principal, and it appears that an examination of the latter note would have disclosed the terms upon which its maturity would be advanced, the grantee in the deed was chargeable with a knowledge of these facts, and in assuming payment of the mortgage became liable accordingly.

3. The maturity of the note secured by the mortgage having been advanced because of default in the payment of interest, demand for which was made upon the grantee, and payment refused by him, and the mortgagee having exercised a power of sale contained in the mortgage, the proceeds of which sale were insufficient to pay off the debt, and the mortgagor having paid the balance due thereon, the grantee became liable to her in an action for the amount of such balance.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Helen S. Moody against M. B. Williams. From a judgment for plaintiff, defendant brings error. Affirmed.

Lewis & Green, for plaintiff in error. King & Spalding, for defendant in error.

SIMMONS, C. J. M. B. Williams purchased certain land from Mrs. Helen S. Moody, taking a conveyance from her, which contained this provision: "This deed is made subject to a mortgage of \$2,000, given on said property by Helen S. Moody to Samuel D. Rambo, dated 12th day of January, 1893, with interest from date at 8 per cent. per annum; principal due 3 years, interest payable semiannually in separate interest notes given therefor; which said mortgage and interest said M. B. Williams assumes as part of purchase price above." The mortgage commenced thus: "State of Georgia, Fulton county. \$2,000. Atlanta, G., Jan. 12th, 1893. Three years after date I promise to pay Samuel D. Rambo or order two thousand dollars, value received, with interest from date at eight per cent. per annum, as per my interest coupons note No. 1, of even date herewith." This being followed by this language: "I hereby create and give to said Samuel D. Rambo, his heirs and assigns, a full and complete mortgage lien on the following property" (describing it). A provision was contained in the mortgage that if the debt to secure which it was given was not paid at maturity, the mortgagee had the power, after complying with certain conditions as to advertising, etc., to sell the property described, and apply the proceeds to the payment of the debt. The "interest coupons note No. 1," referred to in the mortgage, was a note with interest notes attached, and corresponded in date, amount, time of maturity, and rate of interest with the mortgage. It contained, however, a provision, which did not appear in the mortgage, that "upon failure to pay any of said interest within thirty days after due, said principal sum shall, at

the option of the holder, become due, and may be collected at once; time being of the essence of this contract." The purchase of the property by Williams was made before any of the interest notes had matured. When the first interest note became due, Mrs. Moody demanded of him that he pay the same, but he refused or neglected to do so, and, after 30 days from that date had elapsed, the mortgagee elected to declare the whole debt due, and proceeded to enforce collection thereof. After complying with the provisions of the mortgage as to advertising, etc., the mortgagee sold the property at public sale for \$1,300, and credited this sum upon the mortgage indebtedness, which, together with the expenses of the sale, amounted to \$2,208.25. Payment of the balance—\$908.25—was demanded of Mrs. Moody by the mortgagee, and she paid the same. She then made a demand upon Williams for the payment of this sum, and upon his refusal to pay brought the present action to recover the same, the facts above recited being set out in the declaration. The declaration was demurred to upon the grounds that no cause of action was set out; that the petition and exhibits failed to show any right of the plaintiff to demand of the defendant the sum sued for; that it failed to show that the defendant assumed the note, or was liable for any of its terms; that Rambo had no right to sell the property as alleged, and that the attempted sale was unauthorized and void, especially so far as the defendant was concerned, and the plaintiff's acquiescence in the sale could give no right of action against the defendant; that the relief sought was equitable, and the proceeding not a proceeding at law, and therefore could not be entertained in the city court of Atlanta, in which the suit was brought. The court overruled the demurrer, and the defendant excepted.

The court did not err in overruling the demurrer. It is well settled that where a purchaser of property accepts a deed to the same which recites that he assumes payment of a mortgage on the property as a part of the purchase price, he becomes personally bound for the payment of the mortgage debt (1 Jones, Mortg., 4th Ed., §§ 749, 752; 2 Warr. Vend. p. 658); and if he fails to pay it when due, and the mortgagor himself pays the same, the amount so paid may be recovered by the mortgagor in an action at law against the purchaser (1 Jones, Mortg. § 768 et seq.; 15 Am. & Eng. Enc. Law, 834, 842, note, and cases cited). It was not insisted in the argument before us that the mortgagee, under his contract with the mortgagor, as embraced in the mortgage and the notes given in connection therewith, did not have the right, upon default as to the interest, to collect the whole debt, and for that purpose sell the mortgaged property; or that the mortgagor was not liable for the deficiency in the proceeds of the sale to the extent of the sum paid by her to the mortgagee, and sued for

In this action. It was contended, however, that the mortgage did not disclose the existence of any other contract in connection therewith, except the interest notes, and that it did not appear that the defendant, at the time of his purchase, was put upon notice of the separate note for the principal which contained the provision authorizing the mortgagee to collect the whole debt upon default as to the interest; and, no such provision being embraced in the mortgage itself or the interest notes, the declaration failed to show that the defendant was liable for the sum sued for. An examination of the mortgage and the notes referred to therein will show that this contention is untenable. The agreement to pay the mortgage was an agreement to pay the debt secured by the mortgage, in accordance with all the covenants attached to the contract, and the defendant was chargeable with notice of the terms of the debt as disclosed not only by the mortgage itself, but by any other papers connected therewith, the existence of which was indicated by the mortgage. The mortgage recited a promise to pay the sum stated therein and interest, "as per my interest coupons note No. 1." It became incumbent upon the defendant, therefore, to ascertain what this note contained. This description, as we have shown, applied to the note containing the stipulation in question. The word "coupon" means something intended to be "cut off" from another thing, and a "coupon note" is defined to be "a promissory note with coupons attached," the coupons being notes for the interest, written at the bottom of the principal note and designed to be cut off when the notes are presented for payment or paid. See *And. Law Dict.* 272; *Webst. Int. Dict.* If, however, the mortgage could be considered as ambiguous on this point, and as appearing to be the original obligation itself for the principal, and the term "coupons note" could be understood as meaning the interest notes only, an examination of the latter, it seems, would have shown that these notes were in fact attached, in the form of coupons, to the note containing the stipulation in question; at least we may so infer from the fact that they are described in the latter as being "hereto attached." Besides, even if they were not, at the time of the purchase, attached to the principal note, they purported to be for the interest upon a note described by them as "my note No. 1," and this would hardly be understood as applying to the mortgage itself. This reference to the principal note was sufficient to put the defendant upon notice of all that the principal note contained. *McClure v. Oxford Tp.*, 94 U. S. 429. We therefore cannot hold that the declaration is insufficient as failing to show that the defendant assumed that part of the original contract under which the collection of the whole debt was enforced. There is no merit in the contention that this was an equitable proceeding, and consequently did

not fall within the jurisdiction of the city court. Judgment affirmed.

ATKINSON, J., not presiding.

(95 Ga. 19)

SHEPHERD v. TODD et al.

(Supreme Court of Georgia. Nov. 12, 1894.)

SALE BY EXECUTOR—ACTION TO SET ASIDE—
ESTOPPEL OF HEIR.

Under the facts in evidence, including the responsive matter in the answers of the defendants (this being an equitable action, and discovery not having been waived), there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Mary E. Shepherd against Robert Todd, executor, and others, to cancel a conveyance made by the executor. From a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

Mary E. Shepherd, by her petition, alleged: She is one of the children, and an heir at law, of Edward Harper, who on March 11, 1886, made a will, and shortly afterwards died. This will was afterwards probated in solemn form by Robert Todd and W. C. Harper, executors. By its terms all the real estate of Edward Harper was devised to his wife and children, and was not intended by him to be sold by his executors, or in any manner interfered with by them, but that the same should be divided by his heirs among themselves, at their election, or that they should remain tenants in common, as he made them by his will. The will required that the executors should give bond, and it was the manifest intention of the testator that they should do so before they entered upon the execution of the will; but without giving bond, and without the consent of the heirs,—some of them being minors, and are yet minors, and incapable of consenting,—they illegally obtained letters testamentary, and thus illegally took charge of, and proceeded to administer, the estate. They proceeded immediately to have the estate appraised and make return, all of which was unnecessary, and not warranted by the will, and the expense of which was a waste of the estate. At the December term, 1888, of the court of ordinary, they fraudulently procured an order for the sale of all the realty, on the ground that it was necessary to sell to pay debts, and for distribution. The ground alleged as to distribution was utterly without foundation, for the will itself had devised all the realty to the heirs, as tenants in common, and it was no part of the power or duty of the executors to make division among the heirs. The ground as to payment of debts was equally false, for there was more than enough personal property to pay all of testator's debts and the unnecessary ex-

pense of administration. A portion of the realty embraced in the order of sale was a square acre of land in Atlanta (describing it). The executors proceeded to have this land platted, and largely advertised for sale; the advertisement stating that it would be sold on the first Tuesday in February, 1889. On that day, when the executors exposed the land for sale, one of the heirs (John T. Harper) bought in the whole lot for the benefit of the heirs, and no money was paid on his bid, or any deed made to him. A short time afterwards the executors, still contriving to waste the estate, without re-advertisement, and without the consent of the heirs, sold the whole tract to one Wey, at private sale, for \$2,500, when it was worth \$5,000. In their deed to Wey the executors recited that Wey was the highest and best bidder for the premises, when in fact they knew, and he knew, that he was not a bidder at all at the sale, and was not even there present, but he received the deed, reciting that he was such bidder at the sale on the first Tuesday in February, 1889, knowing the recital was untrue, and knowing that he was a purchaser at private sale at a considerable time thereafter illegally made to him by the executors. The executors well knew that the tract was rapidly improving in value, and that, if there was any necessity to sell any portion of the realty of testator, they should have sold a portion of the farm lying in the country, the value of which was not enhancing in any near ratio to that in the city. The executors were guilty of fraud, because they knew they had not given bond as required by the will; had alleged a false ground to procure the order of sale. They knew that, to sell the whole tract, it would bring less than if it had been sold by the lot, as platted. They knew they had no right to sell it at all, much less at private sale. They knew there was no necessity to sell the whole tract, and that in the whole transaction they were injuring the heirs, and running the estate to unnecessary expense. Wey knew that the executors had not given bond as required by the will; that the order for sale had been illegally procured; that he had no right to purchase at private sale; that the tract, at public sale, and sold as platted, would bring more than he was giving the executors; that the estate was not getting the advantage of the sale by lots, as platted and advertised,—and yet, knowing all this, deliberately entered into the fraud which he saw the executors perpetrating, assisted them therein, and derived a large profit therefrom. He was informed by them that they did not need all the purchase money for any purpose, and he agreed to pay them only one-third of the purchase price; and, after all their illegal expenditures, they now have on hand two-thirds of the money he paid them. Harper, one of the executors, has died, leaving Todd sole executor. Wey is in possession of the land and of the deed.

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Petitioner prayed that Wey be required to deliver up the deed, and that he and Todd be required to show why the deed should not be canceled and the sale set aside, and why the property should not be declared to be the property of the heirs of Edward Harper, and for general relief. Petitioner brings the petition because Todd participated in making the fraudulent deed, and will not proceed to annul it. By the first item of the will of Harper, he gave to his wife certain personalty, and one-eleventh of his realty, for her natural life, and to be equally divided between all of her children at her death. By the second item he devised to his children the remaining ten-elevenths of his entire estate, after \$100 was paid to A. J. Harper, and \$200 to Daisy Fish, provided he remained with the family until he was 21 years old. In this item he named the children he wanted the ten-elevenths "divided between," after deducting the \$300, among them being Mary E. Shepherd, and appointed for her trustees William G. Harper and Robert Todd, and provided, "said trustees are to take said trust fund without bond." The third and last item was: "I hereby constitute and appoint my son W. G. Harper and Robert Todd executors of this, my last will and testament. This, the 11th day of March, 1886, with bond." After the introduction of the evidence for plaintiff, a nonsuit was granted, to which ruling the plaintiff excepted.

Mrs. Shepherd testified: "I am a daughter of Edward Harper. The land in question was sold the first Tuesday in February, 1889. I was not present at that sale. Mr. Todd told me he had sold it, and that brother John bought it in for the heirs. I never made any consent or agreement that this property be sold to Mr. Wey by John T. Harper, nor did I ever consent that the property be sold to any one. There were nine living children of my father, and one dead, who had three little children. My mother is still living. There are minor children now. Father was in possession of this city property at his death. I never knew or consented to John T. Harper transferring his bid to Wey, or any one. The place had been sold some time before I heard that Wey had bought it. My property was left as trust property. I went to Mr. Rosser in 1890, to bring suit, and went to Mr. Battle, my present attorney, in 1892, directly after I found that the suit had not been brought. In the conversation with Mr. Todd after the public sale, I told him I didn't think he had any right to sell the property and pay the debts; that I thought he ought to collect the money and pay the debts. He said he had to sell it to pay debts. The objection I had was that he ought to pay the debts by collecting the money, and not by selling the property, and because the property was advancing every day, and should not be sold that way. My husband had been

acting for me in the matter, and looking after my interest, and I had confidence in him. Since my father's death, my husband has not been looking after my interest. Mr. Todd was looking after my interest. My interest was left in Mr. Todd's and my brother's hands, as trust property. My brother didn't have anything to do with it. My husband was there at that sale, and I knew he was going. He went through curiosity, to see what it brought. He did not go representing me at all. He went because I wanted to know what they were doing. I thought he would come back and tell me, but he was not my agent, or anything like that. I didn't tell him to represent me at all. He went like anybody else would go to a sale, and I expected him to tell me when he came back what they did, but I do not see what he could have done to represent me. He and I talked over what the property ought to bring many times, and he went there with an idea as to what I wanted it to bring, but they didn't ask him. I was expecting Todd to take care of my interest. I was very well satisfied when they bid in for the heirs. I thought it was still ours, and did not say anything then. If the heirs had got the proceeds of the sale, I would have been perfectly satisfied, but we did not get it. I was not satisfied with the price it brought. If he had divided it up, and we could have kept it, I would have been satisfied. I thought he was going to divide it up. He (Todd) had divided it up into ten lots, and said he was going to sell it, to get it out of court, and then it would be the heirs'. It was bought in for the heirs. Todd told me that, if he sold it, it would be bought in for the heirs. The last time I was talking to him before the sale, he told me he was not going to sell the town lot, but was going to hold that for an investment for the heirs; that it was advancing in value, and he was going to hold it. But, the next news I got, he advertised it for sale. When I had this conversation with him, he said he was simply selling it to get the title in the heirs. That is what he said he was going to do with both places. Before the sale, I told him he ought not to sell the land; that he ought to collect money and pay the debts,—and he told me he was going to hold that piece. He never did tell me he was going to sell it to get money to pay the debts. Afterwards he said he did sell it to pay the debts. When I was talking to him after my brother had sold it, he said the heirs didn't pay in any money, and he was obliged to have some, and he went and sold it again to get some. I never saw any of the money paid in by Wey. He said he had it in the bank. After the money came in that Wey paid, Todd told me that was all the money the estate had, and the other heirs had consented to paying the doctor's bill for my mother (over \$100) out of it, and I gave consent to his paying it. I thought I could not

help myself. I had been to the ordinary, and he told me that Todd held my property as trust property, and I thought Todd could do as he pleased. When the home place of my father was sold by the executor, the heirs that were of age bought it in for the heirs, and I thought it would be divided among the heirs. Some of the heirs agreed to let our mother stay there, and others did not. I did not agree, but wanted it divided up. The home place and the place bought by Wey were not sold at the same time, but the town lot was sold first. The town lot had no building on it. My father owned it for some thirty years, but never improved it. He died in 1887."

The husband of plaintiff testified: "I was at the sale. The lot, I suppose, is an acre. William G. Harper was alive at the time of the sale. James Treadwell bought the property at that sale for the heirs. I suppose John T. Harper spoke to him to buy it in for the heirs. It was sold on the day it was advertised. The reason why I know it was to be bid in for the heirs was that there were several heirs there, and I heard one of them say they would protect the property, and buy it in for the heirs, if it did not bring enough. I was not consulted in regard to it. They just said afterwards they bought it in to protect the heirs. I never heard Todd say anything about it, but Treadwell said he bought it in for the heirs. His bid was something like \$2,200 or \$2,300. I did not pay much attention to what it brought. On the day of and before the sale, John T. Harper told me, if it did not bring what they thought it ought, they would bid it in for the heirs. He never told me anything afterwards. I do not know that there was any amount mentioned, as to what it should bring. I did not see Wey there that day, and he did not make any bid on the property, that I know of. If Treadwell transferred his bid to Wey, we never knew anything about it. The first announcement Treadwell made, as to who his bid was intended for, was just after the property was knocked off. W. G. Harper, John T. Harper, Tom Lawrence, Bill Swan, and all those interested in it, and, I think, Todd, were present. The substance of the announcement by Treadwell was that he bid it in, at the request of John T. Harper, for the heirs of Edward Harper. I never represented my wife as agent in any of this transaction. I was not known as her agent in this, because she had a trustee under the will of Edward Harper. I went with my wife to the ordinary, and he told us we had to leave the will as it was, and we had no say so about it. I have never been consulted in regard to the transaction. I was present at the sale, because I knew it was going to be sold that day, and my wife told me she would like for me to go up, and see what it would bring. I cannot remember now what else was said in regard to it,

but think I told her I thought it a very valuable piece of property. I thought that section of Atlanta was coming out. I did not go particularly for her, but out of curiosity, and because I felt some interest in it, as a matter of course. Tom Lawrence married one of the heirs, and Swan another. I don't know that all the heirs were there who were in the state, nor that they were all represented. I did confer and talk to those present on the day of the sale. I talked the matter over, and it was perfectly agreeable."

Lawrence testified: That, to the best of his knowledge, Treadwell bid off the property for the benefit of the heirs. That Shepherd was there representing his wife's interest, witness supposed, but did not know. That just after the sale, in the presence of John T. Harper, Treadwell said he bid it in for the benefit of the heirs. That Harper asked him to defend the property for the benefit of the heirs, and John T. Harper so stated afterwards. That witness was there, watching the sale, but had no authority to represent his wife. That everything seemed to be perfectly satisfactory, and no objection was made by anybody, but "we did not think the property brought enough," and witness heard some grumbling right there, but wasn't able to make it bring more. That witness was not recognized in the sale, nor was his advice asked. That John T. Harper told him afterwards that his bid had been transferred to Wey for \$2,500. That John T. Harper said: "I sold it, and I have got a profit on it. I have sold it to Mr. Wey, and I have a profit on it. I have got \$2,500 for it." That witness did not know that John T. Harper told him that all that went to the executor, and he didn't get a cent of it; supposes he did, though witness thinks he never asked him. And that the land was platted off a week or so before the sale.

Plaintiff also put in evidence the will of Edward Harper, and the order of sale, and also the advertisement of the sale. The order and the advertisement recited that the sale was for the purpose of the payment of debts, and for distribution. The advertisement was of the land as one parcel, and the terms of sale were stated as one-third cash, and the remainder in six and twelve months, with interest. Attached to the petition was what purported to be a copy of the deed by the executors to Wey. It was in the ordinary form of such deeds; stated that Wey was the highest and best bidder at the public sale, and that the property was knocked off to him for \$2,500. It does not appear that this deed was put in evidence, but it was alleged in the answers of defendants that the property was bid in by John Harper after a fair public sale, and that Harper, acting for the heirs, after having bid in the property for \$2,250, in a few days (given him by the executors in which to negotiate a private sale, they agreeing to make titles if he found such a purchaser, and the property being bid in by him

upon this promise of the executors), sold the property to Wey for \$2,500, which was a big price for it, and which amount was paid to the executors, and they made title to Wey, as alleged in the petition, etc.

T. C. Battle, Jas. L. Key, P. F. Smith, and W. B. Farley, for plaintiff in error. Payne & Tye and Westmoreland & Austin, for defendants in error.

LUMPKIN, J. Mrs. Shepherd filed an equitable petition against Todd, one of the executors of her father's estate, and one Wey, upon the trial of which action a nonsuit was granted, and she excepted. The reporter's statement sets forth, in substance, the contents of the plaintiff's petition, the evidence introduced in support of it, and the answers of the defendants. There was no waiver of discovery, and consequently these answers, in so far as they relate to facts within the knowledge of the defendants, and are responsive to the allegations of the petition, are to be treated as a part of the evidence proper to be considered in passing upon the question of nonsuit; it not appearing that the responsive statements were rebutted in the manner prescribed by law. Indeed, they were not seriously disputed, in any material particular, by anything contained in the evidence of the plaintiff or of her husband. We deem it unnecessary to repeat or summarize the contents of the official report, but will content ourselves with mentioning a few of the most important facts, in view of which the judgment of nonsuit was, we think, unquestionably right.

The executor's sale took place on the first Tuesday in February, 1889. The plaintiff knew in advance that the sale was to take place, and her husband was present when it occurred. While, according to her testimony and his, he was not there representing her as agent, he nevertheless promptly reported to her all that had been done. She was informed, not only that the property had been bid off by John T. Harper, but also that the latter had transferred his bid to Wey, and that the executor had conveyed to Wey accordingly. With a full knowledge of these facts, she not only silently acquiesced in the sale, but consented to the payment by the executor of a physician's bill for her mother out of its proceeds, and also, with a full knowledge that a deed to the land had been made to Wey, and that the purchase money paid by him had gone into the hands of the executor, received the benefit of her full share in the same without objection of any kind. The sale by the executor was fairly made; the land brought its full value; and the plaintiff, although she had consulted an attorney in 1890 with reference to instituting proceedings to set the sale aside, did not in fact begin her action until more than three years after the sale had taken place. It also appears that Wey bought in perfect

good faith, and without knowledge of any complaint or objection on the part of the plaintiff, or any other person interested in the estate. Without referring more particularly to other facts appearing in the record, enough has been stated to show clearly that the plaintiff fully ratified all that was done by the executor, by John T. Harper, and by Wey, and that she accepted her portion of the fruits of the transaction which resulted in a conveyance of the land to Wey, without objection, and with full knowledge of all the facts. Upon every principle of law and justice, she is now estopped from attempting to set this conveyance aside. Indeed, matters have gone so far, she would not be permitted to do this, even if she offered to restore to the estate the money she has actually received, and that of which she has had the benefit, through the hands of the executor. Judgment affirmed.

(95 Ga. 35)

EAST TENNESSEE, V. & G. RY. CO. v. GREENE.

(Supreme Court of Georgia. Nov. 12, 1894.)

NEW TRIAL AFTER EXPIRATION OF TERM—JUDGMENT OF DISMISSAL.

Where, at a regular term of the city court, a case, on motion of defendant's counsel, was dismissed upon the ground that the declaration did not set forth a cause of action, and no exception was taken during that term, the city court had no authority at a subsequent term to set aside the judgment of dismissal, even if erroneously rendered, and reinstate the case. That judgment being a final adjudication upon the merits of the plaintiff's case, mere error of law in its rendition, in the absence of irregularity, fraud, mistake, providential hindrance, or other like cause, could not, after the expiration of the term, be corrected by a motion to reinstate.

(Syllabus by the Court.)

Error from Atlanta city court; T. P. Westmoreland, Judge.

Action by Ella Greene, administratrix, against the East Tennessee, Virginia & Georgia Railway Company. From a judgment setting aside a judgment for defendant, the latter brings error. Reversed.

Dorsey, Brewster & Howell, for plaintiff in error. R. J. Jordan, for defendant in error.

ATKINSON, J. Inasmuch as the view we take of the leading question made in this case finally disposes of it, we deem it unnecessary to inquire whether, upon the facts stated in the declaration, the plaintiff had a cause of action. Upon a general demurrer filed to the plaintiff's declaration, upon the ground that the same set forth no cause of action, the court, in term, after argument and mature consideration, solemnly adjudged that the demurrer was well taken, and that the plaintiff had no cause of action. This judgment was regular in all respects, and rendered in accordance with the established rules of practice which prevail in this state. It was a valid, subsisting judgment, and conclusive upon the rights of the plain-

tiff, until reversed or set aside in the manner and by the means prescribed by law. If it was the result of an error of judgment upon the part of the presiding judge in considering the merits of the plaintiff's case, the plaintiff should, within the time limited by law, have excepted, and brought it to this court for review; or he might, during the term, have moved the court to set aside the judgment as having been improvidently granted. It may with confidence be stated that, until a final adjournment of the term, the court has such control of all judgments thereat as that it may, for any legal reason satisfactory to itself, vacate and set them aside; and it may be stated with equal confidence, with respect to judgments based upon the merits of controversies, that after adjournment the courts lose control, and they become conclusive between the parties. Courts cannot at their pleasure reopen questions which have been concluded by solemn adjudication. There must be some point at which stare decisis applies, and that point, with respect to a judgment upon the merits, unexcepted to, is the conclusion of the term at which it is rendered. A different rule prevails with respect to irregular and void judgments. The latter, of course, are open to assault anywhere, at any time, by any person with whose right they interfere. The former may be set aside at the suit of the party affected thereby at any time within the statute of limitations. There is still another class of judgments which, after the expiration of the term, are still measurably under the control and within the discretion of the court in which they are rendered. Among this latter class may be included those judgments which, outside of the merits of controversy, pertain to the rules and are rendered upon formal matters of practice in the several courts. Among this class are to be found judgments directing dismissals for want of prosecution, judgments of default for the want of timely pleading, judgments imposing fines for breaches of decorum, for infraction of the rules of the courts, and numerous other judgments of similar character, which are necessary to be rendered in the administration of the ordinary rules of pleading and practice in the courts. These matters involve, to a great degree, the discretion of the courts, and no imperative statute of limitations is imposed upon motions to vacate them. There is yet another class of judgments, such as are voidable. Among these are judgments obtained by fraud, perjury, collusion, or mistake. Such judgments may be set aside at any time upon discovery of the facts upon which they may be impeached.

Bearing in mind this classification of judgments, the decisions of our own and as well of other courts upon motions to vacate them may be easily reconciled, and, whatever may be the discretionary power of the courts over such judgments, we have been unable

to find either in the text-books or in any well-considered case authority for the proposition that a judgment based upon proper pleadings, fairly rendered, upon formal adjudication of the merits of a controversy, is, upon motion made after final adjournment of the court at which it was rendered, still subject to be reopened for review by such court. The mischievous consequences which would result from the allowance of such a doctrine could not be estimated. There would be no limit to litigation. Every final judgment might be called in question every time there happened to be a change in the personnel of the court, and so the rights of parties could never be settled. That a judgment upon a general demurrer for want of a cause of action is a judgment upon the merits, and may be set up as such upon a plea of *res adjudicata*, has been decided by this court; and this being such a judgment, and it being acquiesced in by the losing party until after the adjournment of the court at which it was rendered, the motion to vacate it was too late, and it must be adjudged conclusive between the parties. The judgment of the court, therefore, setting it aside and reinstating the case because of an error of law committed by the presiding judge upon the trial, was erroneous, and such judgment must be reversed; and it is so ordered. Judgment reversed.

(85 Ga. 1)

WINGATE et al. v. ATLANTA NAT. BANK.

(Supreme Court of Georgia. Nov. 12, 1894.)

ACTION ON NOTE — AMENDMENT OF DECLARATION
— STRIKING OUT PLEA.

1. The declaration, as to form, complied substantially with the requirements of the pleading act of December 15, 1893.

2. The note declared upon containing a promise to pay attorney's fees, an amendment to the declaration praying for a recovery of the same did not set up a new and distinct cause of action.

3. The plea of the general issue having been withdrawn by defendants, no question as to alleged error in striking this plea is presented for adjudication.

4. Although the plea alleged that the defendants' firm did not execute and deliver the note sued upon, yet as it elsewhere alleged that one of the members of the firm did execute and deliver the same, without setting forth sufficient facts negating the authority of such member so to do, the entire plea, taken together, did not amount to a plea of non est factum.

5. There being no denial in the defendants' plea, which was substituted for one previously filed and withdrawn, that the plaintiff acquired the note in due course of trade, before its maturity, and this plea, properly construed, not alleging that the plaintiff had knowledge of any facts which would put it on notice that the defendants were accommodation makers only, there was no error in striking this plea.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action on a note by the Atlanta National Bank against Wingate & Mell and others.

From the judgment rendered, defendants bring error. Affirmed.

The following is the official report:

The petition of the bank was in paragraphs, and the paragraphs which stated the cause of action were numbered. It alleged that Wingate & Mell, as partners (naming them), as makers, and Black & McIntosh, as partners (naming them), as indorsers, owed the bank \$200 and interest, for that Wingate & Mell on October 3, 1893, made to Black & McIntosh their promissory note, promising to pay to the order of the latter \$200 60 days after date, for value received, and then and there, for a valuable consideration, and in due course of business, delivered the same to Black & McIntosh, and that on the same day Black & McIntosh, in due course of business, and for a valuable consideration, transferred the note to the bank, by indorsement, which note defendants refused to pay. Copy of the note was attached. It contained an agreement to pay all cost of collection, including 10 per cent. as attorney's fees, as well as for the principal and interest. Plaintiff was allowed to amend so that the suit should proceed for attorney's fees. Defendants pleaded that they were not indebted to plaintiffs in manner and form as alleged. Further, it was true they signed the note sued on, as makers, but the same was not given in the usual course of business to Black & McIntosh, for value received. Defendants denied that plaintiff was an innocent purchaser. Black & McIntosh, as was well known to plaintiff, were heavily indebted for investments in land and improvements. Defendants were contracting plumbers, and did a large amount for defendant, Black, Porter Bros. & Black, etc. For this, said parties were indebted to them. Black & McIntosh sold grain. Defendants bought tin, gas pipes, etc. So no indebtedness could ordinarily exist from defendants to plaintiff. Black proposed to pay a portion of defendants' claim in this way: He would take a note from defendants, made to Black & McIntosh, to plaintiff (his bank), discount it, and turn proceeds over to them, agreeing to pay the note when it fell due. Defendants, supposing he would protect the paper when due, agreed to this, and collected a portion of this bill in this way. The note fell due, and was unpaid. Black came to defendants, got another similar note, and renewed the loan. This note fell due, and was unpaid; and Black, one of the nominal indorsers, procured the note sued on from defendants, and renewed the loan as above. Defendants never renewed the same, or paid interest thereon. It was a pure accommodation paper on the part of defendants. There was no consideration passing from Black & McIntosh to them, but Black & McIntosh were largely in their debt at the time. The facts above alleged put plaintiff on notice that it was an accommodation paper. Further, said agreement was entered into by J. L. Mell of the firm sued,

without the knowledge and consent of J. H. Wingate, his partner. Mell had no power, as partner, to bind the firm, and the note is void. Defendants, by leave of the court, withdrew the foregoing plea, and pleaded that they did not on October 3, 1893, execute and deliver to Black & McIntosh their note, as alleged, and did not, for any valuable consideration, and in due course of business, deliver the same to Black & McIntosh. They cannot admit or deny the allegations as to the transfer of the note by Black & McIntosh to the bank. They did refuse to pay the note. The note is an accommodation paper made by J. L. Mell, of Wingate & Mell, with Black & McIntosh. No consideration passed to Wingate & Mell therefor. On the contrary, at the time of its execution Black & McIntosh were largely indebted, by indorsements, and through joint liability with Porter Bros., to Wingate & Mell. Said parties were largely interested in building houses, and defendants were engaged in the plumbing and tin business, and, as such material men, did a great quantity of work for said parties above mentioned. Of these facts the bank had full notice. The paper now sued on was in renewal of similar notes made in like manner, and likewise void, as being made by one partner, as above set out, without authority from his said firm to execute such paper. As these notes would fall due, Mell and Black would make new notes, which Black would negotiate with the bank, renewing his loan, paying the discount charged, and carrying on the negotiation alone. The bank was the depository of Black & McIntosh, and not of these defendants. The action of Mell in entering into said accommodation agreement was unauthorized, and the defendant firm is not bound therefor.

Mayson & Hill, for plaintiffs in error. B. F. Abbott, for defendant in error.

LUMPKIN, J. This was an action upon a promissory note against Wingate & Mell, as makers, and Black & McIntosh, as indorsers. An amendment to the declaration prayed for the recovery of attorney's fees. The material parts of the declaration and the amendment are set forth by the reporter. Wingate & Mell demurred to the declaration on the grounds that the plaintiff's cause of action was not set forth in orderly and distinct paragraphs, and that the amendment allowed contained a new and distinct cause of action.

1. We think the declaration, as to form, complied substantially with the requirements of the pleading act of December 15, 1893 (Acts 1893, p. 56). An action upon a promissory note is one of the simplest, as to form, which can be brought in the courts of this state; and while, in bringing an action of this kind, the plaintiff might cut his declaration up into a large number of minute paragraphs, it is not absolutely necessary to do so. It was quite an easy matter for the defendants, in the present case, to meet by their plea the

paragraphs of the plaintiff's petition, by severally and distinctly answering each of the same. Very careful and accurate pleading might have led to the production of a declaration containing a larger number of separate and distinct paragraphs, and this would have been, probably, the better practice; but it requires no strain, we think, to hold that the declaration with which we are now dealing was, for all practical purposes, sufficient.

2. The note declared upon contained a promise to pay 10 per cent. attorney's fees, if collected at law or through an attorney; but, through inadvertence or otherwise, there was no distinct allegation of indebtedness for such fees, nor prayer for the recovery of the same. Nevertheless, there was no error in allowing the amendment praying for a recovery of attorney's fees, over an objection that such an amendment set up a new and distinct cause of action. The promise to pay these fees was a part of the plaintiff's cause of action, and this clearly appeared from an inspection of the copy note attached to the declaration. The amendment therefore amounted to nothing more than an amplification of the plaintiff's cause of action.

3. We have directed the reporter to set forth the substance of the plea originally filed by the defendants, as well as the contents of the plea which was subsequently substituted therefor. It must not be overlooked that by the latter the former was, in terms, withdrawn. In the beginning of the first plea the defendants set up the general issue, and followed the same by alleging the special matters upon which they relied as a defense to the plaintiff's action. It will be observed that the substituted plea did not set up the general issue. This latter plea was stricken, on demurrer; and complaint is made that this action of the court was erroneous, on the ground, among others, that "the plea of the general issue was filed, and same should not have been stricken, except on special demurrer." Inasmuch as the defendants themselves withdrew the plea of the general issue, it is obvious that the alleged error in striking this defense presents no question for adjudication by this court.

4. Another ground of complaint against the action of the court in striking the defendants' plea was that it set up the defense of non est factum, by averring that the note was executed by one of the members of the firm of Wingate & Mell without authority. In dealing with the question thus made, it will, of course, be understood that no reference is had to the plea first filed, because it was withdrawn, and what follows is intended as applicable only to the plea last filed. While it is true that this plea does allege that the firm of Wingate & Mell did not execute and deliver to Black & McIntosh the note sued upon, yet, as this same plea elsewhere admits that Mell, one of the firm of Wingate & Mell, did make the note in question in the firm name, and nowhere sets forth facts sufficient

to negative his authority so to do, it follows that the entire plea, taken together, did not amount to a plea of non est factum. The plea contains enough to make it apparent that the making and delivering of promissory notes was within the legitimate scope of the business conducted by Wingate & Mell; and while, of course, neither member of this firm would have power to bind the firm by a promissory note given in a matter relating exclusively to his own private business, and in which the firm had no interest at all, yet, prima facie, a note executed by one member of this firm, in the firm's name, would be binding upon it; and, in the absence of allegations distinctly showing that the note was given upon a consideration outside of the firm's business, the plea entirely failed to show that the note in controversy in the present case was not, as it purported on its face to be, a valid and binding contract of the firm.

5. Other grounds of alleged error in striking the defendants' plea were that it alleged that the note sued on was an accommodation paper made by Wingate & Mell for the benefit of Black & McIntosh, and that the bank, having notice of the accommodation character of the note, took the same at its own risk. Bearing still in mind that we are dealing alone with the plea substituted for the one originally filed and withdrawn, we are quite sure that sufficient facts were not alleged to show that the plaintiff was put on notice that the defendants Wingate & Mell were accommodation makers only, if, indeed, that was the truth of the case. Granting that Black & McIntosh were largely indebted, by indorsements and otherwise, to Wingate & Mell; that the former were largely interested in building houses; that the latter were engaged in plumbing and tin business, and, as material men, did a large quantity of work for Black & McIntosh; and that the plaintiff had full knowledge of all these facts,—we are at a loss to preceive how such knowledge could put the plaintiff upon notice of the true relation of Wingate & Mell to the note in question. They were the makers of the note, and apparently bound primarily, as such, for its payment; and nothing whatever in the facts just recited (which constitute all with reference to this matter contained in the defendants' plea) was calculated to inform the plaintiff that the note was, as to Wingate & Mell, a mere accommodation paper. The plea nowhere denies that the plaintiff procured the note in due course of trade, and before its maturity; and, properly construed, sets forth no valid defense to the action. It makes no difference that the note sued on was in renewal of others previously made in like manner. In any view of the matter, nothing was alleged legally sufficient to defeat a recovery by the plaintiff, and there was no error in rendering a judgment accordingly. Judgment affirmed.

ATKINSON, J., not presiding.

(95 Ga. 44)

ELLESWORTH v. McCOY et al.

(Supreme Court of Georgia. Nov. 12, 1894.)

CANCELLATION OF DEED—PARTIES—REVIVAL.

1. A bill in equity having been filed in July, 1887, by the maker of a deed, against two of the children of a deceased grantee, who had been the wife of the complainant, the bill alleging that the deed had been procured by her fraud and undue influence over the grantor, and that these two children were in possession of and claiming the property conveyed, and praying for an injunction restraining them from conveying or otherwise interfering with the same, for a cancellation of the deed, and for the recovery of the property itself, such bill could proceed in the name of the executor of the original complainant, who died pending the litigation, to final adjudication against these two defendants, without making, or attempting to make, a party defendant a third child of the deceased wife alleged to have been in life three years before the bill was filed, but who was conceded, if still alive, to be a nonresident of this state. Such child, if living, while a proper, was not an indispensable party to the proceeding.

2. Nor was the administrator of the deceased wife a necessary party, there being nothing in the allegations of the bill showing that she was insolvent or in debt at the time of her death, or any right on his part to administer the real estate of his intestate.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by one Carbine against Thomas McCoy and others for the cancellation of a deed. Plaintiff having died, John H. Ellesworth was substituted as party plaintiff. An amended bill was dismissed, and plaintiff brings error. Reversed.

The following is the official report:

After the decision of this case in 85 Ga. 185, 11 S. E. 651, the complainant died, and Ellesworth, his executor, was made party complainant. He amended the bill, alleging: At the time of making the deed his testator was more than 60 years old, was addicted to the use of intoxicating liquors, and by their use, and owing to his extreme deafness, his mind had become extremely weak. His wife, Nancy, was in the prime of life, of strong mind and domineering disposition, and, by reason of the great disparity between their ages, habits, mind, and disposition, she had unbounded influence over him, was able to have him do her will, and did on the occasion of making the deed use said influence, and by reason of that influence, and the other facts set out in the bill, obtained the deed fraudulently. Defendants demurred to the bill as amended, and moved to dismiss the same, which demurrer and motion were sustained, to which ruling complainant excepted. The grounds of demurrer were: The bill as amended shows that Mrs. Nancy Carbine left three children, only two of whom are parties to the bill. Further, the bill fails to show that her estate was solvent, or that her debts were paid, and fails to make the representative of said estate party to the bill. Defendants moved to dismiss, further, for the reasons above set out,

all parts of the bill except those which asked for the delivery by defendants of the personality alleged to have been violently taken from the possession of Carbine.

D. P. Hill, Geo. S. Thomas, and Dorsey, Brewster & Howell, for plaintiff in error. Smith & Pendleton, for defendants in error.

ATKINSON, J. The bill alleges, as the substantial grounds for equitable relief, that the wife of complainant, by resort to the various artful practices, fully stated therein, induced him to execute to herself and her heirs a deed conveying a remainder interest in certain valuable property situated in the city of Atlanta; that there are substantial equities alleged in the original bill has been adjudged by the ruling of this court when this cause was brought here upon exception taken to an order of dismissal upon general demurrer, a report of which, setting out the bill in full, is to be found in volume 85 Ga. 185, 11 S. E. 651. When the remittitur was entered, the complainant amended this bill as appears in the official report, and thereupon the defendants amended their demurrer, upon the ground that the amendment disclosed the existence of another heir of Nancy Carbine, who, as well as the two respondents, was a necessary party to the prosecution of the action, and upon the further ground that the administrator of Nancy Carbine, the original grantee, was not made a party respondent. The court sustained this demurrer, and again dismissed complainant's bill, and so, for the second time, this cause is before this court upon exception to the order sustaining a demurrer.

In order to determine accurately the correctness of the ruling excepted to, it is necessary to analyze the frame of the bill, to consider what were the substantial grounds upon which the aid of a court of equity was invoked, what relief was sought, and to what extent. As it has been heretofore adjudged in this court, it must now, for the purpose of this inquiry, be assumed that Nancy Carbine, under whom the respondents to this bill claim, obtained the deed sought to be set aside through fraud. Since the execution thereof it appears that she has died. The bill alleges that she left three children, two of whom are the present respondents, and the third is alleged to be unknown to the complainant, and a resident beyond the limits of the state. It alleges that the respondents against whom subpoena is prayed have taken possession of certain personal property conveyed by the deed, and hold the same adversely to the plaintiff, notwithstanding his life interest, even should the deed be sustained; that they are claiming, as heirs at law of Nancy Carbine, the remainder after the termination of the life estate reserved in the deed, and prays that, as against any interest either of them may have in said estate, the deed be canceled, and that said

respondents be enjoined from selling or encumbering in any way their alleged interests, and as well from hereafter claiming or asserting any interest whatever in the premises. Under the state of facts disclosed by the record, we think the only necessary parties respondent were before the court. In courts of equity, only persons against whom substantial relief is prayed, and whose interest would be affected by the decree, are necessary to the maintenance of the bill, and must be made parties respondent thereto, and, failing, the bill would be demurrable for want of proper parties. One may well be a proper party while neither a necessary nor indispensable one. An illustration of this principle appears in this record. Two of the heirs at law of Nancy Carbine, under this alleged deed, are setting up an adverse claim to this estate. From their assertion of title, this complainant, according to the statements of the bill, has just cause of grave apprehension. By a conveyance to innocent purchasers of their adverse remainder interests, they may ultimately deprive his own children of their just patrimony, or, retaining in themselves the title until after his death, they may appropriate to themselves, under this fraudulent conveyance, an estate intended by him for children of his own blood. It does not appear that the third child of Nancy claims any interest whatever. So far as this record discloses, he or she, as the case may be, may have yielded to the complainant's rights, or there might be reason satisfactory to this complainant why he should not desire to disturb any interest which, under the deed, might vest in this remaining child. The several interests of the heirs at law of Nancy Carbine are not necessarily interdependent. They claim under a common ancestor, it is true, but there is no community of interest between them. Either could sell or convey his interest to a stranger without the consent of the other. If this be true, then what rule of law is violated in seeking to set aside a conveyance in so far as it affects one and not another? Not only is no rule of law violated thereby, but, on the contrary, the principle here declared is in harmony with the rule laid down by the supreme court of the United States in *Williams v. U. S.*, 138 U. S. 516, 11 Sup. Ct. 457, as follows: "A court of equity has jurisdiction to divest either one of the adverse holders of his title in a separate action. Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the court, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action; but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the

joinder of both parties as defendants in one action." This injunction is sought against the only parties from whom the complainant has just cause of apprehension, and this estate being common, but their interests several, the bill is maintainable against them alone. Of course, if it shall appear that there are others with incidental interests, whose rights can be determined in this proceeding, such would be proper parties, and, if they be within the jurisdiction, the court may and should, by proper proceeding, cause them to be made parties, to the end that there may be an end of litigation; but such are in no sense indispensable to the maintenance of this bill. We have discussed thus far this proceeding upon the idea that all of the heirs at law are within the jurisdiction. As a matter of fact, the bill alleges that the third heir at law resides beyond the limits of the state, and that his or her name is unknown to the complainant. If this be true, and so it must be taken on demurrer, admitting even that by service by publication a nonresident may be bound in a direct proceeding to cancel a deed,—and this can by no means be conceded,—it would be impossible to bring such person before the court, as, the name being unknown, the court could not frame a subpoena or make other provision for service which would reach the person for whom it was designed. We are thus led to the conclusion that the court erred in sustaining the demurrer, in so far as the same rested upon the ground that the undisclosed heir at law was not made a party, and likewise are we led to conclude that, as to the respondents who are served and who are before the court, it may proceed to final decree.

2. We do not think the ground of demurrer a good one which objects to this bill because the administrator of Nancy Carbine is not made a party. By the terms of this deed, the estate was to Nancy Carbine and her heirs. It does not appear that there is any administration upon her estate; that, dying, she left debts; nor does any other reason appear for administration upon her estate. So, if these heirs took by purchase under the deed from Carbine, or if they took by descent from Nancy, in either event the bill is maintainable against them as tenants in common with several interests, without the administrator; for, by the statute law of this state, realty descends to the heirs at law, subject to administration for the purpose of the payment of debts; and inasmuch as the administrator upon her estate is claiming no right adverse to the claim of this complainant, and no debts being alleged to exist, we know of no good reason why, without this formal functionary, this cause cannot proceed to final decree against these two parties against whom this complainant seeks substantial relief, and therefore it is so ordered. Judgment reversed.

(95 Ga. 31)

ASHER et al. v. COPE.

(Supreme Court of Georgia. Nov. 12, 1894.)

CERTIORARI—NOTICE OF—WAIVER.

1. Where, after a petition for certiorari had been presented to the judge of the superior court, and his sanction had been entered thereon, and after the clerk had issued the writ of certiorari and attached the same to the petition, an acknowledgment, in these words, indorsed on the petition, was signed by counsel for the defendant in certiorari: "Due and legal service of the within petition for certiorari and certiorari acknowledged. Notice of time and place of hearing waived,"—it was error to dismiss the certiorari for noncompliance with the requirements of section 4059 of the Code.

2. This acknowledgment was sufficient evidence that the defendant in certiorari had not only waived written notice of the time and place of hearing, but had also received due and legal notice of the judge's sanction. This case differs from *Ayer v. Kirkland*, 65 Ga. 303, and *Bryans v. Mabry*, 72 Ga. 208. It did not, in either of those cases, appear from the terms of the notice given that the judge had ever acted upon the petition for certiorari at all.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Petition for certiorari by M. J. Asher and another against James A. Cope. The writ was denied, and petitioners bring error. Reversed.

Simmons & Corrigan, for plaintiffs in error. C. S. Winn, for defendant in error.

ATKINSON, J. The specific ground upon which the petition for certiorari was dismissed in the court below was that the plaintiffs in error had not given notice of sanction thereof, as required by law. It appears from the record that the petition was presented to the judge of the superior court; that it was sanctioned, and the writ of certiorari ordered to issue on April 22, 1893, and that the writ of certiorari issued regularly on the 28th of the same month; that the order sanctioning the issue of the writ was entered upon, and the writ itself attached to, the petition for certiorari; and that thereafter counsel for the defendant in certiorari, upon the petition therefor, entered and signed the following acknowledgment: "Due and legal service of the within petition for certiorari and certiorari acknowledged. Notice of time and place of hearing waived. This May 5th, 1893." We think this acknowledgment covered notice of the sanction of the writ. The law does not require service either of the petition or the writ upon the defendant in certiorari, but only that he be notified of the sanction of the writ, and of the time and place of hearing. The issue of the writ presupposed the sanction of the judge, and when the defendant, in writing, acknowledged service of the petition, it was equivalent to an admission that he would take due and legal notice of every material fact which appeared therein, and of every entry legally appearing there-

on. This petition had in fact been formally sanctioned by the judge, and his order was entered thereon, so that notice to the defendant of the sanction of certiorari was complete. Of course, if the defendant had declined to take notice, or had refused to acknowledge service in writing, the plaintiff would have been compelled to give him formal notice; but the acknowledgment of service of the petition, which itself conveyed the notice required by statute, took it out of the ordinary rule. In neither of the cases cited in the headnote of this decision does it appear that any action had been taken upon the petition by the judge to whom the same was presented at the time the notice was given, and in each case the notice was served entirely independent of the petition or writ; so that in neither of those cases could notice of the sanction be presumed. We conclude, therefore, that the court erred in dismissing the petition for certiorari, and a reversal of the judgment complained of is ordered. Judgment reversed.

(55 Ga. 146)

LOWRY BANKING CO. v. HOLLIDAY et al.
(Supreme Court of Georgia. Dec. 4, 1894.)
MORTGAGE FORECLOSURE—RIGHTS OF JUNIOR MORTGAGEE.

Where a mortgagee holding a first lien proceeds by equitable petition for the foreclosure of his mortgage, and the holder of a junior mortgage likewise proceeds in a separate suit at law, the former cannot, by amending his petition and enjoining the suit of the latter, thus compelling him involuntarily to litigate his rights under the proceeding first instituted, acquire a right to have any portion of the proceeds of the mortgaged property which would otherwise be applied to the extinguishment of the junior lien, appropriated to the payment of the fees of counsel representing the senior lien. And this is true even though it was necessary to the preservation of the mortgaged property to enjoin the separate proceeding of the junior mortgagee. Section 2942 of the Code is not applicable to a case of this kind.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Lowry Banking Company, trustee, against J. S. Holliday and others, to foreclose a trust deed. From the judgment rendered, plaintiff brings error. Affirmed.

Candler & Thomson, for plaintiff in error.
Arnold & Arnold, for defendants in error.

ATKINSON, J. The Lowry Banking Company, as trustee for certain creditors of the Atlanta Pianoforte Manufacturing Company, held a deed of trust to all the property of this corporation to secure the payment of the debts described therein. A bill was filed by this trustee for the purpose of foreclosing the trust deed held by it, and the appointment of a receiver was prayed against the defendant. Subsequent to the filing of this bill the Atlanta Piano Company (the previous name of the corporation having been changed by an

amendment to its charter) executed to Mrs. Holliday a mortgage upon all its property to secure the payment of a certain debt therein described, and, she proceeding to foreclose by summary statutory process her mortgage upon the property described, the plaintiff, by an amendment to its bill, brought her in, and made her a party defendant thereto, and prayed that she be enjoined from selling the mortgaged property, upon the ground that such proceedings might tend to waste the trust estate, and thereby imperil its security. Certain other common-law executions having been issued against the defendant, these were likewise purchased by Mrs. Holliday, and plaintiff prayed that as to those executions she likewise be enjoined. By its amendment the plaintiff alleged that the mortgage to Mrs. Holliday was executed to delay and defraud creditors, and to defeat it in the assertion of its lien under and by virtue of the trust deed. Answers were filed by the respondents. The issue formed, after stubborn and prolonged contest, was finally decided in favor of the plaintiff, the Lowry Banking Company, as trustee, in so far as it set up the lien of its trust deed, though reducing the debt to some extent because of alleged usury, but was found against the Lowry Banking Company and in favor of Holliday in so far as it recognized and established the validity of her mortgage lien, though reducing somewhat the amount claimed to be due thereon. The decree rendered, awarding to the plaintiff the amount of its debt, principal, interest, and cost, as found by the verdict, was fully discharged, leaving a balance in the hands of the receiver to be applied to the extinguishment of the junior lien of Holliday. Counsel for the plaintiff, the Lowry Banking Company, filed a special petition praying that of the sum so left in the hands of the court after the extinguishment of their client's claim the court should set apart and award to them, as counsel for the plaintiff in the case, the sum of \$2,500, upon the idea that the defendant Holliday, the holder of the junior mortgage, had taken an interest under the bill, had been stubbornly litigious, and had exposed the plaintiff to unnecessary expense in the assertion of its rights. This petition was demurred to in the court below upon the ground that the same was insufficient in law, and as affording no ground upon which the court would be authorized to grant the relief prayed for. This demurrer was sustained, and the prayer of the petition refused. Let us see whether the holder of this junior mortgage was liable, out of the fund apportioned to the payment of her debt, to contribute in any manner to the payment of counsel fees for the plaintiff. Aside from our statutory regulations upon the subject, under the rules of equity pleading, parties having claims are admitted as interveners upon their own application as parties plaintiff only upon condition that they aver

a willingness to bear their portion of the expenses of litigation. This is the condition upon which they are admitted as parties upon their own prayer, and, being so admitted, whether such intervenor be the holder of a junior or senior lien, courts of equity have power to tax him with his proportionate share of the expenses of litigation. This is the principle upon which, in the administration of an estate by a court of equity, the expenses of litigation are awarded in the nature of costs as being superior to the liens of parties at interest. The divesting of the lien, however, and an appropriation of any portion of the money which should be applied to the payment thereof to any other purpose, when made upon the voluntary application of the party holding the lien, is one thing, and the appropriation of such money to such other purpose as against one who is a party defendant, and who is proceeding entirely outside the scope of the plaintiff's bill in the assertion of his rights, is entirely a different thing. In the one case, through the plaintiff, he invokes the remedial processes of the court, and thereby commits himself to the purposes of the proceeding, and likewise to the payment of his proportion of the expenses of litigation; in the other case, his position is one of antagonism to the purposes of the bill, and, though he may take indirectly a benefit thereunder, there is no reason why he should be made liable for the payment of expenses. That a defendant in the assertion of ordinary legal remedies is stubborn and litigious in the assertion of his right affords no reason why the court, as against him, should award counsel fees to his adversary, where he proceeds in good faith, and has a substantial right in the premises. The very issue upon which the plaintiff contends that this defendant was stubbornly litigious was submitted to a jury. The issue of fraud in the execution of the mortgage was distinctly made, and that issue was found against the plaintiff. The jury found that the defendant Holliday had a bona fide existing lien upon the property in question; that she had a bona fide subsisting right. But, even if this were not true, the plaintiff could not recover against the defendant attorney's fees by way of damages upon the ground that she was stubbornly litigious, for the reason that there was no privity of contract between the plaintiff and the defendant. The defendant had violated no contract made with the plaintiff, was under no duty to submit to its demand, and it is only in that class of cases, under our Code, that damages are allowed as against a defendant who is stubbornly litigious. This plaintiff's right to have its attorney's fees allowed out of this fund must rest, then, upon some supposed equitable right resulting from the fact that the defendant in some manner took a benefit under the final decree rendered in the case. If she had been a voluntary party by intervention to the bill, and received affirmative assistance at the hands of the plain-

tiff, the plaintiff's contention might be well founded. In this case, whatever benefit this defendant may have taken under the bill was due to no assistance rendered her by the plaintiff. It is a general rule of law that every man is to pay his own lawyer, that every litigant pays his own counsel, and to justify a court in appropriating the funds of one person to the payment of the fees of another the party affirming the correctness of the proposition ought to be required to show by uncontrovertible authority the power of the court so to do. To allow attorneys representing unsecured claims to file a creditors' bill, and make a mortgage creditor a party defendant to the bill, and, upon marshaling the assets of the estate, to take away from the mortgage creditor a large proportion of the money which should be appropriated to the extinguishment of his lien, and apply it to the payment of counsel fees of moving creditors, would be nothing short of judicial confiscation. It would be an effort, under the forms of law, to divest a mortgagee of property of which the court could have no legal power to deprive him. The same rule would apply to the holder of a senior mortgage. He cannot be entitled to more than to have his entire debt extinguished. As against a defendant who has not made himself a voluntary party to the bill, it cannot be said to be either equitable or just that his money be appropriated to the fees of counsel for moving creditors, and we think the court committed no error in sustaining the demurrer and dismissing the petition for the allowance of fees. Judgment affirmed.

(95 Ga. 135)

CITY OF ATLANTA v. MILAM.

(Supreme Court of Georgia. Dec. 4, 1894.)

DEFECTIVE SIDEWALKS—LIABILITY OF CITY—VIEW OF PREMISES BY JURY.

1. The duty of a city to keep a sidewalk reasonably safe for public use extends to all of the sidewalk intended for travel by the public as a thoroughfare, and is not confined to keeping in a safe condition a special part only of the sidewalk which happens to be most generally used.

2. The jury having, at the request of defendant's counsel, been permitted to personally inspect the obstruction upon the sidewalk which occasioned the injuries received by the plaintiff, and there being evidence to sustain a finding that because of this obstruction the sidewalk was not reasonably safe for the passage of pedestrians, and that the city was negligent in permitting the obstruction to remain, and the charge of the court having fully and fairly guarded all the rights of the defendant, the discretion of the trial judge in refusing to set aside the verdict in the plaintiff's favor will not be overruled.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by John A. Milam against the city of Atlanta for personal injuries. Plaintiff had judgment, and defendant brings error. Plaintiff also filed a cross bill of exceptions. Affirmed, and cross bill of exceptions dismissed.

The following is the official report:

Milan sued the city of Atlanta for damages from a personal injury which he alleged he received on or about April 1, 1892, from falling violently over a high, iron projection near the corner of Alabama and Broad streets, Atlanta, negligently allowed by defendant to project far out into the public sidewalk, and obstruct the same for about four feet. The verdict was for plaintiff, \$833. Defendant's motion for new trial was overruled, and it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and also that it was contrary to certain specified portions of the charge. Further, because the court erred in the following charge: "This duty of diligence extends to the whole of the sidewalk which is intended for travel by the public as a thoroughfare for travel, and is not confined to any special part of the sidewalk in use by the general public in walking along there. It is bound to keep all of its width reasonably safe for persons to travel along its entire width." Alleged to be error because it did not fairly submit to the jury defendant's contention that the strip of iron was not an actionable defect in the street, but was only a proper part of an ordinary, necessary, and reasonable appurtenance of the Inman Building, which abutted on the street at that point. During the trial, before the close of plaintiff's evidence, defendant moved the court to send the jury, in charge of the court's bailiff, to inspect and view for themselves the alleged defective sidewalk, grating, and iron over which it was alleged plaintiff fell. Plaintiff objected on the ground that the court had no authority to send out the jury in this manner, and to take evidence, in this manner, that could not be reviewed by the court, and on the ground that it was improper in this case, as plaintiff denied that the defective premises were in the same condition as when plaintiff fell. These objections the court overruled, and ordered the jury to be sent, in charge of the bailiff, to view the alleged defective premises and sidewalk, which was accordingly done. To this action of the court plaintiff assigns error, by cross bill of exceptions.

J. A. Anderson and Fulton Colville, for plaintiff in error. Arnold & Arnold and C. D. Hill, for defendant in error.

LUMPKIN, J. The facts are stated by the reporter. The law of this case is not very complicated. While, of course, in most American cities, water plugs, telegraph and telephone poles, trees, and other things, are allowed upon the margins of sidewalks, and pedestrians, therefore, are not expected to use such portions of the same as are occupied by these obstructions, still there can be no doubt, under the rules of law now settled by repeated adjudications in this and other jurisdictions, that the city authorities must

keep in a reasonably safe condition all parts of its sidewalks which are intended to be used by the public. It may often happen that in a particular locality a comparatively narrow portion of a sidewalk, on either side or in the middle of it, is much more generally used than other portions of the same; but this does not relieve the municipal authorities from liability for negligence in permitting dangerous obstructions to be continuously maintained in places upon sidewalks over which the public have a right to pass, merely because those places are not so much used as others. It appeared in this case that the obstruction over which the plaintiff fell had existed for a considerable time, and was located upon a portion of the sidewalk over which he had a right to walk. The evidence as to the dangerous character of the sidewalk was rather weak,—so much so that we would very probably have set aside the verdict in the plaintiff's favor, had it not been for the fact that the jury, at the request of the defendant, were permitted to personally inspect the obstruction, and form their own opinion concerning it, by ocular demonstration. We are constrained to hold that they were better judges on the subject, after this opportunity of obtaining information, than we could possibly be from a mere paper report of the testimony introduced in the case. We will therefore allow the verdict to stand. Judgment affirmed.

(95 Ga. 151)

PETERS v. LITTLE.

(Supreme Court of Georgia. Dec. 4, 1894.)

PRIVATE WAY—EASEMENT BY PRESCRIPTION—TACKLING.

Where one who had, for a period of more than two years, used as a private way a strip of land belonging to another, and then, at the request of the owner, abandoned this strip, and, with his consent, used in its stead, as a private way, for more than five but less than seven years, another strip of land belonging to him, no prescriptive right to the use of either strip as such private way arose in favor of the person first mentioned; and, whatever may be the rights of this person under the facts stated, the ordinary had no jurisdiction to summarily order the removal of obstructions placed in the new strip by the owner.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Julia Peters against Joseph Little for the removal of obstructions from a private way. Defendant had judgment, and plaintiff brings error. Affirmed.

Austin & Park, for plaintiff in error. H. M. Patty, for defendant in error.

LUMPKIN, J. The error complained of in this case was the refusal of the judge of the superior court to sanction a petition for certiorari. This petition alleged, in substance, the following facts: The plaintiff, Mrs. Peters, presented to the ordinary of

Fulton county a petition against Joseph Little, praying for the removal of obstructions placed by him in a private way of which she had been in the uninterrupted and continuous use for more than seven years. The evidence introduced before the ordinary showed that Mrs. Peters had used as a private way, for a period of more than two years, a strip of land belonging to the defendant, and then, at his request, and with his consent, had abandoned this strip, and used in its stead, as a private way, for more than five but less than seven years, another strip of land which belonged to him. After hearing the evidence, the ordinary refused to grant the prayer of the petition, and ordered it to be dismissed. The plaintiff's theory was that, by tacking together the two distinct periods during which she had used as a private way the two separate strips of land, she made a case of seven years' prescription, under section 737 of the Code. We do not think this contention was sound. In order to acquire the statutory prescriptive right to a private way by constant and uninterrupted use of the same for seven years or more, the use must relate strictly to the same identical strip of land over which such right is claimed. In the present case neither of the strips in question was used by the plaintiff for such a period. She might have acquired a prescriptive right over the first strip if she had continued to use it; but when she voluntarily abandoned it, although she did so with the consent and at the request of the defendant, the prescription ceased to run in her favor as to that particular strip. As to the second strip, her use of the same did not continue for the requisite time to give a prescriptive right of way over it. See *Follendore v. Thomas*, 93 Ga. 300, 20 S. E. 329, which is somewhat in point. Under the facts stated, we do not mean to say she has no rights at all as against the defendant, Little. This is, however, a matter with which we are not now called upon to deal. We are quite certain that, in view of the facts above recited, the ordinary had no jurisdiction to summarily order the removal of the obstructions complained of, and consequently the judge of the superior court was right in refusing to sanction the certiorari. Judgment affirmed.

(95 Ga. 54)

McLENDON v. HORTON.

(Supreme Court of Georgia. Nov. 12, 1894.)

EJECTMENT—SUFFICIENCY OF EVIDENCE—IMPROVEMENTS.

1. The plaintiff's evidence showing that her mother, while in possession of the premises in dispute, and holding the same under a deed, had conveyed the same to another, who reconveyed to the mother for life, with remainder to her children (these conveyances being duly recorded, and the mother remaining in possession for some time thereafter); that the plaintiff was the only child of her mother; and that the latter was dead,—these facts made out a prima facie case

for the plaintiff, in her action against the defendant for a recovery of the property.

2. The defendant having shown that he entered the premises and claimed the same under a tax title which was void, and having also, both by his pleadings and his evidence, set up and claimed title under one to whom the plaintiff's mother had conveyed by a deed junior to the above-mentioned conveyance made by her, the plaintiff was entitled to recover. Even if the defendant's entry under the tax title was bona fide, yet as he virtually admitted title in the plaintiff, by tracing the title upon which he finally relied to the same source as that of the plaintiff, and her title derived from this common source was better than his, her right to the property, as against him, was sufficiently established.

3. As the evidence showed that the defendant had received in rents amounts more than sufficient to reimburse him for all improvements, taxes, and other expenditures upon the property, and there was no recovery by the plaintiff of mesne profits, errors, if any, in the instructions given to the jury with respect to these matters, were immaterial. The verdict upon the substantial merits of the case was right, and we find no error authorizing the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action in ejectment by Ida Horton against J. J. McLendon. Plaintiff had judgment, and defendant brings error. Affirmed.

John C. Reed and Orlando McLendon, for plaintiff in error. A. A. Manning and Rosser & Carter, for defendant in error.

ATKINSON, J. Ida Horton, whose maiden name was Ida McMasters, sued McLendon, in ejectment, for a certain lot of land in the city of Atlanta, claiming mesne profits. The abstract of title upon which she based her right of recovery consisted of a series of deeds commencing, in point of date, in 1863, and running down, through James M. Johnson, to Jane McMasters; the last-mentioned deed being dated May 11, 1870, from Jane McMasters to T. K. Oglesby, dated February 13, 1871, and then a deed from T. K. Oglesby, of date February 13, 1871, back to Jane McMasters. The deed last mentioned quit-claimed the premises to Jane McMasters for and during her natural life, and at her death to her children for life, then to their heirs and assigns. It was further alleged that Jane McMasters was dead; that she was the mother of Ida Horton, and left no other child. It was further alleged that Jane McMasters was in the actual possession of the premises in the years 1870 and 1871, up to and including the year 1877, and from that date to the year 1884 by her guardian. All of the deeds above enumerated were duly recorded. The defendant pleaded the general issue, and likewise filed an equitable defense, to the effect that in the year 1884 the premises described, under a tax execution in favor of the city of Atlanta against one Mrs. F. E. C. Stewart, had been levied upon and sold, and that at the sale he became the purchaser; that he bought in good faith, and had entered and made valuable improvements greatly increasing the value of the premises,—and

prayed to be allowed to set off his claim for enhanced value against mesne profits, and that, in the event it should appear that the mesne profits did not amount to the increased value because of the improvements, the court would, in his behalf, decree the excess to be a charge upon the premises in dispute. Defendant further pleaded that on June 19, 1884, Jane McMasters had conveyed the premises to one Carmichael, who, in turn, had conveyed to him. The plaintiff introduced the deeds herein specifically described as having been set out in the abstract attached to her declaration. Showed that she was the only child of Jane McMasters; that Jane McMasters was dead; that she was in possession at the time of the execution of the deeds, and remained there for several years; that about the year 1876 she became insane, was confined in the lunatic asylum for a number of years, and while she was released from the asylum, about the year 1884, her mind was not entirely restored, and she died in this condition the year following. It was further shown that, from the year 1880 up to and including the year 1884, the premises were occupied by a tenant, who paid rent to the person who had been previously appointed guardian for Jane McMasters, she having been adjudged a lunatic. Upon the conclusion of the plaintiff's case the defendant moved a nonsuit, upon the ground that the plaintiff had failed to show a title which would warrant a recovery, and this motion was overruled. The defendant then introduced a deed from the marshal of the City of Atlanta to the premises in dispute, together with the execution upon which it was based. The execution was an ordinary tax execution, in regular form, and against Mrs. F. E. C. Stewart. He likewise introduced the books of the tax assessors of the city of Atlanta, showing that the premises in dispute had been, for the year 1884, assessed as the property of Mrs. Stewart, that the taxes thereon had not been paid, and that notice of the levy had been delivered to a negro woman whom the city marshal had found in possession. The defendant further introduced a deed from Jane McMasters to Carmichael, dated June 19, 1884, and a deed from Carmichael to himself. The value of the premises for rent during the time the same were occupied by defendant was shown to be in excess of the value of the improvements, and the sum paid for taxes and other charges incurred by the defendant by way of assessments for street improvements. It was not shown that the defendant named in the tax execution was ever in possession of the premises in dispute, ever claimed title thereto, or exercised any act of dominion over them. It was not shown that such person ever existed, and none of the witnesses, including the city officials who assessed the property, who issued the execution, or who conducted the sale, had ever seen her, or had any knowledge of her existence.

1. The court, upon motion, struck so much of the defendant's plea as claimed a judgment for the excess of improvements over mesne profits, but allowed the plea to the extent of permitting the one to be set off against the other. Exception was taken to this ruling. In addition to this, exception was taken to certain instructions to the jury to the effect that they might consider the value of the improvements, and allow such value as a set-off against mesne profits. Whether or not error was committed in this ruling, or in these instructions, is not material. The undisputed testimony shows that the sum of the mesne profits, after allowing all reasonable charges for taxes and street assessments paid by the defendant, was considerably in excess of the value of all improvements made by him; and, as the jury did not find any sum for mesne profits, the set-off was much more favorable to the defendant than he had a legal right to expect, and this cannot be made a cause of complaint by him.

2. The real questions made in the case involve the claim of title between the respective parties, and arise upon a refusal to charge, in effect, that the plaintiff was not entitled to recover upon proof of prior possession alone, and a counter instruction by the court to the effect that, if the jury should believe that Jane McMasters was in the quiet possession of the premises, under claim of right, and that if she was unlawfully evicted therefrom by the defendant, she, and those claiming under her, would be entitled to recover upon her prior possession, as against any person other than the true owner. There are a number of exceptions covering this branch of the case, but, upon analysis, they all present the question made as above. It is quite evident, from the testimony in this case, that Jane McMasters entered into the possession of the premises in the year 1871, and remained in the actual occupancy thereof until the date when she was adjudged a lunatic, which appears to have been in 1876 or 1877. It further appears that her regularly appointed guardian, by a tenant who recognized him as landlord and paid him the rent, was in possession from the year 1880 until the date of the sale of the property under the tax execution against Mrs. Stewart, under which sale the defendant claimed a right of entry. This, of itself, affords strong presumptive evidence of the continuity of Jane McMasters' possession from the date of her original entry under Johnson until the date of her final eviction under the tax sale. But assuming that this presumption does not afford sufficient evidence of an uninterrupted possession to establish in her a perfect prescription, based upon the Johnson deed as color of title, the two possessions establish the fact that there was no abandonment of her claim to the right of possession up to the time of her final eviction. The question then is, her possession being proven, and she holding the life estate, can the re-

remainder-man, at her death, recover upon the force of a possession from which she was unlawfully evicted during her life? The life tenant holds the estate subject to the right of the remainder-man at the termination of the estate upon which it is limited, and immediately upon the termination of the life estate the remainder-man is entitled to possession. The life tenant can convey no greater interest therein than the residue of her estate remaining at the date of the conveyance. Therefore, the conveyance by the life tenant of the fee, the deed under which she held being duly recorded, conveyed to Carmichael, her grantee, no right which would entitle him and his lessees to the possession of the premises after the termination of the life estate. So that, treating the defendant in this case as having entered by virtue of the deed from Jane McMasters to Carmichael, he was bound to surrender at the termination of the life estate; and he, entering in subordination to her right expressed in the very deed under which Jane McMasters held possession, is estopped to deny the right of the remainder-man,—the present plaintiff. Treating the entry of the defendant as having been by virtue of the tax sale, what is his situation? The law, considered in relation to the subject upon which it operates, is, to a great extent, a science of applied presumptions. From given hypotheses the law makes certain deductions, and upon these deductions it raises presumptions that in themselves constitute the great body of law, which, independent of statutory enactment, depends upon right reason for support. This is the true law of the land,—that law which is the corner-stone of most of our property rights. One of these presumptions, and the one with which we are now to deal, is the presumption of title to property arising from possession alone. The law presumes that title follows the possession of property, and this presumption applies to personal as well as to real property. A person, upon proof of prior possession, may recover personal goods from another who wrongfully deprives him of their possession, and is entitled, in law, to maintain his prior possession against the claim of any one except the true owner. So with real property, upon the presumption of title arising from proof of a bare possession, a person, except as against the true owner, may recover the premises from any one who wrongfully deprives him of the possession. This is the legal equivalent of our Code provision that one may recover in ejectment upon his prior possession alone, as against one who subsequently acquires possession by "mere entry and without lawful warrant or authority." Tested by this rule, how was the entry of the defendant effected? The tax execution was issued against the lands and tenements, goods and chattels, of one Mrs. Stewart. It was not shown that this person was ever in possession of the premises, that she ever claimed title thereto, or that she ever returned the same for taxes, or ex-

ercised any act of ownership whatever over them. No witness was produced who knew, or had ever seen, the defendant in execution. The tax lien could attach only to her estate, and yet, under such an execution, the city marshal sells the property in dispute, the city of Atlanta becomes the purchaser, and, the defendant in this case purchasing from the city of Atlanta, the tenant in possession is evicted, and the possession delivered to this purchaser from the city. The only lawful warrant upon which a tenant can be evicted is a process against the tenant himself, or against the person under whom such tenant claims his right of possession. He can only evict, under a judicial sale, the defendant in execution, or his privies in estate. The same rule applies to tax sales. Therefore, if an officer, with an execution against one person, seizes property in possession of another, he can justify the seizure only by showing that the property seized was really the property of the former, or his privies. So in this case, the execution not being against the person in possession, and there being no privity between the defendant in execution and such person, the sale of the property and eviction of the tenant in possession was a trespass; and it not being made to appear that the defendant in execution was the owner of the premises, or had any interest therein, the entry of the lessor of the defendant in this action, in so far as concerned the person holding the prior possession, was without lawful warrant or authority, and was, in law, a mere entry. As against such a one, the first possessor was entitled to recover upon her prior possession alone. So that, whether the defendant be treated as having entered as a purchaser under the life tenant, or whether we treat him as having entered under the alleged tax sale, the plaintiff was, in either event, entitled to recover. Such was, in substance, the instructions complained of, and, under the views here expressed, we are bound to adjudge them correct; and the verdict being supported by the evidence, in every essential particular, the court properly refused a nonsuit, and properly denied a new trial. Judgment affirmed.

(96 Ga. 61)

CORNIFF v. COOK.

(Supreme Court of Georgia. Nov. 12, 1894.)

BILL OF EXCEPTIONS—LEVY OF ATTACHMENT—INSTRUCTIONS—BURDEN OF PROOF.

1. A demurrer to a rule, instituted in the city court of Atlanta, having been overruled, and no exceptions pendente lite having been filed, it was too late to assign as error the judgment overruling the demurrer in a bill of exceptions sued out more than 60 days after the date of such judgment.

2. Where a constable, having in his possession an attachment against a private corporation, went to a house in which personal goods of the corporation were located, for the purpose of levying upon the same, made an inventory of the goods (they being at the time under his view, in his immediate presence, and constructively in his

possession), informed the only servant of the corporation present that he had levied upon the property, and thereupon immediately went to the president of the corporation, who, upon being informed of what had been done, agreed with the officer that if the goods were not removed from the house the same should be held subject to the order and control of the officer, who shortly thereafter made an entry of levy upon the attachment, the levy was legally sufficient, although the constable did not take actual manual custody of the goods, or lock up the house, or remove the goods therefrom.

3. The requests to charge relating to what would be necessary to constitute a valid levy were not applicable to the facts disclosed by the evidence, and there was no error in refusing the same, and the charges given upon this subject were pertinent and correct.

4. The law with reference to the burden of proof and the preponderance of evidence was correctly stated by the presiding judge, and there was no error in refusing to charge that "the question whether the burden of proof has been carried is to be settled by looking at the number of witnesses testifying in favor or against certain facts, their demeanor on the stand, character, interest," etc.

5. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by William Corniff against J. A. J. Cook. Defendant had judgment, and plaintiff brings error. Affirmed.

Mayson & Hill, for plaintiff in error. Goodwin & Westmoreland, for defendant in error.

LUMPKIN, J. 1. Upon the rule of practice announced in the first headnote we will attempt no comment. The question involved is too well settled to require further notice at our hands.

2. The evidence as to what was done by the constable, Cook, when he went to levy the attachment sued out by Chamberlain, Johnson & Co. upon the property of the Southern Travelers' Club is somewhat complicated and confused; but, after giving it a very thorough examination and study, we think a fair summary of its real purport and meaning is stated in the second headnote. Counsel for the plaintiff in error strenuously insisted that the porter of the club, in charge of its property at the time Cook went to make the levy, could not, under the circumstances, become the agent of Cook to retain possession of the property; and further, that, inasmuch as the constable did not take absolute manual possession and control of the goods, there should have been a joint promise by the porter and the president of the club to hold the property for the constable, in order to make the levy valid. Both of these contentions are, in our opinion, successfully answered by the fact that, after the constable left the clubhouse, the president of the corporation agreed with the constable that if he would allow the property to remain where it then was it should be held subject to the officer's order. The president was the alter ego of the corporation,

and, this being so, it is entirely immaterial whether the porter did or did not join with him in promising to hold for the constable; and it is also of no consequence whether the porter, regarded as an agent of the corporation, could or could not become also the agent of the constable to keep the property for him. The evidence of Wellhouse, the president of the club, as to what occurred between himself and Cook, at first glance, seems to conflict with the evidence of the latter; but upon a careful examination it will appear that at best the statements of Wellhouse are (if not evasive) merely negative, and that he really does not deny the account of the transaction given by Cook. The question, therefore, is, taking Cook's version as correct, whether or not what he did in the premises amounted to a legal and valid levy. We think it did, and this position is well sustained by the most respectable authority. The evidence, as we understand it, shows that the constable, armed with the attachment, went to the clubhouse for the purpose of levying upon the goods of the corporation; that they were in his view, in his immediate presence, under his control, and, constructively, in his possession. He made an inventory of them, and then went to the president of the corporation, who agreed to hold the goods subject to the order and control of the officer. It was really at the instance of Wellhouse that this arrangement was entered into, he fearing the goods would be damaged if the officer insisted upon removing the same from the premises. Taking all the facts together, it amounted simply to this: that the officer left the property, to be kept for him, in the hands of the defendant in attachment. A few quotations from standard works will suffice to show that, under these circumstances, it was a good levy. "In all cases there must be something more than a mere pen and ink levy. It is not sufficient that the officer merely makes an inventory of the property, and indorses the levy upon his writ. He must go where the property is. He must have it within his view. It must be where he can exercise control over it. And he must exercise, or assume to exercise, dominion, by virtue of his writ. He must do some act by reason of which he could be successfully prosecuted as a trespasser if it were not for the protection afforded him by the writ. But, in order to make him responsible as a trespasser, it is not essential that he should remove the property, nor that he should touch it. It is enough that, having the property within his view, and where he can control it, he does profess to levy and to assume control of the property by virtue of the execution, and with the avowed purpose of holding the property to answer the exigencies of the writ; for one who, to that extent, assumes dominion over the goods of another, is a trespasser, unless he is justified by a valid writ." 2 Freem. Ex'ns, § 200,

and cases cited. "The levy of an execution is the seizure by the officer of the debtor's property under the writ, and the taking possession of it, or subjecting it to his control. In order to constitute a valid levy upon personal property, it must be within the view of the officer, and subject to his control at the time. Some of the courts seem to hold that there must be a manual seizure, and actual possession taken by the officer; but according to the weight of authority it is sufficient if the property is under the control of the officer, and he may even leave it with the debtor, to hold as his agent. He must, however, openly and unequivocally assert his title and right of dominion under the writ. The test generally adopted for determining the validity of a levy is this: Have the acts of the officer, in asserting his title to the goods under the writ, been such as would make him liable as a trespasser but for the protection afforded by the writ?" 7 Am. & Eng. Enc. Law, 148, 149, citing numerous cases. To the same effect, see Murfree, Sher. § 641, from which we make the following extract: "As it would in many, probably most, instances be highly inconvenient to the sheriff and to all concerned for the officer to keep actual personal possession of chattels levied on during the interim between the levy and the day of sale, the law provides that during that period the property may remain in other hands, due precaution being taken for its safety by bond or otherwise. If the sheriff chooses to leave the property in the hands of the defendant, he may do so, but it will be at his peril. So far as all others are concerned,—creditors and subsequent purchasers,—the levy will be good, unless there are other circumstances indicating fraud, which coexist with the fact that the defendant is, by the sheriff's appointment, the custodian of his own property." The following from the opinion of Frost, J., in *Weatherby v. Covington*, 3 Strob. 27, is a very clear and pertinent statement of the law upon the question under review: "It is not necessary to a levy that the sheriff should actually seize and keep possession of the goods. It is sufficient if, the goods being in the possession of the defendant, and the sheriff having power to take them, with the consent of the defendant, he indorses a levy on the execution. The sheriff must, by some unequivocal act or declaration, assert his title to the goods under the execution, so that the legal possession and control be manifestly transferred from the defendant to him. It is not material whether the right of possession be acquired by an actual exercise of official authority, or by the voluntary act of the defendant. A written acknowledgment of a levy is as effectual as an actual levy; and if the goods, in either case, remain in the possession of the defendant, he is the bailee of the sheriff." It would be easy to cite many other authorities, but we are content to allow the correctness of our judg-

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ment to rest upon those above referred to, especially in view of the fact that our own Code (section 2625) recognizes that a constructive seizure of personal property by a levying officer may be valid.

3. Following up the contentions which have been stated in the preceding division of this opinion, counsel for the plaintiff in error, at the trial below, presented to the judge certain requests to charge, embodying the views of counsel as to what would be necessary to constitute a valid levy. The refusal of the court to give these requests is complained of as error in the motion for a new trial. We find no merit in this complaint. Whatever may be said in support of the requests as abstract propositions of law, they were really not applicable to the facts of this case, as we gather them from the brief of evidence before us.

4. After charging the jury that the burden of proof was upon Cook to show to their reasonable satisfaction by a preponderance of the evidence that he did in fact effectually levy the attachment in his hands, the trial judge said: "The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or set of facts. In determining, however, upon which side the preponderance of the evidence lies, the jury should take into consideration the opportunities of the witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or the preponderance of the evidence." The court refused to give in charge to the jury a request, the material portion of which is copied in the fourth headnote. In view of the charge given, we have no hesitation in saying there was no error in refusing the request, because the language adopted by the judge accurately conveyed to the minds of the jury all which the request, properly construed, ought to convey. If the purpose of the request was to have the jury understand that they were bound to believe two witnesses in preference to one, it would not do at all. The case of *Dowdell v. Neal*, 10 Ga. 152, relied on by counsel for the plaintiff in error, will not support any such idea. It is true, Judge Nisbet said that if three witnesses were all free from suspicion, and of equal credibility, then two of them were to be believed, rather than the other, who was in conflict with them; but at the same time he utterly repudiated the idea that the question of credibility is to be determined by mere numbers, and distinctly stated that the jury may, if they deem proper, believe one witness as against two or more. So, in the present case, the rule laid

down by the court may be regarded as sufficiently clear and accurate to answer all practical purposes. See *Clark v. Cassidy*, 62 Ga. 408, headnote 3, and also page 411.

5. As will have been seen by what has already been said, this court is satisfied that the evidence warranted the verdict. The trial judge very properly refused a new trial. We affirm the judgment all the more readily because the verdict is not only consistent with the law, but also with the real justice of the case. It is always to be regarded as fortunate when both law and justice coincide in bringing about the correct termination of a lawsuit. Judgment affirmed.

(95 Ga. 173)

**FIDELITY BANKING & TRUST CO. v.
KANGARA VALLEY TEA CO. et al.**

**KANGARA VALLEY TEA CO. et al. v. FI-
DELITY BANKING & TRUST CO.**

(Supreme Court of Georgia. Dec. 4, 1894.)

**CANCELLATION OF MORTGAGE — RIGHTS OF CRED-
ITORS OF MORTGAGOR — TRIAL — RIGHT TO
OPEN AND CLOSE — INSTRUCTIONS.**

1. The general creditors of an insolvent mercantile firm having filed against it an equitable petition under the insolvent traders' act, by virtue of which a receiver was appointed, and the assets of the firm converted into cash; and a mortgage creditor of the firm having filed an intervention, praying the equitable foreclosure of the mortgage, and its satisfaction out of the fund in the receiver's hands; after which, by an amendment to the original petition, this mortgage was attacked as being fraudulent and void,—in the trial of the issue thus made, as to the validity of the mortgage, there was no error in allowing the original parties plaintiff to open and conclude.

2. While the charges complained of may not have been, in every respect, strictly pertinent and applicable, they contain no error against the intervenor which requires the granting of a new trial. The requests submitted, so far as legal, were substantially covered by the general charge, which was, as to the matter embraced in the requests, fully, as favorable to the intervenor as this party had a right to demand. The evidence, though decidedly conflicting, was fully sufficient to warrant the verdict; and, upon a careful review of the entire case, no reason appears for interfering with the discretion of the trial court in refusing to set it aside.

(Syllabus by the Court.)

Error from superior court, Fulton county;
J. H. Lumpkin, Judge.

Action by the Kangara Valley Tea Company and others against Dawson, Bergstrom & Co., wherein the Fidelity Banking & Trust Company intervened, praying for the foreclosure of a mortgage. From the judgment rendered the banking company bring error, and the tea company also assigned error. Affirmed on the main bill of exceptions, and the cross bill of exceptions dismissed.

W. M. Everett, J. S. Bigby, and Goodwin & Westmoreland, for plaintiff in error. Arnold & Arnold, Glenn & Maddox, Porter King, Glenn, Slaton & Phillips, Rosser & Carter, A. A. Meyer, Bishop & Andrews, Jno. L. Hopkins & Sons, and W. R. Brown, for defendant in error.

LUMPKIN, J. 1. The Kangara Valley Tea Company, and other creditors of the firm of Dawson, Bergstrom & Co., filed a petition under the insolvent traders' act, by virtue of which a receiver was appointed, and the assets of the firm were by him converted into cash. In the original petition it was alleged, in general terms, that the partnership had recently given a mortgage to the Fidelity Banking & Trust Company, but that this mortgage was invalid, because it had been executed by one partner only, over the protest of the others. The banking company voluntarily, by intervention, became a party to the case, and prayed the equitable foreclosure of its mortgage, and payment of the same out of the fund in the receiver's hands. After this had been done the petitioners, by an amendment, specifically attacked this mortgage as being fraudulent and void, setting forth the facts upon which this charge was based. When the case came on for trial, the main issue in controversy was as to the validity of this mortgage. The banking company claimed the right to open and conclude, but the court, over its objection, allowed the original parties plaintiff to do so. There was no error in this action of the court. These plaintiffs were the movants in the litigation from its very beginning, and this fact of itself would ordinarily entitle them to open and conclude. But it further appears that at the trial they assumed the burden of proof, and, as the result shows, carried it successfully. So, on the whole, there can hardly be a doubt that they were entitled to open and conclude. The case of *Boykin v. Eppstein* (decided Oct. 25, 1894) 22 S. E. 218, may be cited as pertinent in this connection.

2. Exception was taken to the following charges of the court: "A debtor may prefer one creditor to another, and, to that end, he may bona fide give a lien, by mortgage or other legal means, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit. If a surplus is reserved for his own benefit, it destroys the validity of the mortgage so given." "If you believe from the evidence that the mortgage in question was executed by A. M. Bergstrom, one of the members of the firm of Dawson, Bergstrom & Co., to the Fidelity Banking & Trust Company, and was intended to delay or defraud creditors, and such intention was known to said banking and trust company, then such mortgage would be void, and it would be your duty to find that it be set aside. If you believe from the evidence that the mortgage in question was executed by A. M. Bergstrom, a member of the firm of Dawson, Bergstrom & Co., and was partly intended to delay or defraud creditors, and partly with the intent to secure a debt, and the Fidelity Banking & Trust Company had knowledge of the intention to defraud creditors, or had grounds for a reasonable suspicion that

such intent existed, said mortgage would be void, and you should find against it, accordingly." "Every conveyance of real or personal property or estate, by writing or otherwise, and every bond, suit, judgment, execution, or contract, of any description, had or made with the intention to delay or defraud creditors, and such intention known to the party taking, is considered in law as fraudulent against creditors, and as to them null and void." "But if you believe from the evidence that the giving of the mortgage and the conveyance of the real estate were parts of the same agreement, and that there was an intention, known to both parties (Bergstrom and the bank officials), to delay or defraud creditors by saving property for Bergstrom from his creditors, the whole transaction would be avoided thereby, as against creditors, and this mortgage, which is now involved, would accordingly be avoided, as a part of the transaction. If this mortgage was executed by A. M. Bergstrom, a member of the firm of Dawson, Bergstrom & Co., to the Fidelity Banking & Trust Company, for the purpose of securing the banking company, as a creditor, and, as a part of the same, an agreement was made by which certain other property was to be conveyed by Bergstrom to the bank, which the bank agreed to hold for said Bergstrom, and save from his creditors, and eventually return to him, in whole or in part, and that there was an intention on the part of Bergstrom to delay or defraud his creditors, of which intention the bank had notice, or grounds for reasonable suspicion, in such event the mortgage would be void as against other creditors, and you would find against it accordingly."

Error was assigned upon these charges, on various grounds. One was that there was no contention on the part of the plaintiffs that any surplus was reserved in the mortgage itself, and there was no issue in the case based on the ground that any such reservation was made in the mortgage. Another was that certain portions of the charges complained of were not authorized by the evidence; and, as to the last above quoted charge, it was insisted that it was erroneous because it excluded from the minds of the jury any view of an alleged original agreement on the part of the firm to secure their indebtedness to the banking company whenever security should be demanded, and because "if transactions which are partly valid and partly fraudulent are clearly severable, if any were fraudulent, a court of equity will separate the two, and give force to that which is valid." There may be some expressions in the charges complained of not strictly applicable, but, when considered with reference to all the facts of the case, they were, in the main, pertinent, and substantially correct. The mortgage itself did not, of course, contain any reservation for the benefit of the mortgagors, and it is true

that the plaintiffs did not so contend. They did contend, however,—and the contention was supported by evidence,—that the mortgage alone did not fully evidence the entire transaction between the insolvent partnership and the banking company, but that there were dealings between these parties with reference to certain real estate, as a result of which the mortgage was given, in which dealings a fraudulent reservation was made for the benefit of one of the mortgagors. Certainly, if all these transactions, including the giving of the mortgage, were only parts and parcels of a general scheme, and one of the purposes of that scheme was to prevent property belonging to Bergstrom from being reached by his creditors, and to eventually return the same to him, the mortgage itself was tainted with fraud, and void as to creditors. A general fraudulent scheme of this kind cannot be separated into parts that are valid and into other parts that are not so. The banking company, among other things, contended that, before any credit was extended by it to the firm of Dawson, Bergstrom & Co., an oral agreement was made by the firm, in which all the members participated, that security by mortgage would be given whenever demanded, and that accordingly, although at the time the mortgage was actually given it may have been done against the protest and over the objection of one of the members, the mortgage would nevertheless be binding upon the firm, because of the above-mentioned original agreement made by the firm as an inducement to the banking company to extend credit in the first instance. The court was requested to charge to this effect, and also to charge generally, without qualification, that one partner may, notwithstanding the protest of another, mortgage the firm's assets, consisting of personal property, to secure a valid, existing debt of the firm. This latter request was, we think, properly refused. It will be readily perceived it cannot be good law, because it might lead to great perplexities and inextricable confusion in the management of a partnership business, and it would oftentimes happen that to carry out such a doctrine would be utterly impracticable. One member of a firm might desire to give a particular creditor a preference, by mortgaging to him the entire personal property of the firm, while another member might have a similar desire as to another creditor, and each, independently of the other's protest or objection, might pursue his own course in the matter. If, under such circumstances, each simultaneously executed a mortgage in the firm name to the creditor he wished to favor, who could say which creditor had the better lien? Nor, in such case, would it do to hold that the two liens were of equal rank, for this would be to defeat the very purpose each member of the firm had in view. The true rule is that the acts of partners binding the other

members of the firm rest on the doctrine of agency, and there is an implied authority from all to each that one may do whatever is legitimately within the scope of the partnership business, and thus bind the firm, when there is no express objection to the contrary. To hold that one partner can execute a mortgage binding the assets of the firm, against the protest of a fellow member, would be to allow the former to deprive the latter of his right to "have joint possession of its effects, to collect and apply its assets, to contract or otherwise bind the firm in matters connected with its business,"—a right which is reserved to each partner alike, under section 1904 of the Code. There was evidence introduced in behalf of the banking company strongly tending to show that there was a previous agreement to give security whenever demanded, made with the consent of all the members of the firm; and in this connection the court instructed the jury, in effect, that if this were so a mortgage subsequently given by one member only of the firm would bind them all, even if one or more of them did actually object or protest against the giving of the mortgage. We have not used the precise language of the judge, but have stated its meaning as the jury must have understood it, taking into consideration all he said in this connection. We are not prepared to say the instructions thus given were sound, but certainly they were as favorable to the banking company as it had any right to demand, and fully covered its request to charge to which reference was first above made. Other assignments of error in the motion for a new trial alleged that the verdict was contrary to certain specified portions of the judge's charge. This is only another way of alleging that the verdict was contrary to law, and does not, therefore, require special comment.

After a careful review of the whole case, we find that the issues involved were fairly submitted to the jury, and that the verdict was fully warranted by the evidence. No reason for interfering with the discretion of the trial judge in refusing to grant a new trial appears. Judgment affirmed. Cross bill of exceptions dismissed.

(95 Ga. 132)

BLOUNT v. BEALL.

(Supreme Court of Georgia. Dec. 21, 1894.)

CONTINUANCE—ABSENCE OF WITNESS—COMPETENCY OF WITNESS—TRIAL—RULINGS ON EVIDENCE—LIMITATION OF ACTIONS.

1. There was no abuse of discretion in refusing a continuance because of the absence of a material female witness who had not been subpoenaed, and whose testimony had not been taken by interrogatories, although witness had, for the purpose of testifying in the case, voluntarily attended the court for several days before the trial, and had promised the defendant's counsel on the day immediately preceding the trial to be in court next morning to testify.

2. Although the plaintiff's daughter resided

with, and was dependent upon, the plaintiff for a support, the daughter was not by reason of these facts so interested in the result of the suit as to be excluded from testifying as a witness under the evidence act of October 29, 1889. Nor was the plaintiff herself, under any provision of that act, incompetent to testify to transactions or communications which did not occur between herself and the intestate of the administrator who was the defendant in the action.

3. Although a witness may have persisted in repeating a statement which the court had ruled was irrelevant and improper, yet, where the trial judge distinctly informed the jury that they must disregard the statement so made by the witness, this court will not overrule the discretion of the trial judge in holding that the impropriety on the part of the witness was sufficiently corrected.

4. Although testimony may have been admitted without objection, it is the privilege of the party against whom such evidence bears to afterwards move to rule it out for irrelevancy, and it is not proper for the court, in refusing to grant such motion, to remark: "Too late. The mill will never grind with the water that has passed." If, however, the testimony in question was, for any reason, relevant, neither the refusal to rule it out, nor the objectionable language by the court, is cause for a new trial.

5. The statute of limitations does not begin to run in favor of a bailee until he denies the bailment, and converts the property to his own use.

6. Hence, where one deposited with another certain personal property as collateral security for the payment of a loan of money, and the loan was paid at maturity, and demand made of the holder of the collateral for its return, and the holder promised, but failed, to make return, and the demand was repeated at intervals for several years, with like promises and failures on the part of the holder, and, after 10 years had elapsed, the holder informed the owner that the property had been lost, but never denying the bailment or setting up any adverse title to the property, the statute of limitations certainly did not, before this acknowledgment by the bailee was made, begin to run in favor of the holder of the collateral.

7. Where, under the facts above recited, the holder of the collateral promised to pay the depositor a certain amount agreed upon between them as the value of the property, which promise was accepted by the latter, it became an account stated, the damages became liquidated, and the statute did not until then begin to run against the depositor.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by M. E. Beall against B. M. Blount, administrator. Plaintiff had judgment and defendant brings error. Affirmed.

The following is the official report:

Mrs. M. E. Beall sued the administrator of L. J. Gartrell on the following account: "General L. J. Gartrell, to Mrs. M. E. Beall, Dr. 1889-90. To one diamond finger ring left with him, lost by him, and for which he agreed to pay the sum of \$500." The declaration was filed on July 13, 1892. Defendant demurred for a want of a cause of action, and the demurrer was overruled. He pleaded, in addition to the general issue, the statute of limitations and set-off. The jury, on May 31, 1894, found for the plaintiff \$500 principal, \$151.66 interest, and costs, and a new trial was denied. To the overruling of the demurrer and of the motion for a new trial defendant excepted.

The plea of the statute of limitations alleges that, if any promises were made by the decedent to pay for the ring sued for, the first promise was made more than four years next before the commencement of the suit, and that no subsequent promise is in writing, either in the party's own handwriting or subscribed by him or some one authorized by him. The plea of set-off alleges that during his life Gen. Gartrell maintained and supported the plaintiff and her daughter, Miss Lula Beall, and gave them a home for and during the term of five years from 1885 to 1891; that he furnished them with board and lodging in his own house, equal in every respect to that enjoyed by his own family, for which trouble and expense neither he nor his administrator has ever been paid or received any compensation, and which accommodations so furnished were reasonably worth \$360 a year; and that plaintiff undertook and promised to pay said reasonable sums.

(1) Defendant moved to continue the case on the ground of the absence of Mrs. E. M. G. Bailey, his counsel stating that she was a very material witness, and that she had been in regular attendance on the court to testify every day for several days before the day of trial, and had promised the counsel, on the afternoon immediately preceding, to be in court next morning to testify. The court inquired whether counsel had made any effort to take her interrogatories, and counsel replied that he had not, as he relied on the witness' willingness and promise to be present. Thereupon the court overruled the motion to continue. It was not stated at that time what was expected to be proved by the witness, because the court ruled that if defendant and his attorney relied upon the promises of an unsubpoenaed witness, not subject to subpoena, to attend and testify, they were only entitled to such performance on her part as she would voluntarily render, and any further showing was thereby prevented. She resided in Fulton county. She was in attendance as a witness on the day the trial commenced, though she had not been subpoenaed, and stated to defendant's attorney that she would return the next morning and testify. She was not absent by the procurement or consent of defendant, but he and his attorney believed she would attend and testify as promised. Defendant expected to prove by her that she was present when Mrs. Beall wanted to borrow some money from Gen. Gartrell, and offered to pledge the diamond ring referred to as collateral security, but he refused to accept it, saying he did not want it as collateral, and he also said it was not worth \$25 anyway. But the ring was pledged as collateral nevertheless. Mrs. Beall insisted upon it being received as collateral, and thereupon it was done. Witness was familiar with the circumstances of Mrs. Beall's husband at the time of their marriage, and he was not a

rich man, but poor, and unable to buy such a fine ring. Defendant's counsel knows, from conversations between himself and this witness, that she would have testified in the manner stated, if she had been sworn as a witness in the case.

(2) Defendant objected to the competency of the plaintiff and her daughter as witnesses, on the ground, as to plaintiff, that the material facts to which she testified were parts of the transactions with the deceased, and, as to the daughter, that she was interested in the suit. It is alleged that the court erred in holding that the daughter was a competent witness under the act of October 29, 1889; in refusing to allow defendant to show by the daughter herself that she was dependent on her mother for support, except as bearing on her credibility, and not for the purpose of excluding her as a witness; and in holding that plaintiff was competent as to any transaction or communication which did not occur between her and deceased, and in allowing her to testify as to the sale of her furniture, and as to the value of her ring, one of the heirs of the deceased having been introduced by defendant, and having testified as to its value.

(3) On direct examination of the plaintiff she testified that the ring "was worth the price he set on it." On defendant's motion this statement was ruled out. On further examination by her counsel, plaintiff made the same statement. The court told her she could not state anything which occurred between her and the deceased. Afterwards, on cross-examination, she again repeated the objectionable statement before she could be checked by the court or counsel. Thereupon the court told the jury that they must disregard the statement just made by the witness. Defendant alleges that he ought to be granted a new trial because of this unfair conduct of plaintiff.

(4) The plaintiff's daughter testified that "her uncle was well off; he left considerable property." This testimony was not objected to when offered. Afterwards defendant's counsel moved to rule it out, on the ground that it was not competent in this action to prove the means of wealth of the deceased. The court held that counsel could not sit by and allow objectionable testimony to come in, and then have it ruled out at a subsequent stage of the case, on an objection known and not taken advantage of at the time. While plaintiff was being examined, her counsel proposed to show by her what was the means or financial condition of her brother, the deceased. Defendant objected that such testimony was incompetent. The court, sustaining the objection, remarked: "There is some evidence on that subject already in, without objection." By defendant's counsel: "Then we move to rule it out." The Court: "Too late. The mill will never grind with the water that has passed." Defendant says it was error to call the jury's attention to what

was in evidence without objection, and to emphasize it by the remark quoted, and to refuse to rule out the incompetent testimony; the effect of the remark and of the ruling being to impress the jury strongly that the objectionable testimony was proper for their consideration. The court also failed to charge the jury to disregard this testimony, though no request so to charge was made. In a note to this ground the court states: "It was competent to show that the brother was of ample means, and the aged widowed sister of no means at all, as bearing on the question of asylum or boarding house."

(5) At the close of plaintiff's evidence, defendant moved for a nonsuit on the ground that, on her showing, her claim was barred by the statute of limitations. The motion was overruled; and the court, in charging the jury, instructed them that the statute of limitations was not in the case. Errors are assigned upon these rulings, and upon the refusal of the court to charge, as requested, in the language of sections 2918, 2931, and 2934 of the Code, and as follows: "Constructive fraud will not prevent the bar of the statute from attaching, but it must appear that the deceased acted corruptly and committed actual fraud or such as involved moral turpitude."

A. H. Davis and King & Anderson, for plaintiff in error. Westmoreland & Austin and Henderson Hallman, for defendant in error.

ATKINSON, J. The facts necessary to an understanding of this case appear in the official report.

1. Motions to continue are addressed to and are generally within the sound legal discretion of the court. The exercise of proper diligence, by suing out the interrogatories of this witness, or by taking her depositions, it appearing that she was a resident of the city of Atlanta, would have secured her testimony, so that it could have been used upon the trial of this case. If, therefore, the defendant had availed himself of the means afforded by the law to procure the testimony desired, it would not have been necessary to have presented this motion to continue. The motion itself does not appear to have been wholly without merit, and this court is not prepared to say what would have been its decision with respect thereto, if called upon as an original proposition to rule thereon. The exercise of this discretion, however, is one of the functions of the trial court, and, inasmuch as this court is not prepared to say from the record that the trial judge committed an error of law in refusing to continue the case, it will not undertake to control his discretion.

2. The plaintiff was the bailor of the property for the value of which she brought this suit. The bailee was dead. Upon the trial the daughter of the bailor was offered as a

witness to prove the bailment, and certain negotiations thereafter between the bailor and bailee looking towards the restitution of the thing bailed. It appeared that the witness lived with her mother, the bailor, and was dependent upon her for a support. Objection was made to the competency of this witness under the act of October 29, 1889, to testify as to any transactions with the deceased party. We do not think this objection was well founded. This witness was no party to the record; was in no sense interested in the result of the litigation. She does not come within either of the classes of persons who by the terms of said acts as witnesses are proscribed. Whatever personal interest she might have felt in the result of her mother's suit, she had no such legal interest in the thing in controversy as disqualified her as a witness.

3. The duty of administering the proper correctives to contumacious, refractory, and loquacious witnesses devolves upon the judges of the trial courts. These courts can best judge what is the proper corrective to apply in a given case. This court will not undertake to control or give direction to the trial courts, unless, in the exercise of their discretion with respect thereto, manifest injustice had been done to the party complaining.

4. During the progress of the case a witness testified that her uncle, the defendant's intestate, was well off, and that he left considerable property. This testimony was not objected to at the time, but the defendant afterwards moved to rule it out on the ground that it was not competent to prove the means or wealth of the deceased. The court ruled that this could not be done, inasmuch as the testimony had come in without objection. While the plaintiff was being examined, her counsel proposed to show by her what the means or financial condition of the deceased was, and the defendant objected upon the ground that such testimony was incompetent, whereupon the court admitting it remarked that there was some evidence in on that subject already without objection. Defendant's counsel then moved to rule it out, and the court remarked: "Too late. The mill will never grind with the water that has passed." A motion to rule out testimony illegally admitted, even without objection, is never too late until the cause is finally submitted to the jury. If testimony is illegal, it should not be considered by the jury, and, if it is not to be considered by the jury, it should not be admitted for their consideration. The admission of illegal testimony at the instance of one party does not justify the admission of illegal testimony at the instance of the other. The law recognizes no such thing as an equation of errors, and the true remedy is, when an error is committed, to correct that by doing what is right, and not seek to excuse it by the commission of another error. The motion of the defendant was in time, and,

while we do not approve the language of the trial judge in refusing to rule it out or the reason assigned by him for this refusal, we think he committed no error of law. We think the testimony was relevant. It was contended by the defendant that for many years this plaintiff and her daughter had been to a great extent dependent upon the bounty of the deceased for their livelihood; that he furnished them with board and lodging equal in every respect to that of his own family, and for this the defendant—the deceased's administrator—claimed a set-off, alleging that such support of the mother and her daughter was reasonably worth \$360. The deceased was a gentleman of high character, prosperous, and successful in his chosen profession, and this evidence was admissible to show, at least inferentially, to the jury that it was not probable that a man of his wealth and respectable connections would compel his sister and her dependent daughter to pay him for their support. It was such a circumstance as they were entitled to have submitted to the jury, its weight to be determined by them; and we think the court committed no error, either in admitting the testimony in the first instance or in the second, in declining to rule it out.

5. We will now consider the plea of the statute of limitations, and therewith a motion for a nonsuit, made by the defendant at the conclusion of the plaintiff's case, the motion being based upon the ground that it appeared that the plaintiff's cause of action was barred by that statute. It appears that, in the year 1879, the plaintiff borrowed from the defendant's intestate the sum of \$100, and delivered in pledge to the latter the ring for the value of which she brought this suit. That in December, 1879, she repaid the money borrowed, and demanded the restitution of the ring pledged. That the deceased did not deliver to her the ring, alleging as a reason that he had left it at his office, and, when she applied there for it afterwards, deceased stated that he had mislaid the ring, but would find it and restore it. Then she made repeated demands for the restitution of the ring, and was always met by the statement of her brother that, as soon as he could find it, he would restore it to her. That these occasional demands and promises of restitution were continued from time to time until 1890, when the deceased informed the plaintiff that it would be impossible for him to make restitution of the ring; that he had sought diligently for it, and had been unable to find it; but that he would pay her \$500 therefor. It was insisted by the defendant's counsel that the first demand and failure to restore the property was such a refusal to make restitution as amounted to a conversion of the property, and that the right to recover the value of the property delivered in pledge was therefore barred by the statute of limitations, and that, inasmuch as the plaintiff's cause of action was

so barred, the express promise to pay could amount to nothing more than an oral promise to pay a debt which was barred by the statute of limitations. We do not think this contention is well founded. We do not think that the pledgor was bound to treat a mere failure to deliver upon demand as a conversion of the property pledged. She might have done so, or she might have relied upon the repeated promises of the bailee to make restitution,—he at no time claiming any interest in the thing bailed,—and thus a continuing bailment existed up to the time of an actual adverse holding or claim by the deceased. It has been adjudged by respectable authority that the statute of limitations does not run in favor of a bailee until he sets up an adverse claim in respect of the bailment. See *Marr v. Kubel*, 4 Mackey, 577; *Reizenstein v. Marquardt* (Iowa) 1 L. R. A. 318 (39 N. W. 506), and cases cited in the note thereto. The evidence showed that there was never an adverse claim set up by this bailee until 1890, and then he set up no claim adverse to the right of the plaintiff, but, admitting his liability, promised to pay her the sum of \$500, presumably as liquidated damages for the failure to restore it. Immediately upon his refusal to deliver the property, or upon his final admission of inability to make restitution, she would have been entitled to bring an action as for conversion. There was a bona fide subsisting obligation upon his part to pay to her the value of the thing bailed, and that obligation was the consideration of the promise sued upon in this case. This suit was brought within the period limited by law,—within four years from the date the promise was made. Therefore it was within the statute. The court properly overruled the motion to nonsuit. Upon a careful review of the testimony in the case, we are fully persuaded that the plaintiff proved her cause of action and established her right to recover. The verdict of the jury is in accord with the evidence, and the court did not err in refusing to grant a new trial. Judgment affirmed.

(95 Ga. 178)

BROOKS v. MUTUAL LOAN & BANKING CO.

(Supreme Court of Georgia. Dec. 8, 1894.)

CONSTITUTIONAL LAW—REGULATING JURISDICTION OF JUSTICES OF THE PEACE.

The act of November 11, 1889, "to fix the venue of justice courts in cities of this state having a population of over 15,000 and to locate the times and places of holding said courts" (Acts 1889, p. 116), which was amended by the act of December 20, 1893, so as to be applicable to cities having a population of over 5,000 (Acts 1893, p. 55), does not, by providing that justices of the peace and notaries public who are ex officio justices of the peace "may hold their courts at the same or different time or at the same or different place, as they may desire," violate either the constitutional requirement that justices of the peace "shall sit monthly at fixed times and

places" (Code, § 5153), or that clause of the constitution providing for uniformity in the "jurisdiction, powers, proceedings and practice of all courts or officers invested with judicial powers (except city courts), of the same grade or class" (Code, § 5156).

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action for an injunction by Hiram Brooks against the Mutual Loan & Banking Company. Defendant had judgment, and plaintiff brings error. Affirmed.

Henderson Hallman, for plaintiff in error. Simmons & Corrigan, for defendant in error.

SIMMONS, C. J. An injunction was sought against the enforcement of certain judgments rendered by the notary public and ex officio justice of the peace of the 1234th district G. M., the ground of the petition being that the judgments were void because rendered at a time and place different from the time and place of holding court of the justice of the peace of the district. The court refused to grant an injunction, and the petitioner excepted. It appears that the notary did hold his court, as alleged, at a different time and place from the time and place of holding the court of the justice of the peace, but it also appears that he held it at a fixed time monthly, and that these judgments were rendered at the usual time of holding court for his February term, and at a place in the district fixed as the place of holding his court by an order of the ordinary allowing a removal thereto, and that the removal was duly advertised. The 1234th district being in the city of Atlanta, the case falls within the provisions of the act of November 11, 1889, "to fix the venue of justice courts in cities of this state having a population of over 15,000, and to locate the times and places of holding said courts" (subsequently amended so as to be applicable to cities having a population of over 5,000), in which act it is provided that the justice of the peace and notary public and ex officio justice of the peace of each district embraced in whole or in part within the corporate limits of such cities "may hold their courts at the same or different time, or at the same or different place, as they may desire." Acts 1889, p. 116; Acts 1893, p. 55. It was contended, however, that under the constitution of 1877 there can be but one justice court in each district, so far as time and place are concerned, and that the provision above quoted is therefore unconstitutional. Looking to the provisions of the constitution which bear upon this subject, we find that after declaring that "there shall be in each militia district one justice of the peace," it provides that "justices of the peace * * * shall sit monthly at fixed times and places." Code, § 5153. It then provides for the appointment of "commissioned notaries public, not to exceed one for each militia district," who "shall be ex officio justices of the

peace." Id. § 5155. It does not say, nor do we think the framers of the constitution intend to require, that the notary public and ex officio justice of the peace and the justice of the peace of the district shall sit at the same time and place. The evil sought to be remedied by the clause of the constitution embodied in section 5153 of the Code, supra, was the practice existing under the constitution of 1868 of holding court continuously, or at any time the magistrate might see fit to do so, and the want of any regular terms to which cases might be made returnable, and at which parties might expect trials. Counsel for the plaintiff in error relied upon the case of Tarpley v. Corputt, 65 Ga. 257, in which it was said that "It seems to have been the intention of the framers of the constitution to restore the old order of things, and to have but one justice court in each district, so far as time and place are concerned." That case, however, was decided prior to the adoption of the statute now under consideration, and the court was not then passing upon the constitutionality of an act of the legislature. It seems that the court was not without doubt on the subject, and the decision was based mainly upon a ground which had no bearing upon this question. The rule is well settled that an act of the legislature will not be set aside in a doubtful case. To authorize the court to set aside a statute as repugnant to the constitution, the conflict must be plain and palpable. It is clear, therefore, that in passing upon the constitutionality of this act we are not bound by what was said in the case here referred to. The court in that case did not say, nor was it contended in the present case, that the framers of the constitution intended to return to the old order of things so far as to require that both magistrates should try cases together. The decision treats them as one court "so far as time and place are concerned," but does not go further than that. If they are not required to hear and decide cases together, we do not see what reason there could be for requiring them to sit at the same time and place. So far from accomplishing any good purpose, a requirement that they should sit at the same time and place would necessarily occasion great delay in transacting the business of these courts, especially in cities where a large number of cases are brought before them each month. The more speedy trial of cases was no doubt the main purpose the framers of the constitution had in view in providing for more than one of these magistrates in each district, and it was therefore proper and necessary that they should be permitted to hold their courts at separate times and places. There is no merit in the contention that the act in question is repugnant to that clause of the constitution which provides for uniformity in the "jurisdiction, powers, proceedings, and practice of all courts or officers invested with judicial powers (except city courts), of

the same grade or class." Code, § 5156. That clause does not relate to the time and place of holding courts. See *Bone v. State*, 86 Ga. 115, 116, 12 S. E. 205. Judgment affirmed.

(94 Ga. 766)

DEMPSEY v. STATE.

(Supreme Court of Georgia. Oct. 8, 1894.)

SALE OF INCUMBERED PROPERTY—CONSTITUTIONAL LAW—TITLE OF ACT—VENUE IN CRIMINAL CASES—VARIANCE.

1. No disposition of personal property held under a conditional purchase is a punishable offense under the act of September 28, 1883, except by selling or incumbering the property, the title of the act not being sufficiently comprehensive to embrace any other mode of disposition.

2. As the constitution requires the trial of all criminal cases to be in the county where the crime was committed, the provision in the act above referred to which subjects the offender to be tried in the county of his residence is unconstitutional as applied to cases in which it affirmatively appears that the offense was committed in some other county. But in other cases, as the fact of residence in a particular county would warrant the inference, nothing to the contrary appearing, that any act done by the accused was done in that county, there is no necessary conflict with the constitution.

3. Where the vendor expressly gives the conditional vendee permission to sell the property on condition that the proceeds shall be paid to him, failure to comply with the condition will not render criminal a sale of the property under such permission.

4. An indictment charging the accused with fraudulently selling "one bay horse" is not supported by evidence that the property sold was a "Texas pony," without any evidence whatever touching the color or sex of the animal. But where, from the prisoner's statement, together with the evidence for the state, it can fairly be inferred that the Texas pony was a bay horse, there could be a conviction, so far as this element of the case is concerned.

(Syllabus by the Court.)

Error from superior court, Catoosa county; T. W. Milner, Judge.

W. L. Dempsey was convicted of selling incumbered personal property, and brings error. Reversed.

W. E. Mann and R. J. & J. McCamy, for plaintiff in error. A. W. Flite, Sol. Gen., for defendant in error.

LUMPKIN, J. 1. On September 28, 1883, the general assembly passed an act "to make penal the selling or encumbering personal property held under a conditional purchase, and to provide a penalty for the same." In the first section of that act it is declared that "no person holding personal property under a conditional purchase and sale, where, by the terms of said purchase, the title to said property is retained by the vendor, until paid for, shall be permitted to sell, dispose of or encumber said property with the view or intent to defraud or defeat said vendor's rights, or where such selling, disposing of or encumbering of said property tends to the injury of said vendor, unless the same be done by the consent or

approval of said vendor." The next section of the act makes penal a violation of the provisions of the first section, and provides for the punishment of the same. See Acts 1882-83, pp. 111, 112. A casual inspection will be sufficient to show that the title of the act is not sufficiently broad or comprehensive to include any disposition of personal property held under a conditional purchase, except selling or incumbering the same. Consequently, so much of the body of the act as makes criminal any other disposition of personal property so held is in plain violation of that provision of the constitution which declares that no law shall pass which "contains matter different from what is expressed in the title thereof." Code, § 5067. Therefore it was error to charge: "If you believe from the evidence that the defendant sold or disposed of the horse without the consent of the vendor, or if the selling or disposing of the horse tended to the injury of the said vendor, then the defendant would be guilty, unless the same be done by the consent or approval of the vendor;" the error consisting in the use of the words italicized. In the present case the evidence failed entirely to show either a sale or an incumbrance of the property in question. Only by reason of the above erroneous charge were the jury authorized to find the accused guilty. Therefore the conviction cannot be sustained, and a new trial is ordered.

2. The fourth section of the act confers upon the superior and county courts of the county where the offender resides jurisdiction to try cases arising under it. But, as the constitution distinctly provides that all criminal cases shall be tried in the county where the crime was committed, except in cases of a change of venue (Code, § 5172), it is manifest that the act in question, as applied to cases in which it affirmatively appears that the offense was committed in some county other than that of the residence of the accused, is unconstitutional. In cases where this fact does not appear, the act is not necessarily violative of that paragraph of the constitution embodied in the section of the Code last cited. If the offense is committed in the county where the accused does reside, there is no constitutional difficulty in applying the act. Therefore, if it is shown that the accused resides in a particular county, and did an act which, by the provisions of this law, was penal, and nothing more appears, the inference that the offense was committed in the county of his residence would be warranted. We do not mean to hold generally that proof of the corpus delicti, and residence of the accused in a given county, would be sufficient to show that the crime was committed in that county; but we are of the opinion that, under the terms of the act now under consideration, it was the intention of the legislature to raise a presumption, in the absence of evidence to

the contrary, that a sale or incumbrance forbidden by the act was made in the county where the accused resided, and put upon him the burden of showing the contrary. It might often happen that the state would be able to prove that the accused was no longer in possession of the property, and, by supplementing this fact with other competent evidence, satisfactorily establish the conclusion that an unlawful sale had been made, without being able to show precisely where the sale actually took place. On the other hand, it would never be very difficult for the accused to escape conviction in the county of his residence by showing that he parted with the possession of the property in another county; and in so doing it would by no means be necessary for him to concede the criminality of the act. It is quite probable that some such consideration as this influenced the legislative mind in making the above-mentioned provision as to the jurisdiction. Within the limits we have indicated, we think the act constitutional, and capable of enforcement; and to this extent the will of the legislature should be given effect.

3. In order to render penal the sale or incumbrance by the vendee of property held by him under a conditional purchase, such sale or incumbrance must be made without the consent or approval of the vendor. If the latter gives to the former a conditional permission to sell or incumber the property, a sale or incumbrance made by virtue of this permission would not be criminal, even though the condition attached to such permission should be violated, or not complied with. There must be an absence of all permission. Criminal laws must be strictly construed, and we are therefore constrained to hold that even a conditional assent on the part of the vendor—it being at least some permission—will prevent the sale from being rendered criminal by a noncompliance with the condition upon which such assent was granted. A subsequent violation of the condition is only a breach of contract, and will not relate back so as to make the original qualified permission an absolute nullity.

4. The fourth headnote needs no elaboration. Judgment reversed.

(40 W. Va. 246)

MAYER v. FROBE et al.

(Supreme Court of Appeals of West Virginia.
March 27, 1895.)

**INTOXICATING LIQUORS—CIVIL ACTION FOR
WRONGFUL SALE—DAMAGES.**

1. The common-law definition of the term "exemplary damages" is damages inflicted by way of punishment upon a wrongdoer as a warning to him and others to prevent a repetition or commission of similar wrongs.

2. The term "exemplary damages," in section 20, c. 29, Acts 1887, is used according to its common-law definition, and cannot be otherwise construed without extrajudicial interference with a plain legislative enactment.

3. The first and second syllabi of *Pegram v. Stortz*, 6 S. E. 485, 31 W. Va. 220, and the first syllabus of *Beck v. Thompson*, 7 S. E. 447, 31 W. Va. 459, in so far as they hold that exemplary damages, in a proper case, cannot be inflicted by way of punishment in a civil suit upon a wrongdoer, are hereby disapproved and overruled.

4. In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by Nancy C. Mayer against George A. Frobe and Louis P. Frobe, partners. Plaintiff had judgment, and Louis P. Frobe, as surviving partner, brings error. Affirmed.

B. B. Dovener, for plaintiff in error. W. W. Arnett and Erskine & Allison, for defendant in error.

DENT, J. Nancy C. Mayer, plaintiff, on the 23d day of May, 1893, instituted her suit in the circuit court of Ohio county against George A. Frobe & Son to recover damages for the unlawful sales of intoxicating liquors to her husband, Carl Mayer, by which she was injured in her means of support, which resulted in a judgment for \$750, upon a verdict of a jury. From this judgment the surviving defendant obtained a writ of error, and relies on the following assignment: "First. The court erred in overruling defendant's demurrer to plaintiff's declaration. Second. The court erred in refusing to set aside the verdict of the jury, and to grant a new trial. (See defendant's bill of exceptions No. 1.) Third. The court erred in giving, at the request of the plaintiff, her instructions numbered, respectively, No. 1 and 2, as set out in defendant's bill of exceptions No. 2. Fourth. The court erred in refusing to give, at the request of the defendant, his instructions numbered 1 and 2, as set out in defendant's bill of exceptions No. 3. Fifth. The court erred in refusing to give, as requested, instructions to the jury, for defendant, numbered, respectively, Nos. 3 and 4, and in giving modifications of same, as set out in defendant's bill of exceptions No. 4. Sixth. The court erred in allowing and permitting testimony, as well as refusing to permit certain testimony, to be given to, heard, and considered by the jury, as shown and set out in defendant's bills of exceptions numbered 1, 5, 6, 7, 8, and 9, respectively. And for other reasons apparent on the face of the record."

The first assignment appears to be waived in the argument, and, as there is no essential omission or defect of form in the declaration, the demurrer thereto was properly overruled. Nine bills of exception appear in the record, while the orders of the court only refer to and note the filing of one. It is a stare decisis rule of this court that a bill of

exceptions copied into the record, when there is no order filing the same, is not a true part of the record, and will not be considered. *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, and authorities there cited. Hence eight of these bills of exceptions must be disregarded, while the first, and the only one which can be presumed to be a part of the record, is defective, in that the evidence is not incorporated in it. *Elliott*, App. Proc. § 821, 822. As to the eight extra bills of exception, it is sufficient to say that all the matters therein contained, or questions thereby raised, which are not purely technical and trivial, are included in the motion for a new trial; and in determining this the law must settle all or any of the questions raised as to any prejudicial ruling of the circuit court in so far as the defendant is concerned, and for this reason the failure to have his bills of exceptions properly made a part of the record will not prevent a fair determination of the case, the defects in the bill filed being overlooked, that the important questions of law raised thereby may be judicially determined and settled. Among the defects pointed out and not here passed upon is the failure to designate specifically the grounds relied on in the motion for a new trial. *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 610, 16 S. E. 819; *Elliott*, App. Proc. §§ 827-895, inclusive. Proceeding with the examination of the merits of this case, at the very threshold of its investigation, the question presents itself for determination whether this court, as to the matter of exemplary damages, will be controlled by the case of *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, followed by *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, or will be governed by the law as settled beyond controversy by the great bulk of English and American authorities, including the supreme court of the United States. In the eighth edition of *Sedgwick on Damages*, revised and issued since the case of *Pegram v. Stortz*, the law is stated as follows, to wit: "In actions of tort, when gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him up as an example to the community." 1 *Sedg. Dam.* (8th Ed.) § 347. "Considered as strictly punitive, the damages are for the punishment of the private tort, not for the public crime." *Id.* § 353. "Upon the whole, the doctrine is to be supported (except in those few jurisdictions which have repudiated it) mainly on the grounds of authority and convenience." *Id.* § 354. The true doctrine on this subject, succinctly stated, and which should be generally received and strictly adhered to, is contained in the opinion of Justice Gray in the case of *Railway Co. v. Prentice*, decided Jan. 3, 1893, and reported in 147 U. S. 101, 13 Sup. Ct. 261: "In this court the doctrine is well settled that in

actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." *The Amiable Nancy*, 3 Wheat. 546, 558, 559; *Day v. Woodworth*, 13 How. 363, 371; *Railroad Co. v. Quigley*, 21 How. 202, 213, 214; *Railway Co. v. Ames*, 91 U. S. 489, 493, 495; *Railway Co. v. Humes*, 115 U. S. 512, 521, 6 Sup. Ct. 110; *Barry v. Edmunds*, 116 U. S. 550, 562, 563, 6 Sup. Ct. 501; *Railway v. Harris*, 122 U. S. 597, 609, 610, 7 Sup. Ct. 1286; *Railway Co. v. Beckwith*, 129 U. S. 26, 36, 9 Sup. Ct. 207. "Exemplary or punitive damages being awarded not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others." In the well-considered case of *Pegram v. Stortz* the supreme court of this state, instead of following the hard-beaten path as clearly indicated by the decided weight of authority reaching beyond the memory of man into an unsearchable antiquity, and seeking to discover the underlying reason therefor, because the law appeared to their minds illogical, heroically assumed the responsibility, and endeavored to dam up the vast, increasing stream of judicial opinion, and turn into a new and untried channel. But this attempt, however meritorious, has utterly failed of its purpose beyond our own borders, and within it has only served to produce perplexity and confusion, without any benefit, public or private, except to protect lawbreakers and wrongdoers from the just consequences of their illegal and wrongful acts.

Judge Green, in his lengthy opinion, concurred in by his associates, in line with the arguments of other dissenters from the established doctrine, relies on three principal objections to show that the doctrine of exemplary or punitive damages as received and acted on by the vast majority of judicial tribunals of last resort was opposed to reason, and therefore illogical and unjustifiable: (1) That the form of the writ, excluding the very idea of punishment, does not justify or permit the recovery of any damages other than compensatory; (2) that to allow the assessment of punitive damages in a civil suit is unconstitutional, in that it permits a defendant to be punished twice for the same offense; (3) that it is unjust to inflict a pecuniary punishment on a defendant, and donate it to the plaintiff instead of the state; there being no good reason, as he maintains, in allowing the plaintiff anything beyond a just compensation for injuries sustained, including mental anguish.

The first objection is technical, trivial, and wholly untenable; for the writ covers, and

the plaintiff sues for, all such damages as the law may award. Be they compensatory or punitive or both, they are his legal damages. Blackstone defines "damages" to be "a compensation and satisfaction for an injury sustained." 2 Bl. Comm. 438. A very ancient rule permitted a plaintiff to fix the amount of damages that would satisfy him for the wrong done. 1 Sedg. Dam. § 23. In almost all actions for a willful or wanton wrong to person, property, or reputation it is more a question of satisfaction than of compensation that is sought; and satisfaction consists in visiting on the tortfeasor a punishment fully adequate to the personal injury inflicted by him, vindictive in its nature, and without regard to compensation. The man whose reputation has been vilified, whose child has been seduced from the paths of virtue by a scheming libertine, and his home and happiness wrecked, or who has endured public contumely, gross insult, or unprovoked abuse, appeals not to the law for compensation for his blighted reputation, his wrecked home, or his dishonored life, for that the law can never give, but he demands that the slanderer, the abuser, the villifier, and the seducer shall be punished in proportion to his wanton, wicked, or malicious conduct. In actions *ex contractu*, or mere thoughtless trespass, or of mistaken legal right, compensation is sought; but in actions of malicious wrong it is the satisfaction of punishment that is demanded. And the jurist, however able, who sees in a money compensation a balm for every wrong, however heinous, suffered, and who would limit the relief sought in such cases to the mere mercenary consideration of dollars and cents as a compensation, but adds to the injury already endured. The establishment of such a rule as law will drive many an honorable and sensitive man out of the courts of justice, to become the vindicator of his own honor, and the avenger of his own wrong.

The second objection is equally untenable. There is no constitutional inhibition against a pecuniary punishment twice for the same offense, but the provision of the constitution is that "no person shall be put in jeopardy of life or liberty twice for the same offense." Judge Green, in construing this provision in the case of *Fountain v. Town of Moundsville*, 27 W. Va. 192, says: "Under our constitution it is clear that any one accused of a felony or misdemeanor or of a statutory crime which may be punished by imprisonment is entitled to the protection of this provision; and it is equally clear that no one accused of a statutory crime, the only punishment of which is a pecuniary fine, can claim the benefit of this provision; and therefore, as this crime is not punished by imprisonment, the same offense may, if the legislature authorize it, be punished by imprisonment as well as by fine, when committed in a municipal corporation." And the court proceeds to hold that the same overt act may be punished twice, once as an

offense against municipal ordinance, and once as a statutory crime, so long as life and liberty are not twice put in jeopardy. The same reasoning is of equal force and just as applicable in punishment in a civil action for a private injury. In such case the wrongdoer is neither tried, convicted, nor punished for a crime against the public. Sometimes the law may hold the wrongdoer's act to be a crime, and inflict on him a penalty or fine in addition to the civil punishment; but this is for the offense committed by him against the public, and not for the private injury inflicted. But oftentimes a punishment is imposed in a civil proceeding for an act which is not punished or punishable as a crime. It is, however, certainly true beyond dispute that the legislature is alone clothed with the power to determine in either case in what manner and to what extent the malefactor shall be punished, and at the same time to authorize both civil and criminal punishment where life and liberty are not involved. In the case of *Railway Co. v. Humes*, 115 U. S. 523, 6 Sup. Ct. 110, the supreme court of the United States, by Justice Field, says: "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced,—whether at the suit of a private party or at the suit of the public,—and what disposition shall be made of the amounts collected, are merely matters of legislative discretion." Admitting that the legislature has provided two ways of punishing an offender for the same offense, and in doing so it has exceeded its constitutional authority, yet, until the offender has been punished in one form, he cannot plead it in bar of a proceeding in the other, for the object of the law is to punish the offender at least once, and not allow him to escape because he may be threatened with a double punishment. However this may be, it is plain that a wrongdoer may be punished in a civil action for the private injury inflicted by him, according to the willfulness of his act, to prevent a repetition of such wrongful acts on the part of himself and others; and such punishment is no bar to the infliction of a criminal punishment for the same act if it be a crime. Nor would this be a double punishment for the same offense, as in one case it would be punishment for an oppressive private wrong, and in the other for a wicked public crime. In the one case he is adjudged a criminal; in the other a wrongdoer. In the one case he is assessed with damages as a warning, and to prevent a repetition of wrongful conduct; in the other a penalty is imposed upon him for a crime committed.

The third and last objection is the most serious, but even it deserves not to be denounced as anomalous or illogical. The opponents of the doctrine of punitive damages, with a feeling of impregnability in the logic of their position, ask the question, why

should the plaintiff, after having received a complete and adequate compensation for the injury received, be awarded a further sum as a mere punishment to the defendant? 1 Sedg. Dam. p. 517, answers this question as follows: "Many anomalies which have far less authority behind them must be supported on this ground, and no anomaly supported by both authority and convenience can be eradicated simply by showing it to be illogical. The idea that it is unjust rests upon the assumption that there is something unfair in allowing the plaintiff's damages to be enhanced on account of the defendant's intent; but it is to be said in reply to this that, although the intent cannot make a wrongful act more wrongful, it may make the consequences of it much more serious, and of the extent of these consequences the jury is the judge, and the only possible judge." The supreme court of the United States answers the same question as follows: "The plaintiff is entitled to exemplary damages, calculated to vindicate his right, and protect him against future invasions." *Barry v. Edmunds*, 116 U. S. 562, 6 Sup. Ct. 501. Also: "If, in such cases where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount, or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer, instead of the state, receives them. That is a matter on which the company has nothing to say." *Railway Co. v. Humes*, cited above. The law punishes the wrongdoer by a forfeiture of his property in the shape of damages measured by his evil intent. That it bestows these damages on the plaintiff is not a matter of which the defendant can complain, although it may enhance the bitterness of his punishment.

But there is still, in my humble opinion,—in which the court does not unite,—a more valid, ancient, and sacred reason for the assessment of exemplary damages than those usually given, having for its object the suppression or prevention of all wrong, and the extermination of the desire or motive to commit wrong; and this is that the common law is not agnostical, atheistical, nor even delictal, but is unswervingly theistical. As its crowning glory and chief excellence, with faith immovable it believes in the God of Moses, "who, watching over Israel, slumbers not, nor sleeps." Whatever atheistical or agnostical tendencies may have prevailed from time to time, no act repealing or abrogating, or even derogatory or repugnant to, this fundamental principle of the common law has ever been knowingly enacted by the legislatures of this or the state of Virginia. The great English commentator on the common law, known and honored by all jurists,

speaking of the weakness of human reason corrupted by passion and prejudiced and impaired by disease and intemperance, says: "This has given manifold occasions for the benign interposition of Divine Providence, which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased at sundry times and in divers manners to discover and enforce its laws by an immediate and direct revelation. The doctrines thus discovered we call the 'revealed' or 'divine' law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason in its present corrupted state, since we find that until they were revealed they were hid from the wisdom of ages. As, then, the moral precepts of this law are, indeed, of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet, undoubtedly, the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and unenominated the 'natural' law, because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as of the former, both would have an equal authority, but till then they can never be put in competition." 1 Bl. Comm. 42. The faithful servant of God, whose equal, save One, has never appeared in human form, in transmitting from the infinite to the finite that perfect code of laws known as the "Ten Commandments," which challenges the admiration and obedience of all mankind as the sure foundation of peace, prosperity, and happiness, also at the same time, as from the same divine source, delivered, with a tongue that forbade the utterance of any untruth, the following, among other, judgments for the government of his people: (1) "If a man shall dig a pit, and not cover it, and an ox or an ass shall fall therein, the owner of the pit shall make it good." (2) "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn, he shall pay double unto his neighbor." (3) "If a man shall steal an ox or a sheep, or kill it, or sell it, he shall restore five oxen for an ox and four sheep for a sheep." Exodus, c. 22. In these judgments the principle of punitive damages assessed in proportion to the evil intent of the wrongdoer is declared established, and enforced for the benefit of the injured party, and, in addition thereto, the offender had to make atonement

for his sin or crime by suitable sacrifices. It being my firm conviction, derived from the wisest expounders thereof, that the early founders of the common law were true believers in the Bible as a revelation from God, and from which they acquired its most solid and enduring principles, I have referred to the foregoing judgments without any intention of binding my associates to the same opinion. Nor do I consider it a mere arbitrary rule prescribed by supreme authority, but it is founded on wisdom and justice, for the purpose of preventing, rather than punishing, wrong. It is universally recognized as an unequivocal truth that the greatest source of evil among men is a selfish disregard of the rights of others, the existence of which argumentatively makes civil government absolutely necessary for man's felicity. To overcome and destroy this selfishness by rewards and punishments after the manner or measure of Biblical justice, when properly enforced, this rule has proven itself invaluable. Its effect is fourfold in its operation. As to the wrongdoer, it is a double-edged sword: (1) It requires him to make full reparation. (2) It punishes him in proportion to the maliciousness of his conduct. As to the sufferer: (1) Acting as his protector, it fully compensates him for his loss. (2) As his avenger, it rewards him, in proportion to the wicked spirit of his adversary, for the obedient submission of his cause to its arbitrament. And, when strictly enforced, it stands as a continual and ever-present menace to evildoers. In law, as well as in physics, an ounce of prevention is worth a pound of cure. When an evil-disposed person is forewarned that the effect of his wrongful act will in no wise injure the object of his malice, but will increase his neighbor's estate, and enhance his neighbor's prosperity, at an expense to and loss of his own, in proportion to his oppressive and unlawful conduct, he will not only hesitate, but be deterred from doing a wrong injurious to himself alone, and beneficial to the sufferer from his ill will or evil conduct. His motive for evil is thus destroyed. The question may be suggested, where did the early Saxon founders of the common law obtain their knowledge of this rule? Long before the most ancient records of Saxon origin, the tribes of Israel, by reason of their disobedience in fulfillment of the farewell prophecies of their great lawgiver, had been scattered "among all people, from the one end of the earth even unto the other," carrying with them the laws, precepts, and practices of their fathers, which they were commanded "to teach diligently unto their children." However this may be, truth is not a matter of locality. Wherever and whenever the human intellect, as the image of its maker, is uncorrupted by vice and immorality, uncontaminated by disease and intemperance, and unbiased by passion and prejudice, it perceives and seizes upon

truth with an instinctive affection as a priceless possession bestowed by an all-wise creator, and herein consists the "excellency of the common law, which is said to be the perfection of human reason," and our system of trials by jury, having its foundation on the innate love of right and justice implanted in the breast of all men by infinite wisdom. An illustration of this is to be found in certain present provisions of our statutory law, which bear a marked resemblance to the ancient judgments cited above, and which it would be hardly safe to predicate on legislative imitation of the book of Exodus. Section 25, c. 41, of the Code, provides that an officer who sells the exempt property of a debtor shall forfeit and pay to him double the value thereof. Section 3, c. 60, provides that for a simple trespass by any animal the owner shall pay compensatory damages; for a willful trespass, double; and, if allowed to continue, the trespassing animal is forfeited. Chapter 92 of the Code provides that, where simple waste is committed, damages, as a compensation, shall be awarded; but, where the waste is willful or wanton, three times the damages sustained may be awarded. In these cases, and many others similar, punitive damages are awarded because of the willful, wanton, or unlawful conduct of the wrongdoer. In the case of *Railway Co. v. Humes*, before cited, the court says: "The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing with the least inconvenience the commission of such injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages." There can, therefore, be no other conclusion than that exemplary, punitive, or vindictive damages are sustained by authority, Biblical and human, and justified by reason and experience as the most efficient means that can be devised under divine sanction to prevent the commission of private injuries, and most effectually and completely punish the wrongdoer for the willful and unlawful invasion of his neighbor's rights, and preserve with the least inconvenience and expense the peace and good order of society. The opposite doctrine, as maintained in the case of *Pegram v. Stortz*, directly contravenes this conclusion, and therefore does not propound the law. Hence the duty, unpleasant though it be, devolves upon us of disapproving and correcting the palpable error into which the

court was then led, and of returning to the beaten path of the "wisdom of ages," from which there should be no future departure.

In the case of *Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, the court followed the decision in the case of *Pegram v. Stortz*, and yet with no such disastrous consequences; for while it was held that exemplary damages could not be recovered as a punishment to the defendant, yet they were allowed as a compensation for the mental anguish, shame, and dishonor suffered by the injured party. Sedgwick says (volume 1, § 354): "It should be observed, in conclusion, that even in jurisdictions which discountenance the doctrine [of punitive damages] juries are allowed to give, under the title of 'damages to feelings,' verdicts quite as substantial as any which could be recovered under the head of 'exemplary damages.' Hence it is not open to the opponents of exemplary damages to contend that the practical results of the application of the rule work any injustice, or that the rule bears more heavily upon the wrongdoer than the substitute of which they are advocates. In either case it is the jury, and not the court, which practically decides how much the plaintiff may recover." So in such cases it becomes simply a distinction without a difference. The jury, being unable to measure mental anguish, shame, and dishonor in dollars and cents, ascertains and fixes the damages at a sufficient sum, measured by the maliciousness of the wrong, to adequately punish the wrongdoer; and the court, in sustaining the finding of the jury, determines that the sum so found is a compensation given for mental anguish. The law, by this nothing less than absurd position on the part of the administrators of justice, gains nothing, but loses much of the wholesome influence it would otherwise exert as a terror to evil-doers and the avenger of its zealous and confiding supporters. In the case of *Borland v. Barrett*, 76 Va. 128,—a case in all respects similar to *Beck v. Thompson*,—the correct rule is given as follows: "The jury, in such case, may give not only such damages as they think necessary to compensate the plaintiff, but also such as will operate as a punishment to the defendant, and tend to deter him and others from similar outrages." The case of *Beck v. Thompson*, therefore, while it did no harm, was decided under a misapprehension of the law, and, to the extent it follows a bad precedent, should be overruled. While apparently so at variance with each other, yet a reconciliation of these differences of opinion establishes the just rule of exemplary damages to be as follows: If, after the jury has assessed damages to fully compensate the plaintiff for the injury, such damages are still not sufficient in amount to punish the defendant for the maliciousness of the private wrong of which he is found guilty, and to hold him up as a public example and warning, to prevent the repetition of the same or the com-

mission of similar wrongs, they may add such further sum, in their judgment, as may be necessary for this purpose. But if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury are not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong. A single punishment for a single private wrong is what the law seeks, and, if an adequate compensation will accomplish that purpose, the damages should end there. Justice is not an aristocrat, and should not be made to wear kid gloves on its iron hands to hide from a wrongdoer the fact that he is being punished until he smarts for his malicious, reckless, wanton, or fraudulent conduct. In the case so much relied on by Judge Green, of *Riddle v. McGinnis*, 22 W. Va. 253, being an action for seduction of a daughter, the court held: "The jury, in estimating the damages sustained by the plaintiff, may take into consideration the mental anguish, the dishonor, and shame endured by the plaintiff * * * by reason of the wrongful act of the defendant." This necessarily must include punitive damages, as the lesser is always included in the greater; for what will satisfy shame, dishonor, and mental anguish cannot be less in amount than such sum as will amply operate as a punishment to the defendant, and a warning to others. It would be a poor father, indeed, that would be content with a less satisfaction; and juries are usually composed of fathers and brothers. But there are many cases in which the punitive damages must exceed the compensatory, and this oftentimes by legislative enactment. In the case of *Pegram v. Stortz*, while the argument is based on the claim that exemplary or punitive damages, strictly speaking, are in violation of constitutional and fundamental law, and although it must be conceded that the legislature used the word "exemplary" according to its ordinary, accepted, and legal meaning, yet the court avoids the decision of the law as unconstitutional by giving a new definition to the word "exemplary," wholly different from the ordinary and commonly accepted definition as given in all the standard authorities, text-books, and dictionaries, and received and acted on by the vast majority of courts and legislatures. Webb, *Pol. Torts*, 220, notes. This redefinition is that "exemplary" means "indeterminate" damages, not given by way of punishment, and making an example of the malefactor for the wanton wrong committed by him, but to satisfy wounded honor or feelings, and therefore what law writers usually include under the head of "compensatory" as distinguished from "punitive" damages. In doing so the court not only violated the ordinary rule of construction "that, where a word has a clear and settled meaning at common law, it should be given the same

meaning in construing a statute, but unintentionally invaded legislative functions, and, in effect, amended the statute in such way as to defeat the evident intent and purpose of its enactment. There might have been some excuse for this unjustifiable departure from precedent if it was sound law, as maintained, that the legislature was deprived by some provision of the constitution of the power to authorize the recovery of strictly exemplary or punitive damages in any case it might deem such recovery proper. But this legislative power is beyond question. *Railway Co. v. Humes*, cited above. While the only benefit that has accrued to any one from this redefinition of the word "exemplary" has been the protection of the willful and deliberate law breaker from well-merited punishment, it has had the effect to produce confusion and contradiction in the decisions of this court, and to bring them into disrepute as reliable authority. In the case of *Ricketts v. Railway Co.*, 33 W. Va. 434, 10 S. E. 801, this court is compelled to return to the true common-law definition of the word "exemplary" as recognized and expounded in *Downey v. Railroad Co.*, 28 W. Va. 732; *Ogg v. Murdock*, 25 W. Va. 139; *Vinal v. Core*, 18 W. Va. 1; *Baker v. Sweeney*, 13 W. Va. 158; and numerous other of its decisions, where the true meaning of the word was never questioned. It will hardly be maintained that "exemplary," when it relates to the unlawful sale of intoxicating liquors, has a different legal meaning from its usual meaning when applied to any other wrongful act. Such a proposition is too absurd for argument, and Judge Green, in his elaborate opinion, makes no such pretense. The doctrine of exemplary damages, as promulgated for the first time in the case of *Pegram v. Stortz*, followed by *Beck v. Thompson*, being subversive of the common law, and in contravention of former decisions of this court, cannot be regarded as *stare decisis*, and should be no obstacle in the way of a return to well-founded principles supported by reason and justice, and upheld by authority and practice, to which the "memory of man runneth not to the contrary." Not only is this true as a privilege, but is incumbent as a duty, when by so doing the decisions of the court will be rescued from contradiction, obscurity, and doubt, the legislative enactment sustained and vindicated in accordance with its true intent and meaning, and the ends of justice attained and promoted. For this court to take any other than a backward step in this matter to regain a correct position would be to plunge into further difficulties among a hopeless minority, blindly groping about in a mist of their own creation, avoiding the beacon lights of the past, and straying further away from the point of their departure; thus rendering a return to the old landmarks impossible, except through legislative intervention declarative of the common law. The

creation of such a necessity should be avoided when possible.

Besides the courts of England and the supreme court of the United States, nearly every state supreme court has held the doctrine of exemplary damages strictly as a punishment to be the true common-law rule. 1 Sedg. Dam. § 360. In construing an enactment of the legislature it is always necessary to consider the cause for its existence, or the evil to be remedied. Many good people believe that the sale of intoxicating liquors is an evil in itself that should be prohibited; others consider it a necessary evil that should be regulated and licensed; while still another class regard it a legitimate branch of business, subject to abuse, and necessary to be surrounded with safeguards. All classes, except the lawless, agree that the sale of intoxicating liquors to a minor or an habitual drunkard is an evil in itself, and oftentimes productive of great harm to innocent and dependent persons in their property, persons, and means of support, and therefore should be absolutely prohibited. A compromise of these various views originated in the present license and local option law, with its penalties and forfeitures, contained in chapter 29, Acts 1887, being the enactment under which this suit was instituted. Section 16 of the act provides: "If any person, having a state license to sell spirituous liquors, wine, porter, ale, beer, or any other intoxicating drink, shall sell or give any such liquors or drinks to any minor or person of unsound mind or to any person who is intoxicated at the time or who is in the habit of drinking to intoxication, or if he permit any person to drink to intoxication when he knows or has reason to believe such person is a minor or of unsound mind, or is intoxicated, or is in the habit of drinking to intoxication, on any premises under his control, or sell or give any intoxicating drink to any one on Sunday, he shall be guilty of a misdemeanor and fined not less than twenty nor more than one hundred dollars." And section 20 provides: "Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person or property, or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name severally or jointly against any person who shall by unlawfully selling or giving intoxicating liquors have caused the intoxication in whole or part of such person, and any person or persons owning, renting, leasing or permitting the occupation of any building or premises and having knowledge that intoxicating liquors are to be sold therein, or having leased the same for other purposes shall knowingly permit therein the sale of any intoxicating liquors that have caused in whole or in part the intoxication

of any person shall be liable severally and jointly with the person or persons selling or giving intoxicating liquors aforesaid for all damages sustained and for exemplary damages." By these sections the condition of dependence of one person on another is fully recognized, and a private right declared, the infringement of which becomes a private wrong, for which an action lies not only for compensatory, but exemplary, damages. This statute differs from the one under which the case of *Pegram v. Stortz* was decided, in that no notice to the lawbreaker is required before a civil suit can be instituted; hence much of the reasoning in that case has no bearing on this. The main question in both cases, however, is as to the legislative intention in the use of the word "exemplary." In that case Judge Green says: "The evident object of our statute was to recompense members of a family for certain losses sustained by the sale or furnishing of intoxicating liquors to a member of the family in violation of certain specified provisions of the statute, and it was not intended to punish the vendor of such intoxicating liquors." This is on the theory that the legislature understood before the enactment of the law what definition would be given by him to the word "exemplary," a matter of impossibility. But it is quite plain that the legislature had in contemplation the very ordinary and commonly accepted meaning of the word "exemplary," and it was their evident intention to provide both civil and criminal punishment for the willful lawbreaker, as the most effectual means to prevent the evils of intoxication or excessive drinking. *Bean v. Green*, 33 Ohio St. 451; *Rawlins v. Vidvard*, 34 Hun, 209. The wrong from which the injury results being criminally unlawful, is wanton, and therefore a proper case for the imposition of exemplary damages. The tendency of the earlier decisions in some states, when the legislation on the subject was new and untried, was to hold that aggravating circumstances, in addition to the proof that the sale was unlawful and injurious, were necessary to be shown to justify the assessment of exemplary damages according to the common-law rule. *Franklin v. Schermerhorn*, 8 Hun, 115. But the later and better-considered decisions are to the effect that, where the sale is shown to be injurious to the plaintiff in person, property, or means of support, the fact that it was knowingly made in direct violation of the statute, without any other aggravating circumstance, furnishes sufficient grounds for the imposition of exemplary damages. *Schneider v. Hosler*, 21 Ohio St. 98; *Bean v. Green*, 33 Ohio St. 444; *Davis v. Standish*, 26 Hun, 615; *Rawlins v. Vidvard*, 34 Hun, 209; *Weitz v. Ewen*, 50 Iowa, 34; *Jockers v. Borgman*, 29 Kan. 110. Our legislature has so declared, and in doing so, not having exceeded its constitutional bounds, its en-

actment is beyond the pale of judicial interference. If the law is unwise or injudicious or operates too harshly or severely, the responsibility must rest with, and an appeal for relief must be to, the legislature, and not to the judiciary, who are powerless to alleviate the severity of any constitutional enactment.

In considering the motion for a new trial it is the well-settled rule that the weight of the testimony is for the jury, and not for the court; and, unless the verdict is plainly contrary to the weight of the testimony, it will not be disturbed.

Thus viewing this case, the unlawful sales of intoxicating liquors injurious to the plaintiff's means of support are fully established. The husband had become an habitual drunkard, squandered all his property, and deserted his family, because of his intemperate habits, leaving the wife to support herself and children. The surviving defendant insists as a sole objection to the sufficiency of the evidence that no knowledge of the drinking habits of the husband was brought home to the defendants. There might have been some grounds for this objection had he not testified himself with regard thereto, and given as his reason for not selling the husband anything to drink that he knew his wife did not want him to have any, and knew the way he got when he was next door. Evidently the jury believed his admissions, and gave him full credit therefor, but disbelieved and disregarded his testimony denying the sales, concerning which he was contradicted by other witnesses in the case. There are various other circumstances shown in the evidence from which the jury could infer he had full knowledge of the drunken habits of the husband. Their verdict, being supported by evidence, cannot be disturbed, although the court might have disagreed with their finding had they been on the jury.

As to what would be a proper amount to assess by way of punishment for the private wrong done to operate as a warning and prevent repetition of similar wrongs, many minds might well differ, and, the legislature not having seen proper to fix any limit, the jury become the sole and final judges, unless their finding evinces passion, prejudice, partiality, or corruption; and the court cannot invade their province. Under the law as applied to the circumstances of this case, \$750 is not an excessive verdict. *Battrell v. Railway Co.*, 34 W. Va. 232, 12 S. E. 699; *Borland v. Barrett*, 76 Va. 128.

The defendant might well insist that the punishment is severe; that, if he had not made the sales complained of, others would have done so; and that, the sale of intoxicants being a legitimate business, there were divers ways in which a person in the habit of drinking to intoxication could and would obtain the means to satisfy an uncontrollable thirst; and that he should not be made the

scapegoat or sacrifice for the sins of others. The answer suggests itself that, although the law licenses drinking as a source of revenue, it seeks to prevent and suppress intemperance, with its long line of attendant evils; and the legislature, with this end in view, has authorized the infliction of exemplary damages. That the spirit and manifest intention of the law is good, cannot be denied; and if it could be made to effect the object of its originators it will confer upon society a boon of inestimable value; and, even though it should only succeed in diminishing to a limited extent the widespread sorrow, poverty, and misery inflicted on the helpless and innocent by the wretched slaves of a depraved and vicious appetite, its enactment will not have been in vain. That it may prove entirely abortive is not a valid reason why the court should refuse to enforce or the defendant decline to obey it, although it might furnish a potent reason why the legislature should amend or repeal it. There being no sufficient error to justify the reversal of the judgment of the circuit court, it is affirmed.

BRANNON, J. Judges HOLT, ENGLISH, and myself, lest we be misunderstood, conclude that a short note, to express our position, is called for in view of the opinion in this case. In consultation we suggested that we did not feel called upon, in a judicial opinion, to assert or deny any particular distinctive Christian creed or dogma. Blackstone is referred to in the above opinion. He was writing law for a government in which church and state were united, a particular church and its creed being an integral part of that government; but it is our boast that ours is a government in which church and state are separated by the letter of our constitutions, by governmental administration, and by the sentiment of our people. In this land every one may worship and believe as his conscience and mind approve. Our government knows no distinctive Christian or other creed, merely as such, but grants absolute tolerance to all creeds and beliefs; and our population is composed of people of many differing Christian denominations and of other creeds. As men and citizens they are equal before the law, the government, and the public courts. The government is by all, for all, and of all the people. This court is a part of that government. Its duty is to expound alike for all the municipal law of the land, and when it does that its function is performed. It is not its duty or prerogative to expound religious principles, or expressly or impliedly disparage any man's belief. While we, as individuals, have the highest regard and respect for Christianity generally, we do not think it proper, in an opinion of this court, to appear to espouse or enforce any particular or distinctive Christian creed.

(40 W. Va. 349)

DUNN'S EX'RS v. RENICK et al.

(Supreme Court of Appeals of West Virginia.

April 3, 1895.)

ESTATE OF DECEDENT—TAXES ON LAND DEVISED—FUND FOR PAYMENT—RES JUDICATA—DECREE—RELATION TO FIRST DAY OF TERM—BILL OF REVIEW—SALE BY EXECUTORS.

1. A will directs executors to sell certain land to pay—First a certain debt; next, a legacy to Mrs. Dunn; next, a legacy to Mrs. McNeal; and the residue of proceeds to be equally divided between them and two other children. The executors have a naked power to sell, and the legal title descends to those four children, as heirs. The land sells for only enough to pay the debt and the principal of Mrs. Dunn's legacy. Taxes on the land subsequent to testator's death are paid by the executors, and in this court, by a former decree before sale, they are held to "be entitled, as against the residuary legatees of a portion of the proceeds of said real estate, to credit for the taxes so paid." One of those children (John Dunn) is given a specific devise and legacy. *Held*, the former decree is not *res adjudicata* to fix upon any of the four residuary legatees, receiving nothing as such from the land, a liability to contribute to the payment of such taxes, either as residuary legatees, heirs, or persons.

2. They are not liable under the will, as residuary legatees, nor by law, as heirs, for such taxes.

3. Taxes are not a personal debt, or in the nature of a personal debt.

4. John Dunn is not liable for such taxes by reason of his receiving other land and personality by specific devise and bequest under the will.

5. Such taxes and commission to the executors on sale must be abated from Mrs. Dunn's legacy by crediting them on the money in the executors' hands going to her from the sale.

6. Demonstrative legacies are subject to abatement, but specific legacies are not.

Quære: Do all proceedings of a court relate to the first day of a term?

Quære: Does computation of time limiting a bill of review begin at the first day of the term, or at the date of actual entry of the decree?

7. Though a decree or judgment relate to the first day of a term, yet if the case was not ready for hearing or trial, and therefore no judgment or decree could have been given on such first day, it does not relate to the first day, but has the date of its actual entry of record.

8. A bill of review must state substantially the former bill or bills, the decrees and proceedings thereon, including the decree complained of, and the point wherein the party filing it is aggrieved.

9. On a bill of review for error of law, that error must be collected from the pleadings, and exhibits filed with the pleadings and orders and decrees, and must be made out on facts admitted in the pleadings, or stated in the decree as facts found. The depositions cannot be looked to. An error of the court in reaching a wrong conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal.

10. No one can correct, either by bill of review or appeal or writ of error, an error not aggravating him.

11. A will directs a sale of land by two executors. One only is present at the public auction, but the other consented that his coexecutor make it, and ratifies and approves it. The sale is not invalid on these facts.

12. A will directs a sale of land by two executors. Before sale the executors bring a suit in equity to construe the will and administer the assets, making all persons interested parties, and in it decrees are made directing a sale of land by both or either of the executors. A sale is made and confirmed, and a bill of review is filed for reversal of the decree of confirmation. If there were error in the first decree, in giving power in

either executor to sell, that decree being appealable and final, and relief against it by bill of review or appeal barred by limitation, reversal of the decree of confirmation would not affect it. It could not be reached by bill of review, and a sale by one executor under it would be valid, and beyond reach by such bill of review.

13. No bill of review for error of law will lie to a decree of the supreme court of appeals.

Can one of two executors sell land under a will?

(Syllabus by the Court.)

Appeal from circuit court, Greenbrier county.

Bill by John W. Dunn's executors against Robert W. Renick and others. From a decree in favor of plaintiffs, defendants Sallie P. and Henry C. Dunn appeal. Affirmed.

A. C. Snyder, for appellants. J. W. Arbuckle and Brown, Jackson & Knight, for appellees.

BRANNON, J. John W. Dunn died leaving four children,—Lizzie J. Renick, Kate V. McNeal, John R. Dunn, and Henry C. Dunn. By his will he gave a tract of land called the "Home Place" to John R. Dunn, and certain personalty. He directed the sale of a storehouse in Lewisburgh, and that out of its first proceeds there should be paid to his daughter Kate V. McNeal \$1,000, and that the residue go to John R. Dunn. He gave to a servant \$50. He gave to Lizzie J. Renick an indebtedness against her husband. And he directed that his executors, at such time as they should judge would promote a sale for the largest price, should sell certain land in Kanawha county, and that out of its first proceeds they pay certain indebtedness, (about \$3,000) of his son Henry C. Dunn, and secondly pay \$7,000 to Sallie P. Dunn, wife of Henry C. Dunn, upon certain trust; and he directed that, out of a fund formed from the residue of the proceeds of sale of the Kanawha land and the collection of debts due him, his executors pay, first, \$735 to Kate V. McNeal, and that its residue be equally divided between Lizzie J. Renick, Sallie P. Dunn, John R. Dunn, and Kate V. McNeal. The Kanawha land remained unsold for nearly seven years after the testator's death, and when sold brought \$10,000 only,—just the amount given by the will for payment of indebtedness of Henry C. Dunn and the legacy to his wife, Sallie P. Dunn. In the interim between the death of the testator and the sale, taxes on this Kanawha land were paid by the executors. Some five years after the testator's death the executors brought this suit in the circuit court of Greenbrier county to have the will construed, and for other purposes; and the case once before came to this court, and the decision then made will be found in 33 W. Va. 476, 10 S. E. 810. This court then decided that the taxes so paid should be refunded the executors. When the case went back to the circuit court from this court, a further executorial account was stated, and

a balance was ascertained to be due the executors of \$1,699.15, made up of taxes paid by them on the Kanawha lands, the commission to the executors on its sale, and costs in this suit. The circuit court decreed that the executors, out of money arising from the sale of the Kanawha land, retain the said balance found due them, which operates to make the legacy to Sallie P. Dunn pay the whole of it, by abating it that much. Henry C. Dunn and Sallie P. Dunn appeal.

For them it is contended that such balance in favor of the executors is chargeable equally on the four persons who are the legatees of any residuum which might remain from the sale of the Kanawha land after paying the \$10,000 given to pay, first, the indebtedness of Henry C. Dunn, and next the legacy to Sallie P. Dunn, and next the legacy to Kate V. McNeal, and that, as two of them (Mrs. Renick and Mrs. McNeal) are insolvent, it ought to be paid by Sallie P. Dunn and John R. Dunn. It is claimed that this is inexorably so, by reason of the former decision of this court; that it is res adjudicata as to this. Let us see as to this. This court, in its former decision in the case, held "that the executors had a naked power to sell, without any title vested in them, but that title vested in the four children, as heirs, and that if the heirs permitted the land to be returned delinquent for taxes, and the executors, to prevent the loss of the land, paid taxes, they would be entitled, as against the residuary legatees of a portion of the proceeds of said real estate, to credit for the taxes so paid." Judge Snyder, in the opinion, said: "The title to this farm descended to and vested in the heirs, subject to the naked authority in the executors to sell it in the manner prescribed by the will. The heirs (that is, the four children of the testator) were liable, as the owners, for the taxes on the farm. * * * If it was not the duty of the executors to preserve the farm by paying the taxes, it is certain that the heirs cannot justly complain that they, in good faith, under a belief that it was their duty to do so, did what the heirs neglected to do. The payment of these taxes was for the benefit of the estate, and, those entitled to the residuum being those whose duty it was to pay them, it is entirely equitable that the executors should be credited with the amount, as against the residuary legatees for whose benefit the payment was made." This holding of the court, as explained by this quotation from the opinion, makes the foundation on which rests the plea of res adjudicata. Now, at the date of that decision the land had not been sold. It could not then be foreseen what it would sell for, or whether there would or would not be any balance, after paying the \$10,000 given to Henry C. Dunn's debts and his wife, Sallie P., and Mrs. McNeal, to go to the residuary legatees. When sold, it brought just enough to pay that \$10,000, without interest, leav-

ing nothing to go to the residuary legatees. Did the court mean to say that the four residuary legatees should each pay one-fourth of the taxes on the land, whether they should receive anything from it or not? Had the sale left a balance to go to them, clearly these taxes should be paid out of that balance, because the said \$10,000 was payable first, Mrs. McNeal's legacy of \$735 next, and these legacies ought to be paid net, clear of abatement for taxes, and the four children get only the balance, they being legatees of only a residuum. That is what the court meant; but when there is no residuum to go to them, and they get not a cent, where is the reason for charging the taxes to them? The fact of this deficiency was not before the court, because nonexistent when it rendered that decision. The court only meant to charge the residuary legatees with taxes, in case they received anything as such legatees. If we charge them, on what theory shall we base the charge? Shall we say these four children were heirs, and liable for the taxes? They, as heirs, held only the dry legal title, without substantial interest, because they held subject to the power of sale to answer certain purposes. They should not pay simply as heirs, receiving nothing as heirs. The taxes could create no personal obligation, as heirs, upon them. Taxes are not a debt, or in the nature of a debt. *Board of Education of Cabin Creek Dist. v. Old Dominion I. M. & M. Co.*, 18 W. Va. 441. When Judge Snyder said the heirs, who were the residuary legatees also, were liable for the taxes, he said so because at that date they had an apparent, probable interest; but he never contemplated or intended to decide the liability for those taxes, as between Sallie P. Dunn and the other residuary legatees, upon the basis of there being no residuum for distribution. And observe that Judge Snyder said that the executors would be entitled to have the taxes "credited as against the residuary legatees for whose benefit the payment was made." The very word "credited" supposes something going from the executors to the residuary legatees. A sum cannot be credited when there is nothing on which to credit it. And it is to be credited "against the residuary legatees for whose benefit the payment was made." For whose benefit was it made? At date of payment it was apparently, or might be, for all the four children, though first and foremost for Mrs. Sallie P. Dunn's benefit, she being the preferred legatee; but, as it turned out when the sale was made, it was for her sole benefit. Now, the decision says it must be "credited" in favor of the executors on the fund in their hands arising from the sale, and, as there is no fund in favor of the residuary legatees, it follows that it must be abated from Sallie P. Dunn's legacy. So, this former decision, logically applied to the facts as they now exist, is stronger, as a matter

of *res adjudicata*, in favor of, than against, the decree complained of. Never did the court think of saying in the former decision that those residuary legatees should be bound to pay those taxes as a matter of personal obligation. Yet that is what is proposed to be deduced from that decision. The simple fact that the balance due the executors should be "credited" upon what was expected to come to their hands for distribution among the residuary legatees absolutely repels and negatives all idea that the legatees were to be personally bound, or pay otherwise than by abatement from what should be coming to them. The record, as then before the court, inspired a reasonable expectation that there would be a residuum, as the valuation placed on the land was largely in excess of what it finally realized.

Is it because of their character as residuary legatees that they should pay? They never became such. They received nothing as such. Had they taken anything, they would have taken it subject to the burden. It is not possible that their mere nomination in the will as residuary legatees would impose a personal responsibility. No more would it do so than if they were strangers to the will. Neither Sallie P. Dunn, nor any one else, is liable as residuary legatee, as there is no residuum; but because the executors are entitled to a refundment of the taxes, there being no other assets to pay them, and they having been spent for this land, there comes a necessity to abate them from her legacy. None of the four have any relation to a residuum, there being none. It cannot be thought for a moment that John R. Dunn is to be charged because he was devisee of another tract of land and legatee of certain personal property, because that devise and that legacy are specific in character. A specific legacy is liable to ademption, but not to abatement. The legacy payable to Mrs. Dunn out of the sale of the Kanawha land is a demonstrative legacy, and subject to abatement; and surely Mrs. Dunn cannot, as owner of a demonstrative legacy, call on John R. Dunn, the owner of a specific legacy and devise, to relieve her legacy from abatement or loss from these taxes and commissions, but must suffer the abatement alone. John R. Dunn gets his specific legacy and devise without abatement, whether Mrs. Dunn gets her legacy or not. *Morris v. Garland*, 78 Va. 215; *Bradford v. McConihay*, 15 W. Va. 766; 2 Lomax, Ex'rs, p. 69, c. 1, § 3; 2 Redf. Wills, p. 456, c. 13, § 7, subsecs. 1, 9. This especially so, seeing that the cause of the abatement is taxes on the Kanawha land itself, and subsequent to testator's death. A decree against those legatees cannot be warranted on the idea that the executors have overpaid beyond assets, as all the facts to justify that theory are not present, and especially as this payment was on account of this particular land, and after testator's

death. An executor cannot recover a voluntary payment to a legatee when deficiency appears. *Davis v. Newman*, 2 Rob. (Va.) 664; 2 Lomax, Ex'rs, 173; 1 Rep. Leg. 456.

It is urged in argument that the testator intended to make his children equal; that what was given to John R. Dunn, and the \$10,000 given for the debts of Henry C. Dunn and the legacy to his wife, Sallie P., were at the death of the testator equal, but that John R. Dunn occupied his farm from the testator's death, while Sallie P. Dunn did not realize her legacy for nearly seven years, when the sale of the Kanawha land was made; and that this inequality somehow calls upon John R. Dunn to share the burden of the balance due the executors. I do not see that the accidental circumstance of delay of the sale should produce this result, even were there no other facts here to come in, if we are to consider circumstances of equity. But Sallie P. Dunn and husband during those years occupied and derived support from the Kanawha lands, without rent, which is reported by the commissioner to be worth \$1,200 per annum,—more than interest on her legacy, and more than interest on what was given John R. Dunn, and certainly as great as the yearly value of what John R. received. And John R. Dunn is not responsible for delay of sale. That was a matter with the executors; and not only John R. Dunn, but Sallie P. Dunn and her husband, objected to a proposed sale at a much larger sum than was finally realized.

It is said that the taxes were a debt made for the benefit of the estate. But it was not, but simply for the benefit of the owners of the Kanawha land, turning out to be Sallie P. Dunn alone. There is no obligation on John R. Dunn to contribute to it as a debt before the death of the testator. And, besides, he was a specific devisee and legatee.

It is said that the delay of sale, and consequent accrument of taxes, could have been avoided at any time by the turning over to Sallie P. Dunn, by the others interested, of the Kanawha land. They expected, as did Sallie P. Dunn and her husband, that the land would bring more. Is it reasonable or just to visit upon them a penalty for not giving up a fair chance of realizing something from this land? Is the omission to do so at all pertinent? If we compare default of duty between the children, we should rather expect Sallie P. Dunn to pay the taxes, as she was in possession, receiving large rents and profits from houses on it and from support, and had the largest interest to save it, as legatee. The tenant is liable in the first instance for taxes, though the landlord is ultimately, and the tenant may deduct them out of rent. 1 Tayl. Landl. & Ten. §§ 341, 395; Code, c. 30, §§ 9, 15. But she paid no rent. Why is it inequitable to charge her with taxes? So, I

conclude that the taxes, and a fortiori the commission on sale, should be abated from the proceeds of sale in the hands of the executors, as the court below decreed, and that John R. Dunn and Mrs. Renick and Mrs. McNeal cannot be made to pay any part thereof. Certainly the commission on the sale should be deducted from the proceeds of the land.

Another question arises in this case, and an important one, not only in this case, but in general practice. I can but regret that we have not any argument of counsel or citation of authority on this important point, and I have myself been unable to find pointed authority upon it. The appellees tendered a bill of review to reverse the decree confirming the sale, and to set aside the sale, and it was dismissed as tendered too late, and a brief of counsel for appellees asks us to reverse the action of the court in dismissing the bill of review. The decree sought to be reversed by the bill of review was actually entered June 30, 1890, and the bill of review was tendered July 1, 1893. By Code, c. 133, § 5, a bill of review must be filed "within three years next after such decree." Shall we, in the computation of time, exclude the 30th day of June, 1890? I think it must be excluded. Section 12, c. 13, Code, enacts, as a general rule in the construction of statutes, that "the time within which an act is to be done shall be computed by excluding the first day and including the last." The statute limiting prosecutions of misdemeanors uses the same words, "next after," used in the limitation for bills of review; and in *State v. Beasley*, 21 W. Va. 777, it was held that where an offense was on June 3, 1878, and the indictment June 3, 1879, the day of the commission of the offense must be counted out, under the statute, and that the indictment was in time. I think this would be so without the statute, though there has been much controversy on this apparently simple question. 1 Rob. Prac. 422; *State v. Beasley*, 21 W. Va. 780; Ang. Lim. §§ 46, 50. Thus far the bill of review is not barred. But another question arises, which brief of counsel raises,—the important one, on which we are without help from the briefs filed by counsel. While the decree was actually entered June 30, 1890, the term of court began June 23d. It is contended that we must begin to compute time against the bill of review from June 23, 1890. This is practically an important question. When do you commence to compute time against a bill of review, or writ of error or appeal, or petition of a nonresident for rehearing, and in other instances that may occur in practice? What is the date of rendition of a decree or judgment, the first day of the term, or the date of actual entry of record? I incline to think the date of actual entry has been used in practice. It is strange that, though works on appeals discuss the subject of limitation of appeals, and limita-

tions generally, they do not just meet this point. I have found nothing exactly upon it. "The term of a court is in legal contemplation as one day, and, though it may be open many days, all its acts refer to its commencement, with the particular exceptions in which the law may direct certain acts to be done on certain other days. It is seldom necessary that the day of any proceeding should appear, in making up the record, distinct from that of the beginning of the term, though a minute may be kept of each day's doings. Nor is it necessary that there should be adjournments from day to day, after the term is once opened by the judge; nor, if there should be, that they should be recorded, in order to preserve the authority of the court to perform its functions. The court may in fact not adjourn during the whole term, but be always open, though, for convenience of suitors, an hour of a particular day, or of the next day, may be given for their attendance. If the record state the time of doing an act, as the statement is unnecessary, so it is harmless surplusage, unless the day be beyond the period to which the term legally extends." So said the supreme court of North Carolina in *State v. Martin*, 2 Ired. 122. I think it a correct statement of the law, as the common law certainly considers a term of court, though running over divers days, one day. 1 Lomax, Dig. 287. Judge Tucker said in *Dew v. Judges*, 3 Hen. & M. 27: "The term 'session,' when applied to courts, means the whole term; and in legal construction the whole term is construed as but one day, and that day is always referred to the first day, or commencement, of the term." I hardly think that because our statute contemplates adjournment from day to day, and provides that each day's proceedings shall be separately recorded and signed by the judge, it cuts up the term into separate days, and individuates each day from another, and changes the common-law rule. By reason of this rule that the whole term is one day, the common rule was that a judgment rendered on any day has relation to, and is a judgment of, its first day. Tidd, Prac. 547; 1 Lomax, Dig. 287; 1 Black, Judgm. § 441; 2 Freem. Judgm. § 369; Farley v. Lea, 32 Am. Dec. 680. This doctrine or rule had been always recognized in Virginia before we had a statute, but is now embodied in a statute, as regards the effect of the judgment as a lien. Code, c. 139, § 5; *Society v. Stanard*, 4 Mumf. 539; *Countts v. Walker*, 2 Leigh, 268; *Skipwith v. Cunningham*, 8 Leigh, 272; *Withers v. Carter*, 4 Grat. 418 (Baldwin, J.).

While this is settled as to judgments, I had some question as to interlocutory acts of courts generally, though they would seem to fall under the general rule. In *Foust v. Trice*, 8 Jones (N. C.) 490, it is stated that all acts of court, by relation, stand as if done on the first day, and it was held that

an order of continuance related to the first day. A plea has been held to be a plea as of first day. Opinion in *Pope v. Brandon*, 20 Am. Dec. 49; note to section 442 of 1 Black, Judgm. But this was a final decree, and, in this regard, is to be deemed a judgment. But this fiction of relation of judgments to the first day of a term is not without exception. It applies to cases where the judgment could have been rendered, but not to a case where it could not have been rendered, as where on the first day the case was not in condition for judgment. *Wynne v. Wynne*, 1 Wils. 42; *Swann v. Broome*, 3 Burrows, 1596; *Countts v. Walker*, 2 Leigh, 278; *Withers v. Carter*, 4 Grat. 416, 418; *Brown v. Hume*, 16 Grat. 465; *Yates v. Robertson*, 80 Va. 475. Now, this case was not in a condition to warrant a decree of confirmation of sale until June 30th, as no report of sale was filed till then, so far as the record shows, and there could not be such a decree without such report. Hence we cannot commence to compute time from the 23d of June, and in no view was the bill of review barred. The court gave that as the reason for its dismissal, but the action of a court may be stated to be on an insufficient reason, and yet be right for a different reason. The reason given is immaterial, and the question in the appellate court is, is the decision, for any reason, correct? Opinion in *Henry v. Railroad Co.*, 40 W. Va. —, 21 S. E. 863; *Shrewsberry v. Miller*, 10 W. Va. 115. Then, is the dismissal of the bill of review, for any reason, correct? It is not based on newly-discovered matter, but on error of law apparent on the decree of confirmation. In the first place, I think it is demurrable. It does not recite, or even refer to, the bill, the basis on which the superstructure or proceedings stand, and does not tell the court what proceedings had been had therein, save that a decree had been pronounced confirming a certain sale, which presupposes a prior decree or decrees, and does not comply with the law of equity pleadings regulating bills of review. *Amis v. McGinnis*, 12 W. Va. 371; *Story*, Eq. Pl. §§ 420, 638.

One ground for relief which it assigns is that an attorney for Sallie P. Dunn and her husband, in the case, attended the sale, and bid in the property for her, so announcing, and that this had the effect to prevent bidding, and that a report of sale to her was filed, and delivered to the judge for action, but before decree it was modified so as to show the attorney as the purchaser, and was so confirmed. This is said to be error of law,—to confirm a sale to an attorney of the parties. Without inquiry as to whether this fact of the relation of attorney and client is a fact so appearing on the face of the decree as to warrant a bill of review, I will say that it is only the clients of the attorney who have cause of complaint. What matters it to the parties filing the bill of review

that the purchaser was an attorney of hostile parties? It is only because of the fiduciary relation to his clients that the attorney cannot purchase. The act is only voidable on the objection of his clients. *Newcomb v. Brooks*, 16 W. Va. 32. A person cannot complain of an error by bill of review, unless it aggrieves him, any more than he can by appeal or writ of error. *Laidley v. Kline*, 25 W. Va. 211. Mere error, not aggrieving a party, will not reverse. *Fant v. Lamon*, 27 W. Va. 229. And the act being only voidable, at the election of the client, it would not be ground of a bill of review or error, but the subject of an original bill, even at their instance.

Another point of error alleged in the bill of review is that the will empowered two executors to sell, whereas one only made the sale. On this point the question arose in my mind as to what parts of the record we can look to in solving it. If we can look only to the decree of confirmation,—the only one mentioned in the bill of review,—we find that its language negatives the allegation of the bill that the sale was made by one only of the executors, as it recites that the case was heard on the papers before read, and "the report of sale made by the plaintiffs," and both were plaintiffs. To sustain this allegation, we must look at something else. Can we look at the report of sale, and other decrees? There is confessedly difficulty and confusion, at least, in practical application of the rules on this subject. As the rule is stated in *Story, Eq. Pl. § 407*, to sustain a bill of review for error of law apparent on the face of the decree, you must not find it by looking into evidence, but, taking the facts as stated on the face of the decree, you must find the error there, or not at all; that is, you can look to the decree only, and thus, if the facts are not set out in it, a bill of review does not lie. The practice in England, where the rule originated, was to set out the facts found by the court from the pleadings and evidence. As thus limited, the ground for a bill of review, under our practice, has narrow scope; for our practice, and I think the proper one, is not to detail the facts found true by the court in a decree, but after bringing the cause on upon the various pleadings, exhibits, depositions, etc., essential to a full presentation of the facts, to simply decree the relief given. But I think at present the rule is broadened; that is, the scope of a bill of review. You cannot look to depositions, nor can you correct an erroneous finding or decision of fact on the evidence, which you can only do on appeal; but you can look to the bill and other pleadings, and to all decrees and orders. I repeat: You cannot look to evidence; you cannot find fault with the decision of facts by the court, and turn to the depositions or other evidence to prove it wrong; but you can look to all the pleadings on both sides,

and take the facts in them admitted, or the facts stated in the decree as facts found by the court, and upon those facts show that the decree is wrong in law. You can inspect the pleadings and their exhibits, consider the facts therein admitted, and inspect all decrees, orders, or proceedings, and take the facts in them stated by the court as facts found by it, and show from them that the decree is, in law, erroneous. If there be error in the decree, and you can show it by the record thus limited, you can cure it by bill of review in the same court which pronounced the decree; otherwise, you must seek relief from that error by appeal. *Thompson v. Edwards*, 3 W. Va. 659; *Nichols v. Nichols' Heirs*, 8 W. Va. 174; *Rawlings v. Rawlings*, 75 Va. 76, 88; *Thomson v. Brooke*, 76 Va. 160; *Hancock v. Hutcherson*, Id. 609; *Bart. Ch. Prac.* 334; *Core v. Strickler*, 24 W. Va. 697.

Under these principles, we can look to the report of sale, I think, to support the bill of review. It shows that only one of the executors was present at the sale, but the other recognized and approved the sale by uniting in the report. Now, it may be—likely is—true that if one executor had acted throughout alone in the sale, without approval, his act would be void as an act under the will, which conferred a mere naked power, and that joint. *Johnston v. Thompson*, 5 Call, 248; *Deneale v. Morgan*, Id. 407; 1 *Lomax*, Dig. 362; 2 *Pow. Dev.* 294; *Brown v. Hobson*, 13 Am. Dec. 187; *Floyd v. Johnson*, Id. 255. It can hardly be that a sale would be set aside merely because both were not at the auction; so he concurred in the act by ratification. And, besides, a decree in the case authorized either or both the executors to make the sale. Even if that decree were erroneous, in departing from the will in providing for an execution of the power by one, it would be good until reversed. The court had the will, the property, and all the parties before it, for construction of the will, for its execution, and the administration of assets under it, and I would hesitate long to say, even on appeal, it was for this cause erroneous. But there it stands, valid, and vindicates the sale by one executor. It was an appealable—indeed, a final—decree. *Core v. Strickler*, 24 W. Va. 699. Relief against any error in it was barred by time against an appeal or bill of review, when the bill of review was filed. Therefore, even on appeal from the subsequent decree of confirmation, no error in the former decree could be corrected, as on appeal from a later decree there is no right to reverse prior decrees, appealable, rendered more than the statutory period prior to the taking of the appeal. *Tiernan v. Minghini*, 28 W. Va. 314. Therefore, this bill of review could not possibly reach the decree authorizing a sale by one of the executors, and, as it stood firm, even a sale by one would be

good and irreversible. And, as just occurs to me, that decree authorizing both or either to sell was affirmed by this court; and there can be no bill of review for error of law to a decree of this court, or a decree affirmed by it. *Henry v. Davis*, 13 W. Va. 231. Moreover, the court is the seller. It could confirm on a report by one, even if it had jointly, and only jointly, authorized two to act. The commissioner only receives bids, in place of the court. Such a matter is considered only on confirmation. Judge Snyder said a court could ratify a sale even by one not authorized to make it, and based this statement on *Freem. Jud. Sales*, § 42. See *Core v. Strickler*, 24 W. Va. 697. This because the court is the seller. He said, as I say in this case, it is not such an error as would be ground of reversal, in absence of evidence of actual prejudice to the party from it. I cannot see how it prejudices the party, whether one or both cried the property, or were present at the sale. It does not appear affirmatively that there was prejudice to the parties complaining, and this irregularity is no ground for setting aside the sale. *Core v. Strickler*, supra.

For these reasons, I think there is no error in dismissing the bill of review, taking that bill on the case presented by itself. With a modification in a matter of costs charged to *Sallie P. Dunn*, the decree is affirmed.

(40 W. Va. 540)

FARLEY et al. v. BATEMAN et al.

(Supreme Court or Appeals of West Virginia.
April 13, 1895.)

BONA FIDE PURCHASER—UNDOCKETED JUDGMENT.

The fact that a subsequent purchaser had notice of a prior undocketed judgment may be inferred from circumstances, as well as proved by direct evidence.

(Syllabus by the Court.)

Appeal from circuit court, Summers county.

Bill by John Farley and Charles Farley, under the style of Farley Bros., against Thomas G. Mann and F. M. Bateman. Decree for plaintiffs, and defendants appeal. Affirmed.

W. G. Hudgins, for appellants. Haynes & Stanard, for appellees.

DENT, J. Thomas G. Mann appeals to this court from a decree of the circuit court of Summers county, holding, at the suit of Farley Bros., plaintiffs, that a certain deed, executed to him on the 2d day of April, 1894, by F. M. Bateman, was void as to certain judgments held by said plaintiffs against said Bateman. The facts are as follows: On the 14th day of February, 1894, the plaintiffs obtained a judgment for the sum of \$53.53, with interest, and \$7.15 costs, before Justice H. Ewart of Summers county. This judgment was not docketed until April 9,

1894. March 15, 1894, an execution issued on said judgment. On the 2d day of April, 1894, said Bateman conveyed all his real estate to the plaintiff in consideration of \$117.76, being a balance due the defendant on two several judgments held by him against said Bateman for legal services rendered. Said judgments were liens on the land conveyed, and prior in right to plaintiff's judgment. On the same day Bateman scheduled against plaintiff's execution. The schedule was written just after the deed, in the law office of Mann & Gwynn, by Walter M. Gwynn, member of the firm. Bateman, by conveying away all his real estate, and claiming all his personal property exempt, rendered himself hopelessly insolvent. By sections 5, 6, c. 139, of the Code, judgments of justices of the peace are liens on all real estate of the judgment debtor, except as to a purchaser for valuable consideration without notice they are only liens from the time of docketing. The question presented in this case is whether the defendant Mann was a purchaser for valuable consideration without notice of plaintiffs' undocketed judgment. The fact of notice may be inferred from circumstances, as well as proved by direct evidence; and where the facts and circumstances are such as to raise a presumption of notice, the burden of proof is shifted, and it devolves upon the defendant purchaser to prove want of notice. *Newman v. Chapman*, 2 Rand. (Va.) 93; *French v. Loyal Co.*, 5 Leigh, 635, 16 Am. & Eng. Enc. Law, 790. It is said a court of equity "has a quick eye to detect fraud." A boy may satisfy his mother that his wet hair is the result of sweat, and not of his going in swimming contrary to her commands, but he will hardly convince her that his back and arms were sunburned, and his shirt turned wrong side out, in crawling through a rail fence backwards. And so, in cases of this character, one suspicious circumstance, taken alone, may be easily explained; but, when a number result from the same transaction, the explanation will hardly be sufficient. T. G. Mann, the purchaser, was, and had been, Bateman's lawyer. He knew he was insolvent. He had judgments against him, on which he was pressing. Bateman had had a public and contested lawsuit before a justice of the county with the plaintiffs, who obtained judgment against him, and on which there was an execution issued, and in the hands of a constable for collection. He goes to Mann's office, and in the presence of both partners executes a deed to Mann for all his real estate. Then Mann walks out of the office, and the other partner writes a schedule of Bateman's personal property, to be used against plaintiffs' execution, and then Mann comes back. These facts, unexplained, would lead any unprejudiced and disinterested person to believe that Mann not only had notice of the judgment, but was engaged in aiding the debtor to es-

cape its payment. And yet he fails to testify with regard to the matter, and thus firmly clinches the inference of notice according to well-settled equitable principles. *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717; *Parker v. Valentine*, 27 W. Va. 677; *Bindley v. Martin*, 28 W. Va. 774; *Trust Co. v. McClellan* (decided this term) 21 S. E. 1025. The final decree, being in favor of plaintiff, in effect overrules all demurrers to the bill. For the foregoing reasons the court finds no error in the decree complained of, and it is therefore affirmed.

(40 W. Va. 385)

ROBINSON v. WELTY.

(Supreme Court of Appeals of West Virginia.
April 3, 1895.)

ASSUMPSIT—WHEN LIES—FRAUDULENT REPRESENTATIONS.

1. A party buys and takes a conveyance of certain real estate from a second party, who is insolvent. The real estate is subject to three mortgages and a judgment lien. The first party, for the purpose of making a proper application of the purchase money, and in order to control and thereby clear off the charges and liens, having made known to a third party, one of the mortgagees, his object, takes from him a separate written assignment of one of the mortgages and the negotiable note payable to his order, not yet due, thereby secured, which was not indorsed; and the first party was ignorant of the facts, but was induced by the false and fraudulent representations of the third party, the mortgagee, who knew that the mortgage was fraudulent and voidable, to believe, and did believe, that the mortgage of \$2,000 was a valid and subsisting charge to the extent of \$1,203.82, which sum he paid the mortgagee for the assignment, when in fact, and to the knowledge of the third party, the mortgage was wholly without consideration, and had been given and taken with the intent to hinder, delay, and defraud the creditors of the mortgagor, and was so held in a suit to foreclose, of which the assignor had notice, and was therefore wholly worthless to the assignee. *Held*, such assignee is entitled to secure back the sum with its interest, paid for the assignment. Such recovery may be had on a special count in general indebitatus assumpsit, setting forth specially the facts creating the liability, and averred as the consideration of the promise.

2. It may also be recovered back on the common count in general indebitatus assumpsit for money had and received, accompanied with a sufficient bill of particulars.

3. In such case it is not a good defense for the assignor to aver and prove that if the assignee, the plaintiff in the suit to foreclose, had set up, by way of confession and avoidance, the fact that he was a bona fide assignee for value, without notice of the fraud rendering void the mortgage as against the creditors of the mortgagor, it would have been *held* good in his hands, and allowed. See *Holmes v. Gardner*, 33 N. E. 644, 50 Ohio St. 167.

4. General indebitatus assumpsit does not lie for the breach of an express contract of warranty.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by William H. Robinson against Peter Welty. There was judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Russell, for plaintiff in error. J. D. Elson and Geo. E. Boyd, for defendant in error.

HOLT, P. This is an action of assumpsit, brought by the assignee of a mortgage, to recover back from the assignor the purchase money, the mortgage having proved to be invalid. Upon trial in the circuit court of Ohio county there was verdict and judgment for plaintiff, Robinson, the assignee, and this writ of error was granted defendant, Peter Welty. The grounds of error relied on in this court are as follows: "(1) Because the court below overruled the demurrer to the special count in the declaration. (5) Because the court erred in permitting the record mentioned in the special count to go in evidence. (6) Refused to sustain defendant's motion to exclude plaintiff's evidence after he had rested his case. (7) It was error for the court to give the five instructions given for plaintiff. (8) The court should have granted plaintiff's motion to set aside the verdict and grant a new trial."

I here give in full the special count and the instructions given. The demurrer, which involves the merits, cannot be fairly considered without setting out the count in full; and, besides, leaving out all the charges of fraud and falsehood, it gives a fairly good, connected statement of the facts which the evidence proves, and tends to prove, as it is viewed on motion to set aside the verdict.

Declaration: "In the Circuit Court of Ohio County. William H. Robinson vs. Peter Welty. In Assumpsit. July Rules, 1889. William H. Robinson complains of Peter Welty, who has been summoned of a plea of trespass in the case upon promises, for this: That heretofore, to wit, on the 27th day of October, 1885, he (the said plaintiff) purchased of one John J. McDermott certain real estate situated in Bellaire, Belmont county, in the state of Ohio, for which he agreed to pay the sum of \$2,700. At the time of the said purchase, the said defendant held and owned two mortgages on said real estate, duly recorded in the office of the recorder of the said county of Belmont,—one dated on the 28th day of January, 1879, and given to secure to Peter Welty, the said defendant, the payment of a promissory note, dated January 25, 1879, by which the said McDermott promised to pay to the defendant, two years after the date thereof, six hundred and twenty-seven and thirty-five one-hundredths dollars, with interest from the date thereof, at the rate of eight per cent per annum; and the other of said mortgages was dated on the 31st day of January, 1885, and purported to be given to secure to the said defendant the payment of a negotiable, promissory note, dated January 31, 1885, by which the said McDermott promised to pay to the order of the said defendant, twelve months after the date thereof, at the German Bank of Wheeling, two thousand dollars, for value received, with interest at the rate of six per cent per annum from date. And the plaintiff avers that, while he was in treaty with the said McDermott for

the purchase of the said real estate, the said defendant represented that there was then, to wit, on the 26th day of October, 1885, due and owing on the note first above mentioned the sum of \$715.18, and also falsely and fraudulently represented to the said plaintiff that there was then, to wit, October 26, 1885, due and owing to him, the said defendant, by the said McDermott, on the negotiable note dated January 31, 1885, the sum of \$1,203.82. And the plaintiff further avers that afterwards, to wit, on the 29th day of October, 1885, at the county of Ohio, and after the purchase and conveyance of said real estate as aforesaid, the said defendant assigned and transferred to him, the said plaintiff, the said two notes. The plaintiff, relying on the said representations of the said defendant as to the amount due and owing to him on said two notes, and without notice that such amounts were in fact not due, then and there, in consideration of such assignment and transfer, paid to the said defendant the sum of \$1,919, being the aggregate of the amounts which the said defendant falsely and fraudulently represented to the said plaintiff were due and owing to him on the said two notes secured by mortgages as aforesaid; but he avers the fact to be that there was not due and owing to the said defendant from the said McDermott the sum of \$1,203.82, or any part thereof, on the note for \$2,000, dated January 31, 1885, and that such note and the mortgage given to secure the same were fraudulent and void and without consideration. At the time of the purchase of the said real estate from the said McDermott by the said plaintiff, there was another lien on the same, created by the said McDermott by a mortgage dated October 25, 1878, given to secure Sullivan, Barnard, and Cowen the payment of certain notes therein mentioned. These notes were also assigned and transferred to the said plaintiff, he paying the holders and owners thereof the balance due thereon. Subsequent to the purchase of the said real estate by the said plaintiff as aforesaid, the same was sold to satisfy a judgment lien of — Dubois and — McCoy, partners, doing business under the firm name of Dubois & McCoy, which judgment was against the said McDermott, and was a lien on the said real estate at the time of the said purchase by the plaintiff, but was of a later date than the three mortgages aforesaid, and of inferior dignity to them; and the said Dubois & McCoy became the purchasers of the said real estate at the last-named sale, subject, however, to the lien of the said three mortgages, which had been assigned to and were still held by the said plaintiff. Under proceedings subsequently had in the court of common pleas of Belmont county in the state of Ohio by the said Dubois & McCoy to recover possession of said real estate, he, the said plaintiff, set up and relied on the three mortgages aforesaid; and while,

in said proceedings, the said mortgage to Sullivan, Barnard, and Cowen, dated October 25, 1878, and to the said defendant, dated January 28, 1879, were held valid liens, and the said plaintiff was permitted to recover, and by the judgment of said court did recover, the amounts found due on the notes secured by the said last-named two mortgages, yet the mortgage to the said defendant, dated January 31, 1885, was declared to be fraudulent, and by the judgment of said court in said proceedings held and adjudged to be null and void, and the plaintiff was not permitted to recover the same, or any part thereof, of all of which the said defendant then and there had notice, by reason whereof, and by means of the premises, the said sum of \$1,203.82, which the said defendant falsely and fraudulently represented was due and owing to him as aforesaid, was wholly lost to the said plaintiff, whereby, and by reason of the premises, the said defendant became liable to pay him the said sum of \$1,203.82, with interest thereon from the 29th day of October, 1885. And being so liable, the said defendant afterwards, to wit, on the 1st day of November, 1885, at the county of Ohio, undertook and faithfully promised to pay him, the said plaintiff, the said sum of \$1,203.82, with interest thereon from October 29, 1885, when he should be thereunto afterwards requested. Nevertheless, the said defendant, not regarding his promise and undertaking, and contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not as yet paid to the said plaintiff the said sum of \$1,203.82, with the interest thereon as aforesaid, or any part thereof, but to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff in the sum of \$1,500."

Plaintiff's Instructions: "No. 1. The court instructs the jury that if they believe from the evidence that Robinson paid to Welty a sum of money in consideration of the assignment of two notes of McDermott's and of the mortgages made to secure these, and that Welty falsely and fraudulently represented or induced Robinson to believe, and that he did believe, that there was owing to him \$1,919 thereon, and that Robinson relying on such representation, paid him that amount of money, if in fact nothing was due on one of such notes, then Robinson is entitled to recover in this action so much of the sum of \$1,919 as was paid to Welty for the assignment of the note on which nothing was due and owing, unless they further believe from the evidence that Robinson knew and understood at the time he so paid the money that Welty was to pay such money to Mrs. McDermott, and paid such money with that understanding. No. 2. The court instructs the jury that if they believe from the evidence that Welty falsely and fraudulently represented to Robinson that there was due

on the note of McDermott's \$1,203.82, and that Robinson, relying on such representation, paid him \$1,203.82, and if they further believe that in fact there was nothing due to Welty on said note, and that Robinson has lost the amount so paid, then he is entitled to recover in this action the amount so paid, with interest thereon from the time of payment, unless they further believe that Robinson knew at the time he paid the money that there was nothing due on such note, and that \$1,000 of the money so paid was to be turned over to McDermott. No. 3. The court instructs the jury that if they believe from the evidence that the defendant, Welty, paid over to Mrs. McDermott a part of the money received by him from the plaintiff, Robinson, for the assignment of the two notes and mortgages held by Welty, this is no defense to Robinson's claim in this action, unless they further believe from the evidence that at the time he paid the money to Welty he knew and understood that Welty was to pay a part of the money over to Mrs. McDermott, and that he paid Welty with such an understanding. No. 4. The court instructs that if they believe from the evidence that the note for \$2,000 and the mortgage made to secure it were without any consideration, fraudulent, and void, and that they were assigned by the defendant to the plaintiff for value, then the burden of proof rests on the defendant to show that the plaintiff knew that they were without consideration, fraudulent, and void when they were assigned to him, and also that the plaintiff knew and understood at the time of such assignment that \$1,000 of the money paid by the plaintiff was to be paid over by the defendant to Mrs. McDermott. No. 5. The jury are instructed that it was not necessary on the part of the plaintiff to prove the false representations alleged in the declaration by express and positive statements of the defendant, but it was sufficient to prove them by his acts and conduct; and if the jury believe from the evidence that the defendant, by his acts and conduct, induced the plaintiff to believe that the mortgage for \$2,000 was a valid mortgage, and that there was money due and owing to him on account of the said mortgage, and the plaintiff was hereby induced to pay him the amount so claimed to be due, then the plaintiff is entitled to recover the amount so paid, unless they further believe that the plaintiff knew it was to be paid to McDermott or his wife."

It is contended that the demurrer to the declaration should have been sustained (1) because the form of the action has been misconceived; that the injury complained of, if any, is a tort for which the proper remedy is case, and it is not a case in which an action *ex contractu* in *assumpsit* can be brought; (2) the special count of the declaration alleges that representations were made, and that they were false, but wholly omits to allege that they were know-

ingly false and made with intent to deceive. Here the tort is averred in detail, as showing the liability, and the liability as the exceeded consideration of the promise, and the promise is set forth as an express one. The promise must be so averred, though the duty or allegation arises dehors all contracts, express or implied, in fact, and so solely created by the law; for in all cases the declaration in *assumpsit* must show that a promise has been made by expressly averring that the defendant undertook or promised, or by other equivalent words (see 1 Chit. Pl. 392); and no distinction in this respect exists in common-law pleading between an implied promise and an express one (Id. 394; Bish. Cont. § 190; *Avery v. Tyringham*, 3 Mass. 160; *McGinity v. Laguerrenne*, 10 Ill. 101; *Wingo v. Brown*, 12 Rich. Law, 279; *Muldrow v. Tappan*, 6 Mo. 276; *McNulty v. Collins*, 7 Mo. 69); "and the presence or absence of these words is a test of distinction in declaring between *assumpsit* and case." "Trespass on the case" is generally used as the generic term, comprehending the three classes,—case, *trover* and *conversion*, and *assumpsit*. See Hare, Cont. 132; *Andrews' Steph. Pl.* § 52; 26 Am. & Eng. Enc. Law, 694. And, although *assumpsit* long ago became an action strictly *ex contractu*, it was in its origin an action *ex delicto*, and the express undertaking averred was the inducement, and the gist of the action was the disregard or refusal to complete or perform such undertaking by continuing and intending to deceive the plaintiff in that behalf. See *Holmes, Com. Law*, 183; *Bigelow, Lead. Cas. "Torts,"* p. 20; *Chandelor v. Lopus*, 1 Smith, Lead. Cas. (9th Am. Ed.) 319, 330. The transition from an express undertaking to one to be implied as a fact from conduct would be easy, especially where helped out by the requirement of it by equity and good conscience; and, for the sake of the remedy, it would be easy to pass to the case where the obligation or duty violated had no foundation but a consideration which had moved from the plaintiff, and the requirement of the discharge of such obligation in equity and good conscience. For an interesting discussion of the general subject, see *Keener, Quasi Cont. c. 1 et seq.*

In the special count, the plaintiff avers: That on the 27th day of October, 1885, he bought of one John J. McDermott certain real estate in Bellaire, in the state of Ohio, for the sum of \$2,700. At the time of the purchase, defendant, Peter Welty, held two mortgages on the real estate,—one dated January 28, 1879, to secure a note made by McDermott to Welty for \$627.35; the other (the only one here involved) dated January 31, 1885, given to secure a negotiable note made by McDermott, payable to the order of Welty, for the sum of \$2,000 and interest, 12 months after date, at the German Bank of Wheeling. That, while plaintiff was in treaty with

McDermott for the purchase of the real estate, defendant falsely and fraudulently represented to plaintiff that there was then, to wit, on the 26th day of October, 1885, due and owing him (defendant), from McDermott, on the note and mortgage of \$2,000, the sum of \$1,203.82. That, after his purchase from McDermott, the plaintiff, relying on the representation of defendant of the amount due and owing on the note and mortgage, and without knowledge that such sum was not in fact due, then and there took a transfer of said note and assignment of said mortgage, and in consideration thereof paid to defendant said sum of \$1,203.82, but in fact said sum was not due and owing, but said deed of trust was wholly without consideration, fraudulent as against creditors of McDermott, and void, and was so adjudged, of all which facts defendant had notice. It is seen that this is what we may strictly call a special count in general indebitatus assumpsit, as distinguished from a count on an express contract or promise, being simply the common count in the action of debt, with a slight change in the conclusion. It rests on a liability created by law as springing out of the facts set forth in the inducement, and the question raised by the demurrer is, does such legal liability thus arise as a point of law out of the facts alleged as justifies a recovery in general indebitatus assumpsit? It would be a misleading misnomer to call this a "special assumpsit." That would set forth the representation made by defendant, Welty, as a contract of warranty, as collateral to the contract of assignment, alleging the breach of such express contract and the injury and the damages thereby sustained, and upon such a contract, as a subsisting one, indebitatus assumpsit would not lie. See *Cutter v. Powell*, 2 Smith, Lead. Cas. (9th Am., from 9th Eng., Ed.) 1226, 2 Smith, Lead. Cas. (8th Am. Ed.) pt. 1, p. 48. Therefore, if this count, by reason of its want of an averment of the scienter,—the guilty knowledge on the part of the assignor,—does not allege facts creating a liability for deceit, we cannot, by leaving it out, make a good count on the express contract of warranty where the scienter would be wholly immaterial. But I do not think it can be said that it is defective in this regard, for it avers that a false representation was fraudulently made,—that is, was deliberately made with intent to deceive; besides, avers that defendant had notice of all the facts set forth; and the fact of the mortgage being fraudulent and void, without consideration, and made with intent on McDermott's and defendant's part to hinder and delay McDermott's creditors, as so alleged as to make it a matter of special knowledge, which it was defendant's duty to know, such positive affirmation of such facts comprehends an averment of the scienter. But is the liability alleged a liability which can be enforced in indebitatus assumpsit? If defendant obtained the sum of

\$1,203.82 from plaintiff by the false and fraudulent representation that the mortgage was a valid and subsisting claim to that extent, then, according to the cases, he is bound to refund it, for the mortgage was voidable, and has been held to be void and worthless; for the only object he had in view in buying it, and the consideration which induced plaintiff to pay the sum of \$1,203.82, has wholly failed. In such a case the law puts the defendant under obligation to refund the money. In equity and good conscience he cannot retain it, and this action as on a quasi contract will lie for its recovery. *Moses v. Macferlan*, 2 Burrows, 1012. In 1 Chit. Pl. 157, it is said: "Nor is assumpsit the proper remedy in the case of a deceitful representation not embodied in or noticed on the face of a written contract between the parties, but the remedy should be case for the fraud,"—citing *Meyer v. Everth*, 4 Camp. 22; *Gardiner v. Gray*, Id. 144; *Laing v. Fidgeon*, Id. 169; *Lord Ellenborough, C. J.*, in *Powell v. Edmunds*, 12 East. 11. It will be found that these cases turn on a rule of evidence which does not permit a written instrument to be varied or added to by parol, nor do they apply to indebitatus assumpsit in such a case as this, where the defendant has by fraud and covin obtained the plaintiff's money. See *Cooley*, Torts, 107 et seq. The action for money had and received may generally be maintained where the money of one man has without consideration got into the pocket of another; or, as it is sometimes expressed, a man cannot have something for nothing; "a man shall not be allowed to enrich himself unjustly at the expense of another." *Keener*, Quasi Cont. p. 19. Since one has the right to recover the proceeds of property wrongfully converted and sold, it necessarily follows that, where the plaintiff's money has been tortiously obtained by the defendant, the tort may be waived, and an action for money had and received be brought. Id. p. 180, where this branch of the subject of quasi contract is fully discussed, and many of the cases brought together. The law seems to be settled by many cases that, where the plaintiff's money has been wrongfully obtained by the defendant by misrepresentation of fact or other false pretense, the tort may be waived and an action for money had and received be brought (*Catts v. Phalen*, 2 How. 376; *Burton v. Driggs*, 20 Wall. 125); for, where the defendant has obtained the plaintiff's money from him by fraud and deceit, the law implies a promise from the wrongdoer to restore it because *ex aequo et bono* the defendant ought to refund the money, and to enforce such obligation the action of assumpsit lies. *Garber v. Armentrout*, 32 Grat. 235, 239. See 2 Rob. New Prac. 454; *Bliss v. Thompson*, 4 Mass. 488; *Lyon v. Annable*, 4 Conn. 350, 355; 2 Greenl. Ev. (15th Ed.) § 120; *Bish. Cont.* §§ 225, 226.

It may be stated in this connection that

this declaration also contains the common count for money had and received, and with it the plaintiff has filed an account stating distinctly the particulars and nature of his claim. By the authorities cited, we have seen that this count may be supported by evidence that the defendant obtained the plaintiff's money by fraud, false color, or pretense. 2 Rob. New Prac. 454. And in *Johnson v. Jennings*, 10 Grat. 1, it is said that this is the usual and better mode of counting in such cases. And entire damages having been given, and there being one good count, that is sufficient to support the verdict. See Code, c. 131, § 13. And it would be hard to say what injury the defendant could have sustained by overruling his demurrer to the special count, conceding it to have been error for full proof of all. This special count avers that defendant made to plaintiff the false and fraudulent and material representation that the mortgage given to him by McDermott was a valid and subsisting debt to the extent of \$1,203.82, whereas, as he knew, it was wholly without consideration, nothing was due, but it was given by McDermott and taken by defendant for the purpose and with the intent to defraud McDermott's creditors; that plaintiff, being ignorant of this fact, and relying on defendant's representation, paid his money, took the assignment, and by reason of such false representation was injured and sustained damage to the amount of \$1,203.82 and its interest. But defendant says that this special count is not good on demurrer, because it shows plaintiff to have been a bona fide assignee of the note and mortgage for value, without notice of the fraud of defendant, and therefore according to the case of *Holmes v. Gardner*, 50 Ohio St. 167, 33 N. E. 644, he would have been entitled to protection against the claims of the general creditors of McDermott, the fraudulent mortgagor; and that he failed to get such protection, and lost his mortgage debt by his own fault, in not confessing the fraud charged against McDermott, the fraudulent mortgagor, and defendant, Welty, the fraudulent mortgagee, and avoiding it by replying that he (plaintiff) was a bona fide assignee of the note and mortgage for value, without notice. But can defendant set up, as defense here, plaintiff's failure to thus confess and avoid defendant's own fraud? Does it not come within the meaning of the maxim that a party alleging his own fraud is not to be heard? Still, passing this by, I think the complete answer to the above contention is that, by the averments in this count, he did not know that such charge of fraud made by the defendants in plaintiff's Ohio suit to foreclose was well founded and true, until it was shown to be so by the decision of the court. Therefore, he met such charge by a direct denial, because he did not know and had no ground to believe it to be true.

It also appears, and is so averred in plain-

tiff's special count, that at the time of plaintiff's purchase from McDermott and before plaintiff's purchase from Welty of the notes and mortgages, Dubois & McCoy had obtained a judgment against McDermott which was a lien on said real estate at the time of plaintiff's purchase, but of later date than the three mortgages, and of dignity inferior to them. After plaintiff's purchase of the land, the land was sold on execution under the judgment lien of Dubois & McCoy, and was bought by them; so that, at the time of plaintiff's purchase of the notes and mortgages, Dubois & McCoy were not general creditors of McDermott, but were the holders of a specific lien upon the real estate in question, with rights definitely ascertained and fixed against such real estate, with the right, as against Welty, to have his mortgages reduced to the true amount due thereon. And the fact then being that one of them was without consideration, and therefore void as to them, the question arises, could Welty make it valid, and displace their lien by assigning it to a purchaser for value, without notice of the fraud rendering void the title of such assignor? It seems to me that the reason of the rule as given in *Holmes v. Gardner* would not then exist, for Dubois & McCoy were not general creditors, but were judgment creditors, with a specific lien against the land. They have no longer trusted to the personal responsibility of their debtor, McDermott, but have fastened their debt upon his land, subject, it is true, to valid prior liens, but not subject to invalid ones. Now, if any one bought from McDermott, he would pay his money upon the faith of the debtor's actual title to the specific property transferred, but subject to the judgment lien; and such purchaser for value, acting in good faith, could not get rid of the judgment lien by putting money in the debtor's pocket to take its place. Could he at that stage, for value and in good faith, buy from a fraudulent mortgagee a mortgage and note which was in the mortgagee's hands fraudulent and void as against the judgment creditors, and thus make a worthless lien good against the judgment lien made specific and fixed? If Robinson could have done this, was he compelled to do so to protect Welty in retaining money he had fraudulently obtained? For if Welty had been a party to the suit to foreclose, and Robinson had set up and had allowed against the judgment lien of Dubois & McCoy his claim of being a purchaser for value of Welty's mortgage, without notice of the fraud rendering void Welty's title, the court would certainly at the same time have decreed that Welty should pay to Dubois & McCoy the \$1,203.82, as received by him from Robinson, to stand as a substitute for that much of the value of the land. See *Bean v. Smith*, 2 Mason, 252, 274, Fed. Cas. No. 1,174. So that such decree would have placed the parties Dubois & McCoy, Robinson, and Welty exactly where the

court now finds them, as the result of the suit to foreclose and of the judgment here complained of; and thus both innocent parties would have been made whole, and the wrongdoer alone made to suffer. Any other result in such a state of facts than the one at least ultimately holding the wrongdoer bound to make good the loss would be putting it in his power of his own motion when he saw fit of profiting by his own wrong. If this view of the law is correct, then Robinson was not compelled to set up as against Dubois & McCoy the fact that he was an innocent purchaser for value, but could give their judgment its proper place as against the fraudulent mortgagee, and look to Welty, his assignor, as the one in justice ultimately liable; and if so, it does not lie with defendant to complain of plaintiff putting himself to the trouble, delay, and expense of placing the loss where it ultimately belongs.

Was it error to admit the record? Robinson brought his suit to foreclose in the court of common pleas of the county of Belmont, of state of Ohio, where the real property under mortgage lies; making parties defendant John J. McDermott and Mary Ann, his wife, the mortgagors, and Dubois & McCoy, judgment creditors of McDermott, who had execution on their judgment levied on the real estate as the property of McDermott, had the same sold, and became the purchasers thereof. A transcript of this record, duly certified, was offered in evidence by plaintiff, to which defendant objected; but the court permitted it to go in evidence for the purpose of showing the fact that such judgment was rendered, but reserving the question of its effect as an estoppel, and the defendant excepted. The suit for the sale of the real property under the mortgage was brought in Belmont county, where the lands lie, as required by the law of Ohio (2 Rev. St. Ohio, § 5022); and there the defendants in the suit resided. The defendants Dubois & McCoy, among other things, answered that there was not due on the \$2,000 mortgage the sum of \$1,203.55, or any other sum, but that said mortgage was totally without consideration, and was given by McDermott and received by Welty as a void mortgage, and for no valuable consideration; and this was proved by the deposition of Welty, taken and read in the case, with nothing to contradict it or show it to be otherwise; hence the court, by decree of 26th April, 1888, held the \$2,000 mortgage to have been given without consideration, and to be entirely void as against Dubois & McCoy. The record certainly proves that such a decree was rendered, and defendant, Welty, in his evidence in this suit, says that the mortgage was without consideration and void. The record proves itself, and that Robinson lost his mortgage, for which he had paid \$1,203.55, as the sum remaining due thereon; and defendant, Welty, in this case, says that, under the pleadings and evidence in the suit to foreclose, the judgment is right,

but that plaintiff ought not to have recourse on him, because plaintiff did not set up in that suit the fact that he was a purchaser for value without notice of the fraud of defendant, his assignor, rendering void his title. In such a state of facts, and with the view of the law already given, I cannot see that it makes any difference in this case that he was not a party in that, or that he had no proper notice to appear, make himself a party, and defend and resist the claim of Dubois & McCoy, for by his own showing, if he had been a party, and had set up the fact that Robinson was a purchaser for value without notice, the court would, in any event, have given a decree against him, as the one ultimately liable, for the \$1,203.55; for, if such plea availed, then he had Dubois & McCoy's money, as standing in the place of the property fraudulently withdrawn; if not, then he had the money obtained by fraud from Robinson. If this view be correct, it is not necessary to discuss the question whether he received sufficient notice to defend the claim set up in the foreclosure suit against the validity of the mortgage assigned by him, or, if sufficient, whether it was his duty in some way to cause such defense to be made. The record was at least competent evidence, though the judgment may not be conclusive. See *Sibley v. Hulbert*, 15 Gray, 509.

There is still another view that may be taken. The negotiable note and mortgage were transferred and assigned by defendant, Welty, to plaintiff, Robinson, by a separate written instrument; and although Robinson took them as a purchaser for value, without notice of the fraud rendering void, as against the creditors of McDermott, the title of Welty, his assignor, Robinson, did not take the note by indorsement, and McDermott was apparently insolvent, and had become a nonresident of both states. The evidence also shows that plaintiff, Robinson, before the assignment, had bought the property of McDermott, and had taken a conveyance; that Dubois & McCoy then had a judgment lien; and that Robinson was applying the purchase money in taking up the liens prior to the judgment for his own protection; and that he bought defendant's \$2,000 mortgage, not because it was good against McDermott, who had no other property, but because it appeared upon its face to be a valid and subsisting lien, and was so represented to the extent of \$1,203.55. Did not such representation, which could be made by acts and conduct as well as by words, form the sole basis of the sale, and did not the assignment under such circumstances plainly presuppose and guaranty it to be a valid and subsisting lien to that amount? Having turned out to be a nullity for the purpose for which he bought it, there having been a total failure of consideration, why may he not recover back the purchase money? No part of the \$2,000 had

ever been paid. Why count up any sum as the balance due on it if it were not for the purpose of assuring the plaintiff of the truth that it was a valid lien, and one still subsisting to the extent of such balance? Why should not the jury be allowed to take such representation, such acts and conduct, as put forward by Welty in order to induce Robinson to make the purchase, and that Robinson, knowing nothing to the contrary, and relying upon it, made the purchase? It was a question of fact for the jury. See *Croyle v. Moses*, 90 Pa. St. 250; *March v. Wilson*, Busb. 143; *Bigelow, Frauds*, 467. Robinson had bought the property, and wished to know the valid and subsisting liens against it, so that he could lift them by assignment to himself with the purchase money. The balance due on his mortgage was a fact peculiarly within the knowledge of Mr. Welty. Could not the jury say that he was bound to make good his representation in that regard,—in other words, under the common count, treat his representation as a warranty that it was pro tanto a valid and subsisting mortgage? In this view it might be regarded as an action brought for a rescission, or rather as based upon a repudiation of the contract of assignment, on the ground of a misrepresentation of the material fact of the validity of the \$2,000 mortgage, and a total failure of the consideration. In that view of the case, where rescission is claimed and a restoration of the money paid, it would be only necessary to prove that there was such misrepresentation, and an adjudication that the mortgage was fraudulent and void. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been made by misrepresentation, cannot stand. See *Derry v. Peek*, L. R. 14 App. Cas. 337-359; also, *Brownlie v. Campbell*, L. R. 5 App. Cas. 935. In such case the averment or proof of scienter is not necessary. See 1 *Bigelow, Frauds*, 520. That for which Robinson paid his money proved to be, not a valid and subsisting lien on the property to the extent of a balance of \$1,203.82 as against the other lienors, but a mere nullity as against the judgment of *Dubois & McCoy*. In such case the 'contract' of assignment could be and was treated by Robinson as voidable and as rescinded, and he was entitled to recover back his money on the count for money had and received, because it was entered into on the faith of a material representation, which was false in fact (see *Benj. Sales*, § 429; *Bish. Cont.* § 71); for he did not get what he contracted for, viz. a note and mortgage, with \$1,203.82 due on it, and valid and binding against every one as it appeared on its face, but one wholly without consideration and void for the purpose for which he bought it (see *Bish. Cont.* § 71). If one sells a promissory note, the law implies the warranty that it is not forged, but genuine and

binding on the parties, and not subject to any legal defense; yet, in the absence of fraud, there is no warranty of the maker's solvency or ability to pay. *Bish. Cont.* § 245. This court alleges that after the mortgage had been, in the Ohio suit, adjudged to be null and void, and the \$1,203.82 had become to plaintiff wholly lost, the defendant, treating the assignment as rescinded or repudiated, with full notice of all the facts, undertook and promised to pay. A misrepresentation without the scienter ceases to be innocent when the party who made it undertakes, after learning of its falsity, to maintain the advantage gained by means of it. 1 *Bigelow, Frauds*, 520. See *Street v. Blay*, 2 Barn. & Adol. 456, cited in *Cutter v. Powell*, 1 Smith, Lead. Cas. (9th Ed.) 1226. But see 1 *Tuck. Comm. Laws Va.* 338. I take the true distinction to be that where the plaintiff has the right to repudiate the contract of assignment of the mortgage upon the ground that it is a nullity, and he has nothing but the warranty that it is valid, he would not be required to bring special assumpsit for the breach of the express contract, but may recover at law in *indebitatus assumpsit* as for total failure of consideration; but no opinion is or need be expressed on this point.

When the plaintiff had closed his evidence in chief, defendant moved to exclude it from the jury. If this was meant as a denial of its sufficiency, and that the court should in that way instruct the jury to return a verdict for the defendant, the exception taken to the overruling of the motion was waived by defendant going on with his own evidence. *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596. If it was meant to object to the evidence as irrelevant or otherwise inadmissible, none such was pointed out except the record of the judgment of foreclosure, and that was only admitted for the purpose of showing the fact that such a judgment had been rendered; and, as we have already seen, it was, when taken in connection with defendant's own testimony in this suit, relevant and proper. Defendant claimed that plaintiff knew, when he took the assignment of the \$2,000 mortgage and note, that it had been given and taken with the intent to delay, hinder, and defraud the creditors of *McDermott*, the mortgagor, and that nothing in fact was due, and that he also knew that, of the \$1,203.82, \$1,000 was to be and was turned over to Mrs. *McDermott*. This was the turning point in the case, and upon it the evidence pro and con was conflicting; hence the extent to which it figures in the hypothetical state of facts upon which the five instructions given are based. It is enough to say that there was evidence tending to prove the hypothesis of facts upon which these instructions are founded; and we are of opinion that, taken as a whole, they state the law of the case supposed, with substantial correctness; and, viewing the case from the standpoint of

the evidence not controverted of the special finding of the jury and the tendency of the evidence on other points, we can see no error, if any at all, which could be to the prejudice of the defendant.

Finally, did the court err in refusing to set aside the verdict as contrary to the evidence? On the general issue of non assumpsit there have been two trials and two verdicts. On the first trial the jury were required to answer in writing the following question: "At or before the time when the notes and mortgages were assigned by defendant, Welty, to plaintiff, Robinson, did Welty, either personally or through Schafer, in Welty's presence and with his assent, make any false and fraudulent misrepresentations with reference to the \$2,000 note or mortgage?" The jury on the first trial answered this important question with emphasis in the negative, returning their answer in writing with their verdict for the defendant. This important finding is not to be found in this record, for reasons given in the case of *Welty v. Campbell*, 37 W. Va. 797, 17 S. E. 312. This verdict was set aside, and a new trial awarded. And on the second trial the jury found for the plaintiff, and, in answer to the same special question, returned in writing the following answer, "Yes." We think these papers were misrepresented at the time of the assignment. It is certainly not intended in this case to say anything harsh in regard to Mr. Welty. The answer of the first jury, which might be more reliable, is not before us. We must look only to the answer of the second jury on this vital point. We must, on this hearing of this writ of error, consider all the evidence before us. Code (Ed. 1891) c. 131, § 9. But the general rule is that the verdict ought not on that ground to be disturbed, unless the court can plainly see that the verdict is without evidence on some essential point, or that there is a clear and decided preponderance of evidence against the finding of the jury. On this vital point, as we have already seen, the evidence is conflicting, as well as the verdicts; but the last is the only one before us, and, under the rule as announced, we are of opinion it must stand as a finding on the issue and of the damages by them assessed. Judgment affirmed.

(40 W. Va. 365)

HOUSTON v. MCNEER.

(Supreme Court of Appeals of West Virginia.
April 3, 1895.)

ACTION FOR FALSE REPRESENTATIONS—PAROL EVIDENCE—ASSIGNMENT OF BOND—ASSUMPSIT.

1. The plaintiff took from the defendant a written assignment without recourse of a bond on M., and sued to recover his money back on the ground of fraudulent representation. To avoid such contract, the representation must be of a material fact, and be false, within the knowledge of defendant, and be made with intent on his part that plaintiff should act upon it, which rep-

resentation the plaintiff, in ignorance of its falsity, relies upon, and is thereby misled to his injury and damage.

2. Such written assignment without recourse cannot be changed in its terms by parol evidence.

3. By such contract the assignee takes upon himself all risk of collecting the money, provided the instrument assigned was in fact what it seemed to be,—a genuine, valid, subsisting debt.

4. General indebitatus assumpsit does not lie for the breach of an express contract of warranty.

(Syllabus by the Court.)

Error to circuit court, Monroe county.

Action by A. C. Houston against A. A. McNeer. There was a judgment for defendant, and plaintiff brings error. Affirmed.

A. F. Mathews and John Osborne, for plaintiff in error. J. D. Logan and J. W. Harris, for defendant in error.

HOLT, P. This was an action of indebitatus assumpsit in the circuit court of Monroe county, tried on plea of non assumpsit; verdict for defendant; verdict set aside; again tried, and verdict for defendant, which the court refused to set aside, but gave judgment, to which this writ of error was allowed the plaintiff. The declaration contains the common counts, including the count for money had and received, concluding with a special count in indebitatus assumpsit, as follows: "And for that the said defendant, on the — day of —, 1886, assigned to the said plaintiff, for valuable consideration, to wit, \$415, then and there paid to the said defendant by the said plaintiff, a certain note for the sum of \$499.45, executed to the said defendant by one R. T. McNeer on the 7th day of January, 1886, and due and payable on demand; and the plaintiff avers that at and before the said assignment the said defendant told the plaintiff, and represented to him, that he, the said defendant, was not indebted to the said R. T. McNeer in any way; that there were no offsets to the said note; that the said note was then immediately collectible, and that no objection could be made by the said R. T. McNeer to its immediate payment; that in consideration of said representation the plaintiff took the said note without recourse. And the plaintiff further avers that the said statements and representations were untrue, and well known so to be by the defendant; that the defendant was at the date of the said assignment, and afterwards, indebted to the said R. T. McNeer to an amount greater than that of the said note, so that the said R. T. McNeer refused to pay the said note on account of the said indebtedness, when thereunto afterwards requested by the said plaintiff; and that it would have been a vain thing for the said plaintiff to have sued the said R. T. McNeer. And the plaintiff avers that, by reason of the said false statements and representations, the said plaintiff suffered loss to the amount of the said sum of money paid to the said defendant; and the

said defendant became liable to pay to the plaintiff the said sum, with the interest due thereon. And the said defendant, afterwards, in consideration of the premises, respectively promised to pay the plaintiff the said sums respectively upon demand." The bond assigned by defendant, McNeer, to plaintiff, Houston, with the assignment thereof, without recourse, is as follows: "On demand, for value received, I promise to pay A. A. McNeer the just and full sum of four hundred and ninety-nine dollars and 45 cents. Witness my hand and seal, this 7th day of January, 1886. R. T. McNeer. [Seal.] Assigned without recourse. A. A. McNeer. A. C. Houston."

The only witnesses examined were plaintiff and defendant on their own behalf. Plaintiff's evidence tends to prove that the debtor, R. T. McNeer, was insolvent. He bought the note for the purpose of letting R. W. Bobbitt have it, who was indebted to R. T. McNeer, but such object was not made known to defendant. Plaintiff agreed to take the note if no objection of any sort could be made to its immediate payment, and defendant told him that no objection at all could be made to its immediate payment; that R. T. McNeer owed him (defendant) still more besides the amount of that note. Thereupon plaintiff took it without recourse with that understanding, and let Bobbitt have it in the same way. Bobbitt offered the note in part payment to R. T. McNeer in his settlement with him, but R. T. McNeer refused to take it. Plaintiff then took it back from Bobbitt, and wrote to defendant, A. A. McNeer, about the matter, who came to see plaintiff about it. Plaintiff told him that he took it with the understanding that no objection could be made to its immediate payment; that, if he had known about the Calder land matter, he would not have taken it; and that defendant must take it back, which he refused to do. The Calder land matter seems to have been a debt due to a commissioner who had sold the Calder land under a decree of court, which, as appears from argument of counsel, had been bought by R. T. McNeer at such sale; and the sale, by agreement of the commissioner and all interested, had been turned over to defendant, A. A. McNeer, and one John H. Shrader, who, with the consent of the commissioner, assumed the payment of the purchase money, relieving R. T. McNeer from the payment thereof. Defendant's evidence tended to prove that plaintiff agreed to take an assignment of the note without recourse, at a discount of \$90; that he did not know what plaintiff wanted with it; did not tell plaintiff that no objections could be urged to its immediate payment; that plaintiff did not ask anything of the kind; that he did not owe R. T. McNeer anything at the time of the assignment, but R. T. McNeer owed him more than \$600 over and above the note at the time he assigned it to plaintiff; and

that the Calder land matter was paid, or about paid, when he assigned the note. R. T. McNeer was not sued on the note.

Plaintiff asked the court to give the following instructions, Nos. 1 and 2, to the jury. The court refused, and plaintiff excepted. No. 1: "If the jury believe from the evidence that the defendant, A. A. McNeer, represented to the plaintiff, as an inducement to the contract of assignment, that he (the defendant) was not indebted to R. T. McNeer, while at the same time he was so indebted, —then the jury must find for the plaintiff." No. 2: "If the jury believe from the evidence that, as an inducement to the contract of assignment, the defendant told the plaintiff that there could be no objection on the part of R. T. McNeer to the immediate payment of the note assigned, while at the same time there were unsettled transactions between the defendant and R. T. McNeer, which would prevent the immediate payment of said note by said R. T. McNeer, then the jury must find for the plaintiff." And, on motion of defendant, and against plaintiff's objection, the court gave the jury the three following instructions, and plaintiff excepted: Instruction A: "The court instructs the jury that if they believe from the evidence that, in the spring of 1886, plaintiff and defendant entered upon a negotiation for the sale and assignment of the bond from R. T. McNeer to A. A. McNeer, offered in evidence in this cause, and that the result of said negotiation was the written agreement upon the back of said bond, signed by the plaintiff and defendant, then the legal effect of said written agreement is that, if said bond was due and unpaid at the time of said agreement, the plaintiff, Houston, took upon himself the risk of collecting said bond, and the terms of said written agreement cannot be changed or altered by parol evidence." Instruction B: "The court instructs the jury that, if a bond is assigned without recourse, it exempts the assignor from all liability by reason of the insolvency of the maker of the bond." Instruction C: "The court instructs the jury that if a party takes a bond by assignment to him without recourse, and the amount of money called for by the bond is due at the time of the assignment, he is not entitled to recourse said bond because of any failure or liability on his part to make the money called for by the bond."

The action was not a special assumpsit on the representation treated as an express collateral contract of warranty, in which the fraud and deceit would have been immaterial; such contract of warranty is not made the ground of plaintiff's claim of the right of recovery; but it is an action of general indebitatus assumpsit, with a special statement in the last count of a legal liability growing out of and resting upon a representation, false within defendant's knowledge, made by him to plaintiff, that he (defendant) was not in any way indebted to R. T. McNeer, the maker

of the note assigned; that there was no set-off to it; and that no objection could be made to its immediate payment,—upon which plaintiff relied, and by which he was misled, to his injury and to his damage; and in no case in which general assumpsit is brought, though there may have been a special agreement, does the plaintiff legally ground his claim at all upon the special agreement or promise (or warranty), nor derive any right from it, nor make it any part of his case. He proceeds exclusively upon the implied legal engagement or obligation. See *Cutter v. Powell*, 2 Smith, Lead. Cas. (8th Ed.) pt. 1, p. 48. Whenever, therefore, the plaintiff brings general assumpsit, he grounds his claim, not on the special contract (see *Robinson v. Welty* [this term] 40 W. Va. —, 22 S. E. 73), but upon an existing precedent debt or liability; and this suit, therefore, cannot be treated as a suit for the breach of the contract of warranty if the representation be so regarded, but upon the proof of the tort which creates the legal liability. *Huffman v. Hughlett*, 11 Lee, 549; *Keener*, Quasi-Cont. 207. See *Catts v. Phalen*, 2 How. 376. It may be that the plaintiff would have had the right to treat the contract of assignment as rescinded on account of its fraudulent procurement, and recover back his money in general assumpsit on the count for money had and received, without proof of the scienter or guilty knowledge on the part of the defendant; but that question does not arise in this case. See 1 Bigelow, *Frauds*, 520, 413.

To avoid a contract on the ground of misrepresentation, (1) the representation must be false; (2) known to be so by the person who makes it; (3) ignorance of its falsity on the part of the one to whom made; (4) with the intent on the part of the maker that it shall be acted on; (5) and the one to whom made must act upon it to his injury. See 1 Bigelow, *Frauds*, p. 466; *Wamsley v. Currence*, 25 W. Va. 543; *Crislip v. Cain*, 19 W. Va. 433; *Bish. Cont.* § 650. The representation must be as to a material fact, false to the knowledge of the maker, not known to be false by the plaintiff, who, relying upon it, has been misled to his damage.

Neither of the instructions asked for by plaintiff is based upon such a supposed state of facts as would vitiate the contract of assignment, and thereby entitle plaintiff to recover back the purchase money; and both were therefore properly refused; nor is such a state of facts shown by the evidence, certainly not by such a clear and decided preponderance against the finding of the jury as would justify the court in setting aside their verdict. Plaintiff took the risk of insolvency. It is not pretended that the note is not genuine or had been in fact paid; only that the maker of the note claimed to have some set-off or counterclaim as the ground of his refusal to pay the assignee. But how are we to know that there was any such effectual counterclaim? Defendant, in his evidence,

says there was none. There is no proof clearly showing the existence of any valid set-off against the note assigned. It is true there is some evidence about a land debt due from A. A. McNeer and John H. Shrader to a commissioner of the court for what is called the "Calder Land"; but the evidence about it is indefinite and obscure. There is certainly nothing to show it to be a legal offset. From what does appear the conjecture would rather be that it was not; and, besides, defendant says that it had been settled. The plain and reliable test was a suit at law against the debtor, which the plaintiff declined and refused to bring. See 1 Tuck. Comm. pp. 337, 338. It is said that would have caused delay, and have rendered it useless for the purpose for which it was bought, viz. to let Bobbitt have it to pay his debt with. But no such purpose was made known to the defendant, nor does any testimony, written or verbal, show that particular use of it to have been one of the terms or conditions of the assignment.

The question remains, was there any error to the prejudice of the plaintiff in the instructions given at the instance of the defendant? These three instructions construe the written contract of assignment, and give to the jury instructions as to its legal effect. Is not that a matter of law, and as such clearly within the province of the court? *Goddard v. Foster*, 17 Wall. 142; 2 Pars. Cont. p. 610. Do they propound the law of the case correctly? Taking them as a whole, the court says to the jury, in substance, as follows: This is a restrictive assignment; one without recourse; an agreement in writing; and therefore the terms thereof cannot be changed by parol evidence. *Martin v. Cole* (1881) 104 U. S. 30, 39. It exempts the assignor from all liability by reason of the insolvency of the maker; and if the bond is genuine, and the amount of money it calls for was owing and unpaid at the time of the assignment, then the assignee is not entitled to recourse the bond by reason of any failure or inability on his part to make the money; that is, the assignee thereby took upon himself all risk of collecting the money, provided it was in fact what it seemed to be,—a genuine, valid, subsisting debt. These instructions state the law correctly as applicable to the facts which the evidence tended to prove.

The plaintiff complains in his argument that the effect of the instructions given, with the refusal to give those asked for by him, was to lead the jury away from the only question in the case. It may have had in some degree that effect; but, if so, it could only be by regarding it as a special assumpsit on the representation treated as a warranty, and it was not the fault of the defendant or of the court. If it was the fault of any one, it was that of the plaintiff, who insisted on having the court give to the jury as the law of the case, in his view, what he was not entitled to have given in any

view, because the facts assumed in his instructions did not make voidable the contract of assignment, and give him the right to rescind and recover back the money paid. He did not ask the court to amend his instructions, or to instruct generally on the subject, but elected to stand or fall by his legal propositions as he had framed them. Is this, the defendant's second verdict, to be set aside for no fault of his or fault of the court? Inasmuch as the plaintiff failed to show by a suit that there was any legal set-off or counterclaim against the note, failed to show that fact in any way, and the burden of proving that fact being upon him, I do not see how the circuit court could have avoided giving judgment against him had the defendant demurred to the evidence.

Finally, I see no plain case of miscarriage of justice on any ground. For the reasons given, the judgment must be affirmed.

(40 W. Va. 675.)

TURNER v. NORFOLK & W. R. CO.

(Supreme Court of Appeals of West Virginia.
April 17, 1895.)

INJURY TO RAILROAD EMPLOYEE — COLLISION AT CURVE — FAILURE TO GIVE SIGNAL — SUFFICIENCY OF DECLARATION — NEGLIGENCE OF VICE PRINCIPAL — DEATH OF MINOR — DAMAGES.

1. The allegation in a declaration that the defendant, "without ringing the bell or blowing the whistle, or giving any warning whatever," is a general allegation, under which the plaintiff may introduce any evidence tending to prove any negligence on the part of the defendant wherein it failed to give plaintiff warning of an approaching train.

2. If it plainly appears that the defendant could not have been injured by the modification of an instruction asked, even though the modification was unnecessary, the failure to give such instruction without such modification is not sufficient cause for the reversal of the judgment.

3. In determining whether a boy 16 years of age was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity, and experience, and although he may have been guilty of an act which in an adult would have amounted to an assumption of the risk of injury, and a waiver of the duty the master owes him, yet he cannot be held to have assumed any such risk or waived any such duty which one of his age, discretion, and experience could not fully comprehend and appreciate.

4. A minor has the right to rely upon the superior skill and knowledge of the foreman having authority over him, and if, in obedience to such foreman's directions, he runs into unknown dangers, against which it is the duty of the foreman to warn him, but which duty such foreman negligently fails to perform, he cannot be held to be guilty of contributory negligence or to have assumed the risk of such dangers.

5. The action of the jury in assessing damages in case of the death of a person by the wrongful act, neglect, or default of another is not reviewable, as no damages allowed by the jury within the limit fixed by the statute can be deemed excessive, their determination of this question being absolute and conclusive as to what damages are fair and just, unless the verdict evinces passion, prejudice, partiality, or corruption on the part of the jury.

6. In all cases of negligence the law governing the assessment of exemplary, punitive, or vindictive damages is the same whether death result or not.

(Syllabus by the Court.)

Error to circuit court, Wayne county.

Action by Nathaniel Turner, as administrator, against the Norfolk & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Campbell & Holt, for plaintiff in error.
Marcum, Peyton & Marcum, for defendant in error.

DENT, J. Nathaniel Turner, administrator of the personal estate of Pearly Turner, deceased, instituted suit in the circuit court of Wayne county on the 11th day of February, 1892, against the Norfolk & Western Railroad Company, for the sum of \$10,000 damages on account of the death of said Pearly Turner, and on the 8th day of October, 1892, recovered a judgment for the sum of \$4,500, being the amount of damages assessed by a jury. The defendant, upon a writ of error to this court, insists on the following errors: "(1) The court erred in granting the plaintiff's instructions numbers 4 and 5. They were each irrelevant and misleading, in that neither was predicated upon the specific act of negligence charged in the plaintiff's declaration. (2) If it were proper for the court to grant the plaintiff's instructions numbers 4 and 5, then it was error to refuse to grant your petitioner's instructions numbered 1 and 2, as by it prayed. (3) The court erred in not setting aside the verdict as contrary to the law and evidence. (4) The measure of damages in case of death is the value of a man's life to his estate. The record contains no evidence whatever of the deceased's earning capacity, and the verdict was, in consequence, not only excessive, but absolutely without foundation, and should have been set aside."

The material facts in this case are as follows: On the — day of February, 1892, Pearly Turner, a boy 16 years of age, of average intelligence, industrious, obedient, and healthy, while in the employ of the defendant, under the direction and control of a foreman named Alley, met his death in a collision between an extra engine and a hand car, at a curve about five miles from Wayne Courthouse. The deceased was on the hand car with a crew of employes, all of whom, at the time of accident, were acting under the orders and immediate supervision of said foreman. The foreman went ahead of the hand car to the curve, and without going himself or sending some one else to ascertain whether an extra was coming, as the rules of the company required him to do, got on the hand car and started around the curve, and met the engine near the middle thereof. All escaped except the deceased, who was killed outright. The evidence is conflicting as to whether the whistle of the engine was sounded or the bell was rung; the engineer and crew with him testifying that the whistle was sounded and the bell rung at a road crossing 800 or 900 feet from the curve, and that such sounding of the whistle was for the curve, as he, the engineer, was on the lookout for a gang of

carpenters. None of the crew on the hand car heard either signal, and some other parties testify that they did not hear either whistle or bell, although in position to do so. The deceased had been in the employ of the company for about five months, had passed over the road frequently, and had often flagged trains for the foreman. His father was dead, but his mother was living.

1. The instructions referred to in the first assignment of error are as follows, to wit: "No. 4. The jury are instructed that when a railroad company puts a foreman in charge of a gang of laborers, with power to discharge them, subject to the approval of the supervisor, and makes it the duty of said foreman to see that these laborers perform their duty faithfully, such foreman must, in the performance of all his duties to those laborers under him, be regarded as the representative of the railroad company, and if, through his neglect of duty, one of these laborers, in the performance of his duty, is injured without negligence upon his part, such laborer may recover of the railroad company the damages he has sustained, caused by the negligence of such foreman without the knowledge of such laborer. No. 5. The court instructs the jury that the plaintiff's intestate, Pearly Turner, had the right to assume that his foreman, E. Alley, would give all proper attention to his safety, and that he would not be carelessly and needlessly exposed to risks and damages not necessarily resulting from his occupation, and which might have been prevented or much diminished by ordinary care and precaution on the part of his master or his representative, in this case Foreman Alley." The objection to these instructions is an alleged variance between the declaration and proof. The part of the declaration referred to is as follows: "While said plaintiff's intestate was engaged in propelling and operating the said hand car on defendant's track on said section, without any default or negligence on his part, and without any knowledge of the danger to which he was then and there exposed, the said defendant wrongfully, negligently, and injuriously ran and caused to be run a certain steam locomotive engine around a sharp curve and through a deep cut, without ringing the bell or blowing a whistle, or giving any warning whatsoever, with great force and violence over, upon, and against the said hand car, upon which said plaintiff's intestate was as aforesaid, whereby and by reason whereof the plaintiff's intestate was bruised, wounded, and mangled, from which said wounds, bruises, and injuries afterwards, to wit, on the day and year aforesaid, he died." The defendant insists that the instructions were not proper, because the jury, under this declaration, could not find the defendant guilty of an act of negligence committed by Foreman Alley in not taking the required steps to ascertain and warn the deceased of the approaching train. This was a duty the

defendant owed to the deceased and which it imposed upon his foreman, and certainly comes within the general allegation of the declaration, "without any warning whatsoever." Foreman Alley was the agent of the defendant as to giving this warning, and his failure to do so was the failure of the defendant. It was necessary for the jury under this declaration to have before them and take into consideration any and all failures on the part of the defendant to warn deceased of the approaching train, and, if the defendant had warned him through any of its agencies, it would have been sufficient, although all the others had been guilty of negligence in this respect; and the declaration is founded on the fact that the defendant failed in its duty, and, if it had not been broad enough to cover the negligence of Foreman Alley, it would have been bad on demurrer or motion to exclude the evidence. The demurrer was overruled, and properly so, and no motion was made to exclude the evidence. The evidence which justifies the instructions was first introduced by the defendant on its theory of the case, to show contributory negligence on the part of deceased, and, being in for its purposes, it could not have it excluded because it sustained the plaintiff's case. The instructions were, therefore, proper to meet the defendant's claim of contributory negligence, if for no other purpose. The defendant cannot relieve itself in a case of this character, resulting from the negligence of its servants, by showing that others of its servants were equally or more negligent, and, if they had not been so, the accident would not have happened, unless it shows that the deceased contributed to the latter's negligence. An attempt of this kind was made in this case, and was properly met by these instructions. Under this view of the question presented, the authorities referred to by the defendant's counsel have no application to this case, but only where there is a plain variance between the allegations and the evidence, which has been taken advantage of in the trial court and not here raised for the first time. On this subject, in addition to the authorities cited by plaintiff's counsel, see *Long v. Campbell*, 37 W. Va. 665, 17 S. E. 197.

2. The instructions referred to in the second assignment of error are as follows, to wit: "No. 1. The court instructs the jury that if they believe from the evidence that E. Alley was a foreman of the defendant, in charge of a gang of laborers putting in cattle guards along defendant's line; that the plaintiff's intestate, Pearly Turner, was a member of such gang, and subject to the authority of said Alley; that on the morning of January 28, 1892, the said Turner, in company with his said foreman and the other laborers of the gang under him, got on a hand car on the defendant's railroad track willingly and without objection, and rode along on said hand car in the direction of

Wayne, through cuts and around curves, without the foreman of the crew, or any member thereof by his direction, being ahead with flag or other signal to give the hand car and its occupants warning of danger by reason of approaching trains or otherwise, and the absence of such flagging was known to the said Turner, and he still without objection remained on the hand car,—then, under such circumstances, the said Pearly Turner accepted and assumed the risk of encountering or coming in contact with any extra train or wild engine that might be on the track, and which could be escaped by such flagging; and under such circumstances, if the jury find that the neglect of the foreman to flag was the proximate cause of the injury to Pearly Turner, they cannot find for the plaintiff, but must return a verdict for the defendant. No. 2. If the jury find from the evidence in this case that the intestate, Pearly Turner, for two or three months prior to his death, had been in the service of the defendant, under Foreman Alley, working upon the defendant's railroad track putting in cattle guards, and to his knowledge the railroad company during that time had been daily running on said road divers extra trains, without previous notice, back and forth from one point to another at irregular hours of the day, and that said Turner, without compulsion, got upon the hand car on the morning of January 28, 1892, knowing that his foreman, Alley, had no knowledge or opportunity of knowledge that extra No. 2 would be approaching that morning, and also knew that his said foreman had not flagged around the curve where the accident occurred, then the jury are instructed that the said Turner assumed the risk of a collision between his hand car and any extra which might meet them on said curve." And the plaintiff objected to the giving of said instructions, and each of them, and the court sustained said objection, and refused to give said instructions, or either of them, in the above form; to which opinion of the court in refusing to give said instructions, and each of them, the said defendant again excepted. Thereupon the court modified each of said instructions by adding to No. 1 the following language: "Provided the jury further believe from the evidence that Pearly Turner had knowledge of the duties of said Foreman Alley to do such flagging, or cause it to be done, and if the jury believe further from the evidence that Pearly Turner had knowledge at the time of the accident that said Alley had not so done his duty." And by adding to No. 2 the following language: "Provided the jury further believe from the evidence that Pearly Turner had knowledge that it was the duty of said foreman to do or have done such flagging." And the court then gave each of said instructions as so modified.

The modifications made by the trial court

to these instructions come clearly within the rule as decided by this court in the case of Gregory's Adm'r v. Railroad Co., 37 W. Va. 606, 16 S. E. 819. The mere fact that a part of the modification is a repetition of what is already contained in the instruction would not vitiate it to the prejudice of the defendant. These instructions were based on the contributory negligence of the deceased, who could not be considered as waiving the discharge of a duty which the foreman owed him as the agent of the defendant, unless he had knowledge of the duty. The court did not err in so modifying the instruction, but it did err in giving the instruction as modified, but not to the prejudice of the defendant.

The first instruction contains this language: "Through cuts and around curves, without the foreman of the crew, or any member thereof by his direction, being ahead with flag or other signal to give the hand car and its occupants warning of danger." There is no evidence in this case that justifies this part of the instruction, as it does not appear that any other cuts and curves were passed that morning where the foreman neglected his duty to flag but the one where the collision occurred, and the jury cannot infer from one proven act of negligence that other similar ones occurred. Both instructions are vicious for another reason. They fail to take into consideration the age, capacity, and experience of the deceased. 3 Wood, R. R. (2d Ed.) § 380, p. 1754, lays down the law as to the employment of minors as follows: "The mere fact that a servant is a minor does not of itself render the master under any greater obligation to him than to older employes. When he enters the service, he assumes all the risks incident to it, and no exception to the general rule in this regard is made in his favor." And in Wood, Mast. & Serv. p. 714, § 349: "Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk on himself if he goes on with it, but this only applies where the servant is of sufficient discretion to appreciate the dangers incident to the work. Where there are latent defects or hazards incident to an occupation, of which the master knows or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if, through youth, inexperience, or other cause, the servant is incompetent to fully understand and appreciate the nature and extent of the hazard." In the case of Railroad Co. v. Fort, 17 Wall. 558, a suit for damages sustained by a boy 16 years of age, Justice Davis, rendering the decision of the court, says: "If the order had been given to a person of mature years, who had not en-

gaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger; or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking. He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger." In this case the decedent, a minor 16 years of age, of average intelligence for one of his age, when he entered the service of the company defendant as a track hand, assumed all the ordinary risks incident to that service, and the defendant was bound to accord to him the same protection as to unexpected or extraordinary hazards as it did to adult employes. When it seeks to be excused from culpable negligence on its part in that it failed to discharge its duty towards him in warning him of an unusual latent and dangerous hazard, on the theory that he acquiesced in its negligence and assumed the risk of the hazard, his age, experience, and capacity, if not legally conclusive, are potent factors to be considered by the jury in arriving at a verdict. The defendant's instructions entirely ignore these factors, and propound the law as though he were an experienced adult, with all his powers of mind and body fully developed. If he had signed a written contract or deed waiving the discharge of the defendant's duties towards him in the most solemn and formal manner, the law would have held it void, and, if he had entered into a parol agreement to the same effect, the law would have disregarded it; and yet the jury is instructed that they may find from his acts, knowledge, and conduct that he released the defendant's legal duty towards him, and assumed the risk occasioned by the defendant's negligence, although at the time he was acting in obedience to the defendant's orders. Such a construction of the law is contrary to reason and experience. Boys of 16 seldom stop to consider any danger to which they may be exposed, but rely implicitly on the superior judgment of those in authority over them. And is it not right that they should do so, especially when any insubordination on their part subjects them to condign punishments? Is not such the teaching of both the Scriptures and the law? Shall we say, in the language of the defendant's counsel, "Common sense would teach him, his own safety would require, and ordinary prudence dictate," that he should not place confidence in the superior intelligence, experience, and knowledge of the trusted agent of the de-

fendant, his superior officer, but that he should depend on his own youth, inexperience, and lack of knowledge? The defendant would never countenance such a rule as this in its business. It would take a very strong case to make an infant employé contribute to his master's negligence by obeying his directions, which result in the former's death. Certainly the case now presented is not such a case, and therefore the defendant's instruction, though modified, should not have been given.

3. The conclusions thus reached virtually dispose of the third assignment of error, which is to the refusal of the court to set aside the verdict as contrary to the law and evidence. The defendant's argument under this head is mainly as to the question whether the engineer sounded the whistle and caused the bell to ring, as required by the rule of the defendant, which is in these words: "Extra and delayed trains must sound the whistle frequently on approaching curves, and before passing obscure places." The engineer and other trainmen testify that the whistle sounded and the bell was rung just before and at the road crossing, about 800 feet from where the accident took place. The employes, not less than 12 in number, heard neither the whistle nor bell. This is established by their conduct, independent of their testimony, because, if any of them had heard, it is safe to presume the accident would not have happened. Several other witnesses testified on the same subject. The jury had to weigh this evidence; for it is certainly conflicting and contradictory, depending entirely on the memories of the witnesses, their interest in the result of the trial, and other circumstances surrounding the case. But, admitting that the whistle was sounded and the bell rung, as testified by the trainmen, can we say that it was a full compliance with the rule of the defendant? It certainly did not accomplish the result intended. It could warn no one whose ears it did not reach, and it appears to have been heard only by those in the immediate neighborhood of the engine. Why the whistle was not sounded in the immediate neighborhood of the curve,—the point of danger,—no explanation is given. The engineer says the whistling at the road crossing, 800 feet away, was intended for the curve, because he expected some carpenters along on a truck or hand car, and yet he did not sound the whistle frequently, as the rule requires, but actually ran into the very carpenters he was expecting, without giving them any warning of his approach. The jury were certainly justified in finding that the engineer, as well as the foreman, was guilty of negligence in not obeying the rules of the defendant. The defendant insists that, if the engineer and foreman were guilty of negligence, the boy was guilty of contributory negligence; that "his conduct

under the circumstances was such as no man with a grain of sense or a particle of prudence would have been guilty of." Such language as this might be properly used towards the offending foreman or the other adult hands, seven in number, who were along with him, but is certainly hardly appropriate when applied to this poor, unfortunate boy, who, in his earnest desire to serve his master in an acceptable manner, lost his life while strictly obeying the orders of his master, as represented by its foreman. He not only had the right, but was in duty bound, to rely upon the care and superior knowledge of the trusted agent of his employer, under whose protection and charge he was placed. *Wood, Mast. & Serv.* § 366; 4 Am. & Eng. Enc. Law, 42-61, note 1. This is a much stronger case in this respect than the Fort Case, referred to above. This boy was not sent into a dangerous place, but by the conduct of his superior "was lulled into a sense of perfect security," and then led into unexpected danger, and, when the death trap is reached, the superior, by reason of his experience, activity, and good fortune, saves himself, and permits the innocent victim of his negligence to perish. For his confidence and obedience, the boy paid his life; for its negligence, the master should respond in damages.

4. The last error assigned is that the damages allowed are excessive. Section 6, c. 103, of the Code, provides that: "In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars." By the enactment of this law the legislature, as it had the power to do, gave the jury absolute control over the question of damages, within the limit fixed. The courts are clothed with no authority to disturb their findings, but are inhibited from so doing as positively as though plainly expressed in the language of the statute. They can neither enact, repeal, vacate, or amend legislative enactments within the limitations of the constitution, within which the legislature is supreme and the judiciary powerless. It has been held by the court of appeals of Virginia, in construing a similar statute, from which our statute was taken, that the measure of damages in the case of a man's death is not limited to the pecuniary value of his life to his estate; but may be exemplary, punitive, and given as a solatium. *Matthews v. Warner*, 29 Grat. 576; *Railroad Co. v. Noell's Adm'r*, 32 Grat. 394. This boy, according to the evidence, was strong, healthy, 16 years of age, fatherless, and with a widowed mother. To hold that such a boy's pecuniary value to his estate by any table of probabilities was worth less than \$4,500 would require very close calculation, exclusive of the cost and expense of litigation. But it is certainly evident that it was not the intention of the legislature for the jury to be limited in their finding to the probable

pecuniary loss. The law was to operate as exemplary and punitive, as well as compensatory, but not penal, in any proper case. *Ricketts v. Railway Co.*, 33 W. Va. 433, 10 S. E. 801. Any damages imposed in such cases are a forfeiture for the wrong done, occasioned by the neglect of a legal duty, and, so far as the aggressor is concerned, is intended to be corrective, in tender consideration of human life. A verdict of \$4,500 will illy remunerate a widowed mother for the loss of a strong, healthy, industrious son of average intelligence, 16 years of age, yet it is to be hoped that it may have the effect to either deter the defendant and other similar corporations from employing minors in dangerous occupations, or to cause their agents to be more vigilant in protecting such youthful employes from the culpable negligence of those having them in immediate charge, and to whom they owe the duty of obedience. In any view of this case, the damages found are not excessive, and no error has been committed to the prejudice of the defendant, and the judgment is therefore affirmed.

On Rehearing.

In their able reargument of this case, defendant's counsel present six points for further consideration.

"(1) The engineer and fireman of the special engine were fellow servants of the decedent, a section hand on the track." This depends entirely upon the nature of the act or duty, as it relates to the decedent, they were called upon to discharge at the time of the accident. In some respects they were his fellow servants, but, in giving him warning of the use of the track by a special train, they were discharging the nonassignable, personal, positive, or superior duty of the master, the defendant, in its corporate capacity. It has been well said that it would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. *Lewis v. Seifert*, 116 Pa. St. 647, 11 Atl. 514. Having prepared and promulgated its schedule, it must adhere to it, and, if it makes a change or violates such schedule, it is its positive duty to notify all who may be affected thereby of such change. When, in contravention of its schedule, it sends a "wild engine" over its track unexpectedly, it is in duty bound to warn all its employes who are rightfully on and using the track about its business, whether in charge of engine, train, or hand car, of the change in the schedule, and if it intrusts this duty to others, by bell, whistle, or otherwise, it makes such others its vice principals to that extent, and, if they fail to discharge this duty, the company must answer for their negligence unless it be shown that the injured person contributed thereto. For instance, if the company had failed to notify Foreman Al-ley, by bell, whistle, or otherwise, of the

presence of a special train or obstruction on the track, and he had been injured thereby, he could recover, unless the defendant showed that he was under express instructions to be on the lookout for such special trains, and, as a matter of precaution, to flag around curves and through cuts. In such case he would fall, not because of being a fellow servant with the engineer, but from contributing to his negligence. The company must protect its employes from all dangers created by itself or its authorized agents or agencies which such employes cannot themselves foresee or, by the use of ordinary prudence, avoid. For it must furnish them a safe place to work. To send "wild engines" and trains without any manner of warning or precaution over tracks already rightfully occupied by other employes is negligence in the highest degree criminal, in utter disregard of human life or limb, and worthy of the severest penalties the law can possibly inflict; and it is made less criminal by the degree of precaution taken to give the necessary warning, and only becomes excusable when the measures adopted are sufficient to protect such employes from threatened danger, provided they are free from fault themselves. It is not necessary to refer to decisions of other states to sustain or refute this doctrine, as the law is thus fully settled beyond controversy by numerous decisions of this court, to wit: *Flanagan v. Railway Co.* (decided at this term) 21 S. E. 1028; *Haney v. Railway Co.*, 38 W. Va. 570, 18 S. E. 748; *Core v. Railroad Co.*, 38 W. Va. 456, 18 S. E. 596; *Johnson v. Railway Co.*, 38 W. Va. 206, 18 S. E. 573; *Beuhring's Adm'r v. Railway Co.*, 37 W. Va. 502, 18 S. E. 435; *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397, 15 S. E. 162; *Criswell v. Railway Co.*, 30 W. Va. 798, 6 S. E. 31; *Madden v. Railway Co.*, 28 W. Va. 610; *Cooper v. Railroad Co.*, 24 W. Va. 37. In these, and many others, this court is in accord with the decisions of the supreme court of the United States in the cases of *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 822; *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184; *Railroad Co. v. Baugh*, 13 Sup. Ct. 914; 54 Am. & Eng. Ry. Cas. 328. See note on page 364, 54 Am. & Eng. Ry. Cas., where doctrine is stated and authorities cited.

"(2) The plaintiff's decedent was guilty of contributory negligence." The duty of proving contributory negligence is on the defendant. To do this defendant proved that its foreman had been guilty of negligence in not flagging around the curve, and that by the rules of the company he was required to so do; so far only proving a further breach of its duty towards the decedent, making it liable under the decision of *Criswell v. Railway Co.*, supra, for all damages sustained. It then showed that the deceased had been working for the company five or six months, and that he had

often been sent to flag around curves, and that the foreman had been flagging around curves when he "was looking for a train or anything." When he knew there was no train, he did not flag. This is the only evidence tending to show contributory negligence. No knowledge of the rules of the defendant or of the duties of the foreman were brought home to the deceased, except what might be presumed from his limited observation and experience. As is said by Judge Green in the *Criswell Case*, he had the right to rely on the foreman's judgment and conduct, and that he would take every necessary care and precaution to protect him from unnecessary and unexpected dangers, and in doing so he did not waive the company's duty towards him, nor did he assume any dangerous risks of which he had no knowledge or information. How did the deceased know that the foreman was not doing his duty strictly? The evidence falls entirely to answer this question. As Judge Brannon says in *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 613, 16 S. E. 819: "Before we can say that the plaintiff's action shall be defeated by the mere existence of a rule, we must find that he had knowledge of it." The foreman himself was ignorant of the extent of the rule, and often neglected to observe it. Certainly his hands, who were not required to know or furnished with a copy of it, should not be presumed to have a more extensive knowledge than their foreman, for whose government it was made, and who was expected to be familiar therewith for the instruction and protection of those under him.

Right in this connection is the defendant's third point, to wit: "(3) Turner, the party killed, was sixteen years of age, and, having passed the age of fourteen, he was presumed to have had sufficient capacity and understanding to be sensible of danger, and of having the power to avoid it, and this presumption should stand until it is overthrown by proof of the absence of such discretion and intelligence." The defendant's counsel apparently misunderstand the law as propounded in the opinion in relation to the age of the decedent, and that is that it is the duty of a master who knowingly employs a youthful servant, and subjects him to the control of another servant, to give him such warning of the dangers of his employment as his youth and inexperience require. In this it is not shown that this boy was given any instruction as to the dangerous hazard of riding on this car around this curve without flagging. On the contrary, he was led into the very jaws of death by the man who should have warned him and given him proper instruction. There is a great difference in the law as applied to the case of a minor who acts in disobedience to or without orders and one who acts in obedience to the commands of those having authority over him. In the former case the rule relied on

by the defendant, and the authorities cited in support thereof, may apply, but in the latter case they have no application, but the rule is entirely different. A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older, to whom he is given in charge. But he is taught the lesson of obedience from his cradle, and he is required to respect the commands and pay deference to the judgment of his elders until legally emancipated at the age of 21 years. And it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master. This is no such case, but is in line with the following cases, yet stronger than they: *Railway Co. v. Perego*, 36 Kan. 424, 14 Pac. 7; *Dowling v. Allen*, 74 Mo. 13; *Hill v. Gust*, 55 Ind. 45. In the case of *Railway Co. v. Bridges*, 92 Ga. 399, 17 S. E. 645, it was held that, "the evidence showing affirmatively that the plaintiff was injured while engaged in the line of his duty, under the orders and in the immediate presence of the 'boss' to whose orders he was subject, and the injury was the result of negligence attributable to the company,—either the sole negligence of the 'boss' or the joint negligence of him and of absent officers or employes with whom he should have co-operated in so regulating the movements of his hand car as to prevent a collision between it and a train,—a recovery by the plaintiff would be defeated only by fault on his part amounting to rashness or recklessness in obeying under the circumstances the orders of the boss." It is impossible to say in the light of the evidence that this boy was guilty of rashness or recklessness in obeying the orders of his foreman.

"(4) The former opinion herein recognizes, permits, and commends the doctrine of punitive damages, contrary to the former adjudications of this court." The question of punitive damages does not properly arise in this case. No instructions as to the amount of damages were asked or given, but the jury was left free to find under the statute such damages as they should deem just and fair. The doctrine of punitive damages should be the same in cases where death ensues from acts of negligence as where it does not ensue, in accordance with the law as given in the case of *Mayer v. Frobe* (decided at this term) 22 S. E. 58, which overrules *Pegram v. Stortz*, 31 W. Va. 242, 6 S. E. 485, on which the defendant mainly relies. As to circumstances under which corporations would be subject to the infliction of punitive damages, see *Ricketts v. Railway Co.*, 33 W. Va. 433, 10 S. E. 801; *Downey v. Railway Co.*, 28 W. Va. 732, 743.

"(5) The right given a jury by section 6 of chapter 103 of the West Virginia Code to assess damages not to exceed \$10,000, wherever the death of a person has been caused by a wrongful act, is not a right that may be ex-

ercised arbitrarily, but the exercise thereof is always subject to proper correction and control by the court, under the established rules of law." The fifth syllabus, as propounded in this case, relates only to the amount of the verdict, and is simply to the effect that, there being no other question of law or evidence presented, the court cannot disturb the verdict of the jury as either too great or too small for the very reason that the legislature, as it had the right to do, has lodged with the jury the sole power to determine the amount of the damages, and for the court to interfere with this power is to usurp legislative functions, and, under the pretense of legal construction, to repeal, alter, or change a plain legislative enactment, about which there can be no two distinct and different opinions. That the syllabus may be easier of comprehension, and leave no question of doubt within proper limitations, it has been deemed advisable to add the following words: "Unless the verdict evinces passion, prejudice, partiality, or corruption on the part of the jury." *Battrell v. Railway Co.*, 34 W. Va. 232, 12 S. E. 699. Nothing of this kind, however, is claimed.

But the only reason relied on is as given in defendant's last point, to wit: "(6) In the case at bar, the evidence failed to furnish any proper data upon which to base a verdict or judgment." A boy 16 years of age, robust and healthy, a good worker, employed as a track hand or day laborer by the defendant; a widowed mother, who appeared and testified before the jury. From these facts the inferences naturally follow: That he was receiving the ordinary wages of a laborer of his class; if he was not, the defendant employed him, and could have so shown. That his mother depended on his wages; for, if not, he would not have been at work; the minor sons of the wealthy, or even the well to do, at 16 years never labor as repair hands. These are both matters of common observation, within the knowledge and experience of the ordinary jurymen. *City of Chicago v. Hesing*, 83 Ill. 204. The amount of damages is a question of fact, and not of law. *City of Joliet v. Weston*, 123 Ill. 641, 14 N. E. 665; *City of Salem v. Harvey*, 129 Ill. 344, 21 N. E. 10. While courts are supposed to know and administer the law, the jury determine the facts. With their determination the court ought not to interfere unless it is in a form to shock the understanding and impress no dubious conviction of their prejudice and passion on the mind of the court. *Grah. & W. New Trials*, 452; *Zinc Co. v. Black's Adm'r*, 88 Va. 300, 13 S. E. 452; *Trice v. Railway Co.* (decided at this term) 21 S. E. 1022. There is nothing in this case "to warrant the belief that the jury must have been influenced by partiality, prejudice, or passion, or have been misled by some mistaken view of the merits of the case." *Boster v. Railway Co.*, 36 W. Va. 318, 15 S. E. 158. For the foregoing reasons,

the former conclusion arrived at is ratified and affirmed.

Note by ENGLISH, J.: I cannot concur with the opinion expressed by the majority of the court in this case, for the following reasons: The record discloses the fact that the plaintiff's intestate was a laborer in the employ of the defendant, and at the time he received the injury which caused his death was riding upon a hand car on his way to his work. He was 16 years of age, of "tolerably fair size, and a good worker." So far as appears from the testimony, he was performing the labor of a man, and receiving a man's wages. At that age he was as capable of taking care of himself as a young man 18, 20, or 22 years of age, and it appears to me an injustice would be done to discriminate against boys who were capable of performing the labor of a man by holding that a greater responsibility or liability rested upon their employers in protecting them from injury or accident while engaged in their employment than is required of such employer in reference to those who have arrived at the age of 21 years. I cannot believe that the law intends that, when a young man presents himself as an applicant for work, before employing him the employer must stop and inquire whether he is 21 years of age, or, if he does not so inquire, that any greater responsibility devolves upon him as to such young man than would if he was 21 or 25 years of age. In the case of *Nagle v. Railroad Co.*, 88 Pa. St. 35, Judge Paxton, in delivering the opinion of the court, says: "The law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin. For some purposes, majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at 21 years, and not responsible a day or a week prior thereto. At what age, then, must an infant's responsibility for negligence be presumed to commence? This question cannot be answered by referring it to the jury; that would furnish us with no rule whatever. It would give a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case; one jury would fix the period of responsibility at 14, another at 20 or 21, years. This is not a question of fact for the jury; it is a question of law for the court." After citing several authorities, as to the age when a guardian may be selected, and as to when he may be guilty of crime, he says: "We have thus seen that the law presumed that at fourteen years of age an infant has sufficient discretion and understanding to select a guardian, and contract a marriage; is capable of harboring malice and taking human life under circumstances that constitute the offense murder. It therefore requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and un-

derstanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age." The witness Alley shows that this young man was not without experience, that he had been working on the road before he commenced working for him, and, in my view of the case, he occupied precisely the same attitude as any other hand on the road, and in entering the service of the defendant he assumed the risks incident to his employment to the same extent precisely, no greater and no less, than others engaged in performing the same services. At the time the accident occurred, the plaintiff's intestate was on his way to work, riding on a hand car, and, although he was aware that no flag had been sent in advance by the foreman, yet he remained on the hand car, and took the risk of going around the curve into the deep cut, and thus met his death. It does not appear that deceased was ordered to get on the hand car by any one. It was his voluntary act; it was his means of locomotion towards his work. He could have walked through the cut as well as to have gone on the hand car. The defendant had nothing to do with causing or requiring him to select this mode of traveling to his work. If, then, the fact of his being on the hand car contributed to his death, he voluntarily adopted that mode of travel, and thus contributed to his misfortune. He went thus with full knowledge that the flag had not been sent forward. The declaration avers that the injury was caused by defendant running its engine around a sharp curve and through a deep cut without ringing a bell or blowing a whistle, or giving any warning, whatsoever against said hand car. As to ringing the bell, however, and sounding the whistle, the testimony is overwhelming that both were done, and the injury was not occasioned by the failure to use these precautions, and it does not appear that any fault could be attributed to the defendant in the management of the engine, and, the decedent having voluntarily gone into this cut without any precaution, I think he was guilty of contributory negligence, and could not recover.

(40 W. Va. 627)

CRUMLISH'S ADM'R v. SHENANDOAH VAL. R. CO. et al.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. SAME.

(Supreme Court of Appeals of West Virginia. April 17, 1895.)

ACTION BY ADMINISTRATOR — BILL OF REVIEW — CORPORATE STOCKHOLDERS — RES JUDICATA — RECEIVERS — COMPENSATION — INSOLVENT RAILROAD COMPANIES.

1. An executor or administrator cannot sue or to be sued out of the state conferring his authority.

2. After a foreign administrator has come into a cause by petition to assert a demand of his decedent, the domestic administrator comes by petition to assert the same demand in his name. It is proper to recognize the latter as the proper party to represent the estate, and he takes the place of the foreign administrator. In such case, orders or decrees rendered before the domestic administrator became a party do not bind him.

3. A person who comes for the first time into a pending cause by petition, and is a proper person to file such petition, may have prior erroneous orders in the cause reheard and corrected, upon prayer for that purpose in his petition, whether the case be proper for a petition for rehearing or bill of review in the case of a party to the cause.

4. One who subscribes and pays for stock in a joint-stock company is a stockholder, though he have no certificate of stock.

5. In a suit involving, among other things, a debt between two corporations, a decree is rendered for a certain sum in favor of the one against the other, ascertaining the amount of the liability on the basis of the amount of paid-up stock of the creditor company. That decree is res judicata and estoppel between the companies as to the amount of recovery, and also as between the creditor company and its stockholders, and also between such stockholders as regards the amount of the recovery, but not as to the amount of paid-up stock in settling the rights of stockholders in the distribution of the fund arising from the debt so recovered.

6. There is no fixed rule in this state as to the mode of allowing compensation to a special receiver, whether by way of commission or a fixed sum. Usually, when the fund is large, a lump sum is proper. The amount and mode of allowance are within the sound discretion of the court, under the circumstances of the particular case, subject to review on appeal.

7. Where a decree appointing a special receiver is reversed wholly, without any reservation, his office ceases with reversal.

8. A receiver has no power or title until he give the bond required of him.

9. A special receiver may be allowed fair and reasonable fees paid to counsel necessary in the execution of his receivership. Courts ought to authorize employment of counsel where it is intended to give such power, and they are indisposed to allow such fees without previous authority to incur them given the receiver.

10. The amount of such counsel fees is within the sound discretion of the court, subject to review on appeal. Such fees are allowed to the receiver, not the counsel.

11. In the absence of authority previously given, expenditures to be allowed a special receiver must be reasonable, and such as are proper, essential, and necessary in the due and ordinary execution of his office, and such as were contemplated in his appointment and according to the nature of his business. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance for authority to make it.

12. Those claiming as stockholders the right to participate in the distribution of the assets in the winding up of the affairs of a private corporation must produce some satisfactory evidence of a present, subsisting interest.

13. A corporation has but one asset; namely, a decree for a certain sum against a railroad company, and a decree for the sale of its railroad, etc., to satisfy the same, after first satisfying prior liens and charges to a large amount. The creditors and owners of a greater part of the stock may, if they see fit, give to outside parties, out of the amount decreed to them, a bonus for a guaranty that at the commissioner's sale the railroad, etc., shall be made to bring at least enough to pay their claim, as well as the prior liens and charges. And, if such bonus is made to appear to have been that without which neither cred-

itors nor stockholders would have received anything, then the court will charge the fund thus brought into the cause with the payment of such bonus, and, after the payment of the creditors, distribute the surplus, if any, among the stockholders according to their respective interests.

14. The payment of large contingent fees cannot be provided for by the court, no matter how great and peculiar their merit may be. That, as far as lawful, must be left as a matter of express contract between client and attorney.

15. The practice of allowing to trustees, complainants, and receivers, and their counsel, large and extravagant counsel fees and commissions, payable out of trust funds under the control of the court, commented on and disapproved.

(Syllabus by the Court.)

Appeal from circuit court, Jefferson county.

Bill by H. H. Crumlish's administrator, a stockholder in the Central Improvement Company, for himself and other stockholders, against the Shenandoah Valley Railroad Company and others, for an accounting. This action was consolidated and tried with one by the Fidelity Insurance, Trust & Safe-Deposit Company against the same defendant. From the decree rendered, the administrators of Thomas A. Scott, deceased, and Thomas L. Jewett, deceased, appeal. Modified.

W. M. Stewart, Jr., U. L. Boyce, and Barton & Boyd, for appellants. Holmes Conrad, Marshall McCormick, D. B. Lucas, Frank P. Clark, and A. W. McDonald, for appellees.

HOLT, P. In reviewing this case, I have patiently followed the points involved down to minute details with an expenditure of time that would be manifest by giving such details, but that would incumber this opinion with a mass of statements and figures which could answer no useful end. The conclusions reached are the following: (1) The Jewett receipts for payment of 100 shares of stock are already in the name of John P. Logan, by certificate No. 6, for 100 shares, issued to him as assignee, on the 19th day of February, 1873. (2) There is a high degree of probability that the receipts of payment taken in the name of R. D. Barclay made for stock, say \$20,000 by Col. Thomas A. Scott from 22d September, 1870, to 9th August, 1872, are not, and have not been since the 15th day of September, 1874, subsisting outstanding evidences of his ownership, legal or equitable, of that amount or any amount of the stock of the Central Improvement Company. At any rate, from some cause, whatever it may be, Col. Scott's estate is not made to appear now to be the owner of any stock in the Central Improvement Company. (3) The Central Improvement Company owed its creditors the sum of \$381,906.71. It had a decree against the Shenandoah Valley Railroad Company for \$791,338, with interest from the 1st day of July, 1890, till paid,—and it had nothing else; but there were liens and charges against the railroad, etc., of the railway company de-

agreed to be sold, of higher dignity, and first to be paid, amounting to \$6,600,000. This was in the stringency of 1873, and, unless some one could be induced to bid something over the amount of this prior lien, then the Central Improvement Company would have of assets not one cent. All the creditors thought it wise and best to give parties who were able to buy a bonus of \$200,000, afterwards reduced to \$160,000, to make the property bring \$7,100,000 or over. One hundred and thirty-four out of one hundred and thirty-eight in value of the stockholders thought this the best—the only—thing to do, and did it in an informal way. The only one who complains is one stockholder, who has about $\frac{1}{32}$ of the stock; say, \$4,100. He knew of the arrangement in its making and accomplishment, but stood by without assent or dissent. He also knew that his otherwise insolvent corporation was largely in debt. It was no error in the court, under such circumstances, to charge his stock with its proper proportional part of this item of expense. I have no question but that the Jewett stock is already in and allowed to John P. Logan. Logan was not a subscriber; Jewett was, with receipts for his 100 shares, containing the following: "This receipt to be surrendered upon receipt of stock." So that these receipts were evidence of the ownership of stock, and were used to transfer and pledge and deposit as collateral for loans, just as the certificates were. Jewett, about that time, and at the time of his death, in the early part of November, 1875, was hard pressed; "and at his death his estate was in a very complicated condition, and his securities were scattered everywhere, and it was with great difficulty that we could ascertain really what he had. He had to go round personally to the different banks and places where his securities and papers were hypothecated to get any information about them at all." (Exhibit of William M. Stewart, Sr., one of his executors.)

Logan gave a note for \$5,000 for his purchase of stock. He found the note in bank indorsed by Judge Jewett, and, when he paid it, the money was put to Judge Jewett's credit, and the certificate of stock was issued to Logan himself, on the 19th day of February, 1873. The treasurer's memorandum on his books shows that receipts of payment of some one were used. Whose receipts of payment for the 100 shares of stock were used if not those of Jewett? His receipts of payment were never taken up and money returned. There was only \$138,000 in all. \$134,000, including the Logan \$5,000, are accounted for; and now to allow this to Jewett's estate runs the amount to \$139,000, which cannot well be so if the treasurer's official report of money paid in on stock, proved by his deposition in this case to be correct, is to be taken as true. It is no answer to say that in reaching this conclusion the court would be taking a

mere conjecture, based on probability. Courts, in determining facts, act upon nothing else but probabilities of more or less cogency and convincing power. In fact, all human conduct and belief is based on probabilities. All that we have to see to is that we do not go by what is called "mere conjecture,"—an inference based on presumptive evidence so slight, so nonexclusive of other reasonable modes of explanation, as to amount to a mere suspicion or surmise; a thing based on feeble or scanty evidence. There is nothing to contradict this but the fact that he once had receipts which cannot now be found. This is because these executors have looked in the wrong place; that is, among the file of receipts surrendered among the papers of the company, if such things were preserved. I will illustrate the distinction by the Scott claim of stock in this case. When I started to examine this record, and to read and re-read the evidence, and to scrutinize the transcript of the treasurer's book of issue of certificates of stock, my attention was arrested by the following, all on the one page (258), as follows:

Page 258. No. 15. 133 shares
Issued to M. Baird. 8- 6, 1874
Received certificates as above described.

M Baird,
By M. Baird & Co., in liq.,
Per W. C. Stroud.

Transferred to No. 30, Canceled.

No. 16. 267 shares
Issued to Burnham, Parry, Williams & Co. 8- 6, 1874.

Received certificates as above described.
Void- Not issued J. P. G.

No. 16. 267 shares.
Issued to Burnham, Parry, Williams & Coy. 8- 16, 1874

Received certificates above described.
Burnham, Parry, Williams & Coy,
Per W. C. Stroud.

Here we have the receipts of payment of \$20,000 for 400 shares of stock presented by M. Baird and Burnham, Parry, Williams & Co., acting by one W. C. Stroud, neither of them apparently original subscribers, but M. Baird holding and presenting through Stroud such receipts to the amount of \$6,650, and Burnham, Parry, Williams & Co. holding and presenting such receipts to the amount of \$13,350. No original subscriber subscribed to either one of such amounts.

If we stop at this point, it would be a mere conjecture that this was the Scott receipts of payment of \$20,000 for 400 shares of stock, receipted for in the name of Barclay, the manager of his private business, and remains conjecture by itself. On the 13th day of April, 1874, and down to the 29th day of August, 1874, when he resigned, R. D. Barclay was the president of the Central Improvement Company. In the suit in chancery, by bill for injunction of the county court of Jefferson county, W. Va., against Thomas N. Ashley, secretary of the Shenandoah Valley Railroad Company, J. Edgar

Thompson, trustee, Matthew Baird, Central Improvement Company, and the Shenandoah Railroad Company, the writ of summons was served on said Barclay, as president of said company, on the 13th day of April, 1874, in the city of Philadelphia, the place of his residence, and with it was an order of injunction restraining J. Edgar Thompson, trustee, also Matthew Baird, as well as William McClellan, the president of the Shenandoah Valley Railroad Company, from assigning certain mortgage bonds, but they were required to hold them subject to the further order of the court; also restraining Phillip Collins, proxy of the Central Improvement Company, and any and all other persons, from representing or claiming to represent the stock of the Central Improvement Company in the stockholders' meeting of the said Shenandoah Valley Railroad Company to be held on the 7th day of April, 1874. On the 13th day of April, 1874, notice was served on R. D. Barclay, the president of the Central Improvement Company, that on Tuesday, the 21st day of April, 1874, at the hotel of D. Adams, in Luray, Page county, Va., and at other places, certain depositions would be taken. In that bill it was charged that Thomas A. Scott was the president of the Shenandoah Valley Railroad Company, and was also the owner in substance, if not in name, of \$40,000 in the stock of the Central Improvement Company; "that this stock now stands on the books of said company in the name of R. C. [D.] Barclay, the president of the said Central Improvement Company;" and that the contracts attacked between the railroad company and the improvement company were for that reason void. Barclay did not put in the answer of his Central Improvement Company as its president, as he was called on to do, but resigned the presidency on the 29th day of August, 1874, and Phillip Collins was elected as president in his place. Thomas A. Scott was still alive, for he did not die until 1881. The new president, Phillip Collins, sought information and knowledge on this vital point, so that he might make answer to this charge, and prepared and filed his answer, signed with his name, as president of the Central Improvement Company, to which he affixed its corporate seal, on the 15th day of September, 1874, accompanied by his affidavit, sworn to and subscribed on the 19th day of September, 1874, that the same was the seal of the Central Improvement Company, and the above attestation of the same was his signature; and his answer on that point is as follows: "It is admitted that the said Thomas A. Scott was president of said company [Shenandoah Valley Railroad Company], and Jonas W. Walker vice president, when said contracts Nos. 2 and 3 were made; but it is not admitted, but denied, that said Scott was then, or ever has been, a stockholder in the Central Improvement Company. It is still mere conjecture that W. C. Stroud presented these Scott receipts of payments on the 6th

day of August, 1874, and obtained certificates Nos. 15 and 16; but it is certainly a circumstance in the case tending to show that the estate of Col. Scott does not now show itself to be the owner, legal or equitable, of 400 shares of stock; and I use this only to show how readily they might pass into certificates issued in some other name. Are we to be told that Col. Scott at some time from the 29th day of August, 1874, to the 15th day of September, 1874, deliberately told Phillip Collins, president of the C. I. Co., that he was not a stockholder in the C. I. Co. when he was in fact the owner of 400 shares? He knew it was the right of Collins to ascertain the truth, and make it known to the court, and it would take a good deal to convince me that Col. Scott misrepresented that fact to Collins, especially when the bill of injunction was served on the parties,—on the 9th of April on Collins, on the 7th of April on R. D. Barclay, on the 13th of April on U. L. Boyce, on A. K. McClure on the 7th of April, on Wm. McClellan on the 14th day of April, on Thomas N. Ashby on the 7th of April, on J. Edgar Thompson and Mathew Baird on the 13th day of April, 1874; and Collins' answer was completed and signed, sealed and attested, on the 19th September, 1874. That he did so is highly improbable. He had never accepted the 400 shares. It was put, from the start, in the name of his deservedly trusted agent, R. D. Barclay, for the use of the Penn. R. Co., or for some other person, or for whomsoever he might direct. So that he answered Collins truthfully that he never was the real owner. Mr. Barclay says that Col. Scott had full and complete access to these receipts of payment; that he would not have been obliged to call on him for this evidence of stock in order to deliver it to a purchaser." He had full access to it, and the right to do with it as he pleased. But Mr. Barclay, when questioned by McKeehan and the son and one of the executors of Scott, replied "that it had been so long ago that he had no recollection whether Col. Scott had any stock or not." When they asked Capt. J. H. Green, he said: "He didn't remember anything about it; it was so long ago." This was after the decree had been entered in this suit directing a commissioner to ascertain and report who were the owners of the Central Improvement Company's stocks, a suit which they both knew was pending. Mr. Barclay kept no accounts or memoranda of any kind, took no list, made no inventory of the securities he turned over in solido to the executors of Col. Scott in the summer of 1881. Now, after studying about it, he has the impression that these receipts were among the securities of Col. Scott which he turned over to his executors.

The evidence shows that these securities were kept together. They were in the aggregate of great value. Can any one convince us that they have not been carefully looked through again and again, or that it is any great task to search through them for an en-

velope carefully indorsed, "Central Improvement receipts;" for Mr. Barclay testifies that "he did not know how to 'keep books'; in the general acceptance of the term"; that "he had charge of Col. Scott's personal business, as distinguished from his official railroad business, from the 1st of November, 1862, until the time of his death, which occurred in May, 1881"; and that such a thing as keeping regular books for Mr. Scott was never done. "I never kept books like these or anything of the sort. When I got a receipt of that sort, I simply put it in an envelope, and on the back of it I put, 'Central Improvement Co. receipt,' and put that, you understand, in the safe; and then I would get another one, and would put that in. That is the way it was done." This gentleman, who from his whole testimony shows that he deserved the confidence for honesty and integrity which Col. Scott reposed in him, also shows us with complete frankness that his 10-years inference or conjecture that this envelope was there, to be turned over to the executors with the other securities of Col. Scott, cannot override the inherent probabilities, and other well-known circumstances to the contrary surrounding the transaction. In fact, it was only an impression of his, for he shows that 10 years had caused his memory to grow dim. They were carefully done up, marked, and placed in a safe among other securities, and ones of great value, in May, June, July, and August, 1872. Why are they not found there in 1881? There is but one probable answer. They were taken out by Col. Scott or by his direction in 1874. There is no need to hunt among the heaps of miscellaneous papers of Col. Scott stowed away, and out of the way, in trunks and boxes. Col. Barclay never put them there, nor the executor. They are what are called "securities" by these witnesses. Among them they were placed, and among them they are not to be found. If they are in the trunks and boxes, then the trunks and boxes are to be searched, and that confessedly has not been done. There is a high degree of improbability that they are outstanding. Down to October 14, 1873, 1,900 shares had been evidenced by certificates issued. Nine hundred were issued from August 29, 1874, when Capt. Green went out as treasurer, and Col. Barclay as president, down to the 21st day of February, 1880, when the three Collins certificates, of 100 each (Nos. 38, 39, and 40), were issued, which were the last; making 2,800 in all, not including transfers and subdivisions, which have to be included to bring the number up to 3,756, and the par value to \$187,800,—a mode of counting which may mislead, but for our purpose can have no other effect. No. 20, for 134 shares, to D. E. Small, per John H. Small; No. 21, for 133 shares, to John H. Small; No. 22, for 133 shares, to administrators of Charles Billmeyer, deceased, per John H. Small,—were all issued on the 15th day of December, 1876. These were issued when witness McKeehan

was secretary and treasurer, and Phillip Collins was president. No money was then paid, for "they had paid their money, and had receipts for the money being paid; and, upon the direction of Capt. Green, I issued those certificates to them." (Deposition of C. W. McKeehan.) Same witness says the three certificates, of 100 shares each (Nos. 38, 39, and 40), issued to P. and S. Collins, per Phillip Collins, on February 21, 1880, were the original certificates issued to Mr. Collins. "I simply tore out from the back of the book blank certificates, and filled them up." No money was then paid. "Mr. Collins had given whatever consideration he gave for his stock long before that, but they had not been issued until that time; that is, the certificates had not been issued until that time." "I did it at the request of Mr. Collins. He was the president, and signed it, and I signed as secretary." "I don't remember what the original authority was on which to make the original issue of 300 to Mr. Collins, but it was some writing from the Pennsylvania Railroad office. It was from Mr. Barclay or Mr. Green. There was abundant authority for issuing it, as I understood it." It appears to have been paid for in 1870, as shown by books of B. H. Jameson, treasurer. All this evidence before us, scrutinized in detail, and put together, points with a very high degree of probability to the fact that these receipts of payment made by Col. Scott are not outstanding. From some cause, whatever it may be, Col. Scott's estate is not made to appear now to be the owner, legal or equitable, of stock in the Central Improvement Company; and, for the purpose in hand, that which does not appear does not exist.

Charles McFadden's Claim.

After the decree was entered directing Master Commissioner Brown to ascertain and report who and to what extent were the holders of the Central Improvement Company stock, McKeehan wrote him several letters, asking him if he had stock, and how much, telling him that he wanted to find out all the stock that was out. These letters were written along through the year 1884 and the last one just after the entering of the above decree, as near as witness was then able to fix the date. So, also, Commissioner Brown gave the usual published notice, fixing time and place for the owners to file their claims and produce evidence of ownership. It will be remembered that the amount of recovery of the Central Improvement Company against the Shenandoah Valley Railroad Company in income bonds was to be and by the court was measured and determined by the amount of the paid-in capital stock of the Central Improvement Company, and hence the importance of having it all in. Mr. McFadden saw fit to stand out, and declined to produce his evidence of ownership of stock until the amount of recovery on the above basis had been unalterably fixed at

\$138,100. If it is not included in that sum, about which there has been a costly and vexatious dispute, the fault, in part at least, is his, for he sat idly by without any sufficient excuse for his nonaction. Now, he comes into the cause, and presents as his evidence of ownership the three following certificates of payment:

"No. 4. Philadelphia, February 5, 1872. Received of Charles McFadden, Esquire, two thousand ——— dollars, being a 1st installment of forty per cent. on his subscription to one hundred shares of the capital stock of the Central Improvement Company. \$2,000. John P. Green, Treasurer pro Tem. This receipt to be surrendered upon receipt of stock."

"No. 9. Philadelphia, May 14, 1872. Received of Charles McFadden, Esq., one thousand dollars, being an installment of 20 per cent. on his subscription to one hundred shares of the capital stock of the Central Improvement Company. \$1,000. John P. Green, Treasurer. This receipt to be surrendered upon receipt of stock."

"No. 14. Philadelphia, June 24, 1872. Received of Chas. McFadden, Esq., one thousand dollars, being an installment of 20 per cent. on his subscription, one hundred shares of the capital stock of the Central Improvement Company. John P. Green, Treasurer. This receipt to be surrendered upon receipt of stock."

The stockholders of the Central Improvement Company found by their decree for the sale of the Shenandoah Valley Railroad that, in order to reach their claim of \$800,000, they would have to bid the sum of \$6,600,000. In this emergency they called a meeting of stockholders, formal or informal, to see if anything could be done. A committee was appointed, charged with the duty of securing a bidder for the road, and it was empowered to use the assets of the company at its discretion to accomplish that purpose. This, I suppose, would be regarded as an informal meeting of owners of stock; but there was present, either by present action or subsequent ratification, ⁶⁷/₆₀ of the stock. It resulted in their securing a bidder by giving such bidder \$200,000 out of the stock thus to be realized in full. This bonus was afterwards reduced to \$160,000, with which sum the fund in court was charged before distribution. This was done by the consent of the numerous creditors of the Central Improvement Company, whose claims were thus paid to the last cent, amounting to about \$382,000; and, without such arrangement, neither they nor the subordinate stockholders' claims would have realized one dollar. This is shown to have been proper, and eminently wise and discreet, and, under the circumstances of the hard times of 1873, fortunate. Such is shown to be the fact as far as the probabilities can show a fact by an overwhelming array of testimony, for there is no attempt to show

any fact tending in any degree to establish the contrary. This was a matter for the owners, and the court has nothing to say on the subject; but Mr. McFadden says he did not participate in forming the committee, and is not bound by their action. Surely, I cannot be mistaken in saying that as against him, in order to pay the creditors of his otherwise insolvent company, the charging of the fund with this \$160,000 was right. It was also right in view of the interests of the stockholders as against him, the only one having any interest who is heard to complain.

The court also charged the fund before distribution with attorney's fees to the amount of \$200,000. This was based on a private arrangement for contingent fees of one-fourth and more of the recovery made between client and attorney with which, for the most part, the court has nothing to do, and as to which creditors of this otherwise hopelessly insolvent company whose claims aggregate \$381,996.71 do not complain, and which is agreed to and insisted upon as right by 134 in value out of 138 of the stockholders. I am not sure but what, taking into consideration the interests of the creditors of the Central Improvement Company, it was right; but we do not wish, under any circumstances, to give our sanction to a growing evil of the courts, viz., without any contract between client and attorney, their charging large fees against the fund to be distributed. Therefore, we are of opinion that Mr. McFadden's claim should not be charged with any part of the \$200,000 attorney's fees, and, in so far as the decrees complained of do so, they are hereby reversed; but, in lieu thereof, reasonable, customary, and proper charge, if any, on his claim, in favor of those attorneys who had for him and others the conduct of the cause, should be made. With this modification to be made in the court below, the rest of the decrees complained of are affirmed, and the cause is remanded for further proceedings.

DENT, J. (concurring). The conclusion reached by the majority of the court on re-argument being in accordance with the true principles of equity, as I understand them, I feel in duty bound to change my dissent from their determination to a concurrence therewith, for the following reasons:

By a decision of this court in the cases of Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co., and Crumlish v. Same (delivered March 20, 1890) 33 W. Va. 761, 11 S. E. 58, the paid-up capital stock of the Central Improvement Company was ascertained and fixed at \$138,000, as a basis of recovery against the Shenandoah Valley Railroad Company. By the present decision it is ascertained and fixed at \$164,000 for the purposes of distribution. The commissioner's last report on the subject shows it to

be not less than \$170,000. The difference between the two decisions of the court amounts to \$26,000, which, according to the basis fixed for recovery in the first decree, would, if it had been before the court at that time, increase the recovery by the sum of \$70,788, being double the said \$26,000, with interest added to a certain fixed date. This sum was entirely lost to the stockholders of the Central Improvement Company because of the ascertainment of the wrong amount by the court on insufficient data. It can never be corrected, but is finally lost, as the opinion of the court holds that the question of recovery is *res adjudicata*. Who, then, should bear this loss? The law of estoppel is: "Where a party fails to make his rights known, where fairness and good conscience require that he should do so, to protect the interest of others, he cannot be heard as against them to assert such rights." *Herm. Estop.* § 787. Also, *Id.* § 760: "Nobody ought to be estopped from averring the truth or asserting a just demand unless, by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person, who has been induced to do something, or to abstain from doing something, by reason of what he had said or done or omitted to say or do." And the converse is true. A person who has rights which he omits to assert at the proper time and place will not be permitted afterwards to assert them if by so doing he will cause an injury or loss to another person which could have been avoided had he exercised that due diligence which a court of equity requires of all persons seeking its assistance. Admitting that the basis of \$138,000 is wrong, yet those who by their failure to assert their claims occasioned the establishment of this wrong basis are forever precluded from disputing its truth. And it matters not whether their quiescence, neglect, or silence mislead the court or other persons in interest; the result of their failure to act is the same, and they, and not those who have been attentive and active, must bear the consequences of their own negligence. "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Applying these recognized principles of equity, fair dealing, and good conscience to this case, and what is the result?

In December, 1882, H. H. Crumlish, a stockholder in the Central Improvement Company, brought a chancery suit for and on behalf of himself and all other stockholders who would aid in prosecuting the suit, to compel the Shenandoah Valley Railroad Company to account for and pay over the assets of the Central Improvement Company, in its control. Immediately stockholders representing nearly \$130,000 became active and vigilant with their time, labor, and means in prosecuting said suit, and have continued so during the whole of this

litigation. They promptly made known the amount of stock held by each, and did everything within their power to get at the truth of the whole matter, and secure a prompt adjustment thereof. These appellants and those they represent, on the other hand, so far as any stock was owned or claimed by them, were in a state of absolute nonentity. No information could be obtained from them or about their ownership of stock. Mr. C. W. McKeehan, who was a stockholder and became secretary of the Central Improvement Company in 1877, and continued as such until 1884, the books not showing, undertook, in the interest of the stockholders, to find out who were the actual stockholders in the company, and what amounts of stock each held. This was about the year 1884, and was done in view of the pending litigation. He called on the son and executor of Thomas A. Scott, deceased, and he informed him that he knew nothing about his father having any stock, and had no evidence thereof. He saw Mr. R. D. Barclay, the former president of the company, and business manager of Thomas Scott's private affairs, and also Mr. John P. Green, former secretary and treasurer of the Central Improvement Company, and representative in some capacity of said Scott, and they both informed him that they knew nothing about it. It had been so long ago. These two men, who, as they afterwards testify, held the offices of president, secretary, and treasurer of the Central Improvement Company from and including the year 1870, to and including the year 1874, by virtue of the stock they subscribed for Thomas Scott in their names, could not remember that he ever had any stock in the company. And he therefore concluded that Mr. Scott owned no stock. As to Judge Jewett's owning any stock, he never knew anything, neither from the books nor outside claim. He wrote several letters to the appellant McFadden, to know whether he had any stock, and, if so, the amount thereof, and could get no response from him. The books and papers of the company which had been kept by Mr. John P. Green contained no information as to any of these parties holding any stock. On the 26th day of June, 1889, the deposition of this same John P. Green, secretary and treasurer as aforesaid, was taken for the third time during the progress of this litigation, for the purpose of ascertaining and fixing the amount of the paid-up stock of the Central Improvement Company, and he testifies that it was at least \$128,000, and he thinks it was \$138,000. Indeed, he is positive it was the last-named sum. Acting on this information, this court, as heretofore mentioned, definitely determined, irrevocably, this paid-up stock to be the latter amount. This sum, so ascertained, exceeded by several thousand dollars the amount of stock actively engaged in the prosecution of this suit. Such being the case, the holders of this stock were satisfied with this amount, and were

utterly without suspicion that it could be any greater sum, as they had not the least information that such stock could in any possible way exceed this sum. On the contrary, their information was, if anything, that it was less than this sum, and that they represented almost the entire amount. Therefore, they had no reason to and made no effort to increase the finding, either in the circuit court or the court of appeals, but, feeling safe, allowed it to become a matter of final adjudication.

After, on this basis, a recovery was had against the Shenandoah Valley Railroad Company, amounting to nearly \$800,000, the known stockholders actively engaged in this litigation called a meeting in the Drexel Building in the city of Philadelphia, which had been the principal place of business of said company, after having given notice thereof in a newspaper, as required by the by-laws of said company, and after doing everything they were able to do to get all the stockholders present on the 25th day of April, 1890, for the purpose of taking the necessary steps to realize on their large, but doubtful, recovery aforesaid, which was regarded almost as a hopeless undertaking. These appellants and those they represent had not yet discovered their ownership of any stock. With the exception of James P. Scott, they did not yet put in appearance, although, from their subsequent conduct, it is not a violent presumption to hold that they or those they represent were fully aware of and had an opportunity of attending or being represented at the meeting; but they purposely abstained from so doing, because the fruit was not yet ripe for the plucking. These stockholders, believing that they had the right so to do, as the owners and representatives of all the known stock, and that they were acting in the interest of all, through the committee then appointed by them, without any objection from any source, pledged \$160,000 of this doubtful recovery for the purpose of securing the residue of \$640,000; and, as the evidence shows, they did through this pledge, beyond dispute, secure this last amount for the payment of the expenses, debts, and distribution among stockholders. The evidence shows indisputably that this expenditure turned what was otherwise a doubtful recovery, without market value, into a tangible fund, under the control of the court. Then, for the first time, to wit, in February, 1891, these dormant claimants begin to snow active life, and take a personal interest in this litigation. The memories of Barclay and Green, which have been heretofore so blank, are suddenly refreshed, and they can now so easily remember that Thomas A. Scott, deceased, subscribed for 400 shares of stock in their names, and that he paid for it to said Green, through said Barclay; that Judge Jewett subscribed for 100 shares of stock, and paid for it to said Green; and that Charles McFadden had a

like subscription paid for in a like manner. This evidence, if true, was in the knowledge and under the control of these appellants, or those they represent, at the beginning of this litigation; yet they continually denied any knowledge of having any stock, or led the other stockholders by their silence to believe that such was the case. The certificate book is produced in evidence, and the stubs thereof, in the handwriting of John P. Green, show the issue of \$120,000 of stock to various parties, but none to Thomas A. Scott, Judge Jewett, or Charles McFadden. This is a very significant silence. These certificates were signed by Green, as secretary and Barclay as president, both in the employ of Thomas A. Scott, although the stock was subscribed for in their names; and by reason thereof they were enabled to hold the offices and control the management of the company until its funds were all received and expended. In addition to the above, A. K. McClure paid \$5,000 on stock, for which he received no certificate, and Joseph L. Morton paid \$5,000, for which he received no certificate; making a total of paid-up subscriptions, counting that claimed by appellants, of \$170,000. But Mr. Green swears to and accounts for only \$138,000. What became of the other \$32,000. It will not do to say it was paid in labor, because the evidence does not justify it. There has been either a defalcation in the funds or an overissue of stock, and to take the most charitable view of the matter is that, while this stock was paid for by Scott and Jewett, it was afterwards transferred to and issued to some one else, the money going back to Scott and Jewett; and Barclay and Green, who were in Scott's employ all the time, after the stock was so issued and the money returned to Scott, his two servants, no longer being stockholders, resigned their positions, because their employer had no longer any interest in said company. This is certainly a reasonable conclusion, considering the conduct of these parties during the whole progress of this litigation. But, in my opinion, this matter as to whether these parties had or had not stock has nothing to do with the just determination of this case. It is very evident, with the present state of the proofs before it, that this court, instead of fixing the paid-up stock of the Central Improvement Company at \$138,000, would fix it at \$164,000. This change has been brought about by the testimony of Green and Barclay, and the present activity of these appellants, seeking to profit at the expense and labor of others; and it is just as evident that it was in the power of these appellants to have ascertained and made known this proof before the court immutably fixed the amount of the paid-up stock on which the recovery was based; and it is by their culpable negligence in not asserting their claim to stock at the proper time—that is, right at the inception of the litigation—that occasioned to the stockholders the loss of the \$70,788, as

before stated. On whom, then, should this loss fall? The equitable law of estoppel says, as herein quoted, on him whose failure to act occasioned it; in this case, the appellants. A surety is released from payment of debt for indulgence to his principal and indorser for want of notice; and a bona fide purchaser for value, for neglect to record his deed, loses his land. The slight oversight of one person may result in the loss of thousands of dollars to entirely innocent parties, whom the policy of the law holds liable for his negligence.

Equity ever favors those who are prompt and diligent in the assertion of their rights, and frowns with displeasure on those who listlessly stand by during the heat of battle, and, after the smoke has rolled away, come bravely forward, and seek to deprive others of the well-deserved rewards of their vigilant efforts. As Judge Holt says in the case of *Clark v. Figgins*, 31 W. Va. 15, 5 S. E. 643: "Vigilantibus nondormientibus jura subveniunt." There would be no reward to the vigilant if these parties were now compelled to step aside, and let those who stood by and did nothing take the fruits of their labor and expense, or were compelled to divide it with them." It would be paying a premium to idleness. "To the victors belong the spoils," is not an inequitable doctrine, but underneath it lies the strongest principles of reciprocity and justice. Not only did these appellants or those they represent stand idly by for almost 10 years of a hard-fought legal battle, but, when importuned by those whom they should have been mutually aiding and supporting, they either denied all knowledge of personal interest, or treated with contemptuous silence such importunities; and now that fortune has crowned years of labor with success, in the face of every discouragement, these laggards in the contest come bravely to the front, and demand, not alone a participation in the results, but repudiate any responsibility in the necessary expenditures by which they were achieved. Partners they would be in the profits, but not in the labor, expense, or losses. Justice and equity both require that, before they share in the distribution, they should make good the loss occasioned by their culpable inertia and inequitable silence. This loss, to wit, \$70,788, exceeds any share they can possibly receive in the fund, distributable, after deducting therefrom the reasonable and legitimate expense of creating it, and therefore precludes them from any share in the distribution. The finding of the commissioner and the decree of the circuit court, in my humble opinion, are founded on the true principles of equitable participation, and should therefore be affirmed, except as modified in the opinion of Judge HOLT, in which I now concur.

BRANNON, J. (dissenting). When this case was decided at a former term, after the best consideration which I could give the

evidence, I was of opinion that the last report of Commissioner Brown, finding Jewett and Scott to be stockholders, is correct. I still remain of that opinion, and dissent from the action of a majority of the court at this term, excluding them. I prepared at the former hearing the following opinion, which was then assented to by three judges:

This is an appeal taken by the administrator of Thomas A. Scott, deceased, and the administrator of Thomas L. Jewett, deceased, from decrees of the circuit court of Jefferson county in the two cases, heard together, of *Crumlish's Adm'r v. Shenandoah Val. R. Co. and Others*, and *Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co.* By a former decision of this court in these causes, reported in 33 W. Va. 761, 11 S. E. 58, an indebtedness was established against the Shenandoah Valley Railroad Company in favor of the Central Improvement Company, which a commissioner afterwards found to be \$820,353.81, as of February 10, 1891. After the cases returned from this court to the circuit court on May 30, 1890, a reference was made to a commissioner to report who were stockholders of the Central Improvement Company entitled to participate in said fund, and the respective amounts to which they were entitled, and to audit debts against said company, and to settle the accounts of the special receiver, and ascertain what would be reasonable compensation for expenses incurred by him, and a fair allowance of fees of counsel employed by him. In March, 1891, the petitions of the foreign executors of Thomas A. Scott, deceased, and of Thomas L. Jewett, and the petition of Charles McFadden were filed, respectively claiming that the estates of said Scott and Jewett were stockholders and said McFadden was a stockholder in the Central Improvement Company, and entitled to participate in its distributable assets. Certain decrees were entered prejudicial to the estates of Scott and Jewett, and then Davis, as administrator c. t. a. of Scott, and as administrator of Jewett, appointed as such in West Virginia, filed their petitions, claiming that their decedents had been stockholders in the Central Improvement Company, and asking for their estates a participation in said fund, and praying that said decrees be reheard and reformed. The cases went on, resulting in a decree, not only not rehearing and reforming prior decrees complained of by Scott's and Jewett's representatives, but wholly denying to the estates of Scott and Jewett any participation as stockholders in said fund, and dismissing their petitions, and according to McFadden participation to only a partial extent of his claim, and they appealed here.

I have stated such facts as bear on the first question which I will decide, and that is whether Davis, the West Virginia personal representative of Scott's and Jewett's es-

tates, can maintain this appeal. It is said he cannot; that the foreign representatives were parties when decrees containing certain features prejudicial to said estates were made, and they alone can complain of them; that, in fact, Davis can hold no place as appellant, either as to those decrees made before he appeared or since, as the foreign representatives were received and recognized as parties by the court, and have never been eliminated from the case, and both a foreign and domestic administrator cannot represent the estate in one suit. This contention cannot be sustained. A foreign personal representative cannot sue or be sued outside the state granting him authority. *Hull v. Hull*, 26 W. Va. 15; *Vaughan v. Northup*, 15 Pet. 1; *Bart. Ch. Prac.* 152; *Dickinson v. McCraw*, 4 Rand. (Va.) 158; *Story, Conf. Law*, § 513; *Dixon v. Ramsay*, 3 Cranch, 319; *Fenwick v. Sears*, 1 Cranch, 259; 1 *Lomax, Ex'rs*, 121; 1 *Rob. Prac. (new)* 161; *Andrews v. Avory*, 14 *Grat.* 229; 1 *Lomax, Ex'rs*, 142; *Doolittle v. Lewis*, 7 *Johns. Ch.* 45; *Fugate v. Moore*, 86 *Va.* 1049, 11 *S. E.* 1063. The fact may be pleaded in abatement or in bar. *Noonan v. Bradley*, 9 *Wall.* 394.

Without discussing what would be the effect of a decree for a foreign administrator where no question is raised, yet I can safely say that not only the defendant can raise objection, but that when a suit like this is pending, involving a fund wherein a decedent has a share to be recovered by intervention in the case, the administrator deriving his authority in the state in which the fund is located may come into the case, and demand that his decedent's share be decreed to him, notwithstanding a foreign administrator has before intervened and claimed it; and this because it is the administrator appointed in the state where the debt is owing who alone has title to it, and therefore can sue for it, the foreign administrator having no title. When the administrator *loci rei sitae* makes his appearance in the case, and is recognized, he displaces and eliminates the foreigner. Both cannot be longer recognized, and he must be recognized who has title and whom the law recognizes. This is a suit in equity. All being before the court, cannot, ought not, the court decree to the rightful party? The case of *Dearborn v. Mathers*, 128 *Mass.* 194, relied upon by counsel to support the position above mentioned, was a case where a foreign administrator sued and obtained a verdict, and then a new trial was asked, because it had been discovered that his letters had been granted out of the state; and the court said that the objection should have come by plea earlier, and as the granting a new trial was in discretion, and the plaintiff had after verdict and before judgment qualified in the state of the actions, and thus, before judgment, become possessed of title, and would be liable on his bond, and thus no loss could come

to the defendant, a new trial was refused, and judgment rendered. There the plaintiff became before judgment vested with title by letters relating back to testator's death.

The next question is, were Scott and Jewett stockholders in the Central Improvement Company? The commissioner reported on the evidence that Scott had subscribed and paid for \$20,000, Jewett \$5,000, and McFadden \$5,000, of stock, but had no certificates. I shall not here detail the evidence upon what is purely a question of fact, as I conceive that the purpose of the requirement that we shall give reasons for our decisions refers to legal principles of decision, and was not designed to incumber the Reports with mere evidence, affording no guidance in future cases, like legal principles. Suffice it to say that, upon examination of the evidence, we find that Scott, Jewett, and McFadden were such stockholders. The want of certificate does not alone furnish the test of whether a person is a stockholder in a private corporation. He is a stockholder who has subscribed for and paid for a given number of shares in its capital, as these parties did. The stock is one thing; the certificate quite another. The certificate is merely evidence, but not the only evidence, of ownership of stock. The owner of stock is a shareholder without it. *Cook, Stock, Stockh. & Corp. Law*, § 10; *Hawley v. Upton*, 102 *U. S.* 314; 1 *Beach, Priv. Corp.* § 62.

Scott and Jewett so being stockholders, the next question is, were Scott and Jewett properly denied any share in the fund in court as the property of the corporation, the Central Improvement Company? Various arguments are made to justify such exclusion. I will state the facts which seem to me to bear on this branch of our inquiry in this case. It will appear from the former decision in this case (33 *W. Va.* 775, 11 *S. E.* 58) that the basis of recovery by the Central Improvement Company against the Shenandoah Valley Railroad Company was under a certain agreement between them, which provided that the Shenandoah Valley Railroad Company should deliver to the Central Improvement Company \$250,000 second mortgage bonds of the Shenandoah Valley Railroad Company, and income bonds measured in amount by double the amount of stock of the Central Improvement Company paid in; and, on account of the failure to deliver said bonds, this court debited the Shenandoah Valley Railroad Company with \$250,000, with interest, on account of the second mortgage bonds, and with \$379,224 on account of the income bonds, reaching the latter sum by taking \$138,000 as the amount of stock of the Central Improvement Company which had been paid in, with interest, and then doubling it. When the commissioner was executing a reference requiring him to report who were stockholders of the Central Improvement Company entitled to share in this money, the Norfolk & Western Railroad Com-

pany appeared to own \$128,000 stock (later increased to \$134,000), and claimed that \$138,000 as stock paid in was an unchangeable, immovable given sum in the problem of distribution, and that it must get of the amount to be divided among stockholders in the proportion which \$134,000 bears to \$138,000. This would leave an open space for only \$4,000 of stock in other hands, and would not let in the whole \$30,000 of stock owned by Scott, Jewett, and McFadden. Their \$30,000 stock added to the \$134,000 of the Norfolk & Western Railroad Company would make \$164,000 of paid-up stock.

Scott, Jewett, and McFadden contend that the amount divisible among stockholders must be divided on a basis treating \$164,000 as the amount of paid-up stock of the Central Improvement Company; while the Norfolk & Western Railroad Company contends that it must be divided on a basis treating \$138,000 as the proper amount of paid-up stock. This contention of the Norfolk & Western Railroad Company is sought to be supported upon the theory that the sum of \$138,000, as the amount of paid-up stock, is unalterably fixed as a matter of *res judicata* by the former decision of this court, and constitutes an estoppel against Scott's, Jewett's, and McFadden's contending for any other sum. Let us see as to this contention. The object of the suit of Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co. was only to enforce a mortgage given by the latter to the former company. We may dismiss that suit from consideration here. The object of the suit of Crumlish's Adm'r v. Shenandoah Val. R. Co. was to assert a debt against the Shenandoah Valley Railroad Company in favor of the Central Improvement Company. In ascertaining that debt, as above stated, the sum of \$138,000 was held by this court as the amount of the paid-up stock of the Central Improvement Company; and, on the basis of that sum, a certain amount was decreed against the Shenandoah Valley Railroad Company for its failure to deliver its income bonds to the Central Improvement Company. That this decision is *res judicata* and an estoppel upon the two corporations, the Shenandoah Valley Railroad Company and the Central Improvement Company, and stockholders of the latter company, for certain purposes, admits of no question. The two corporations were parties, and of course they are bound; and as the Central Improvement Company was a party, and Crumlish was a stockholder of that company, suing for himself and all other stockholders, not only Crumlish, but all other stockholders, are concluded for certain purposes. Then, what are those purposes? What the limit of this estoppel?

I do not question the case cited, *Vanderwerken v. Glenn*, 85 Va. 9, 6 S. E. 806, holding that "in a suit wherein a corporation is a party the decree binds the stockholders, though they be not personally parties," nor

the case of *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, holding that, in the absence of fraud, stockholders are bound by a decree against the corporation in respect to corporate matters, and such decree is not open to collateral attack, when those cases are properly applied. I do not doubt that the sum fixed by said decision as the liability of the Shenandoah Valley Railroad Company to the Central Improvement Company and the elements entering into the process of reaching that sum, including \$138,000, considered as the amount of paid-up stock, are forever binding on companies and stockholders. I do not question the proposition that neither the Central Improvement Company nor any of its stockholders can now say that the amount of indebtedness fixed by that decision in favor of the Central Improvement Company was not correctly fixed, or that \$138,000 paid-up stock, taken as a measure or basis in ascertaining that indebtedness, was not the correct amount for that purpose. The stockholders of the one company can for no purpose say the debt decreed against it is too large; the stockholders of the other can for no purpose say that the debt decreed in its favor is too small, because of untrue data or elements in its ascertainment. The \$138,000 treated as paid-up stock then appeared right; but, under evidence since taken, it appears to have been larger. Though wrong, yet nobody can now question it, so far as the amount recovered is concerned. But, now that the money stands for distribution among stockholders, the estoppel ceases. It is now a fund in the corporate treasury, first for payment of debts, then for distribution among stockholders according to their holdings. It is simply assets distributable equally among them.

Shall the loss arising from the fact that the evidence then present showed only \$138,000 paid up be borne by only some of the stockholders? Shall not this loss be shared by all stockholders in common like any other loss? The former decree of this court, while it fixed irrevocably a certain sum as the liability of the Shenandoah Valley Railroad Company to the Central Improvement Company, and bound companies and then stockholders to that sum as the proper sum, did not fix the rights of stockholders as among themselves. The adjudication of the indebtedness of one company to the other is one thing; the adjudication among stockholders of their respective rights as to each other is quite a different thing. The use of \$138,000 paid-up stock as a factor in the process of the adjudication of the indebtedness of the one company to the other is one use, but its use in the adjudication of the rights of stockholders among themselves is quite a different one. For the one purpose, its use as a factor in fixing that indebtedness, it stands immovable, since it did enter into the adjudication of a specific sum of indebtedness; but for the other pur-

pose, as a factor in settling the rights of stockholders among themselves, it not only is not immovable, but it is not a factor, since it was not used in that matter, as that matter was not passed on by this court. That matter has never been passed on by this court. It simply passed on the indebtedness between the two companies, but not on the rights of stockholders among themselves. That was not the point passed upon by the former decision. To make an adjudication an estoppel, it must appear that the same precise question or matter was adjudicated in the former adjudication or was necessarily involved in the adjudication. *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250. The prior decision is conclusive, not only as to the matter actually determined, but also any other matter which the parties might have litigated, and had decided as incident to, or essentially connected with, the matter actually determined, coming within the legitimate purview of the action. *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633. Now, the rights of the stockholders among themselves was surely not the subject-matter of the former decision of this court, but the liability of one company to the other was that main subject-matter; nor were the rights of the stockholders among themselves necessarily involved in the settlement of the indebtedness between the companies; nor were their respective rights among themselves incident to or essentially connected with the adjudication of the indebtedness of the one company to the other. Their rights had nothing to do with that indebtedness, but were irrelevant. What had the Shenandoah Valley Railroad Company, as debtor to the Central Improvement Company to do with the rights of the stockholders of the Central Improvement Company? The bill of Crumlish had three main objects in view for relief: (1) The recovery of a debt in favor of the Central Improvement Company against the Shenandoah Valley Railroad Company; (2) the ascertainment and payment of debts of the Central Improvement Company; (3) the division of its assets among stockholders. Here were three separate and distinct purposes. The first object—the recovery of the debt against the debtor company, the only property of the other company—must be accomplished before the debts could be paid, and the balance distributed among stockholders. A decree upon the single subject of the indebtedness of one company to the other was entered in the circuit court, leaving the other matters untouched, and that decree was brought here for review, and this court passed upon that matter, leaving other matters untouched. How can this decree in any wise preclude action upon the matter of the distribution among stockholders? It is every day's practice, when a bill calls for several

different reliefs, to decree upon one, leaving the other intact; and, unless the things pertaining to one be necessarily involved in or essentially incident to the adjudication, it does not affect the relief to be afterwards given on other matters. For purposes of estoppel under the doctrine of *res judicata*, there must be identity of causes of action in the two controversies. 1 Greenl. Ev. § 528; *Bigelow*, Estop. 75. There being three several matters contemplated as subjects of relief by the suit, we may say, for the present purpose, that there were three suits. The former decision was upon a trial of the first,—indebtedness between the companies, arising from transactions between them. This controversy is upon another cause of action, arising from another transaction,—that of subscription of stock, giving stockholders a cause of action against their corporation; and out of it arose controversy between stockholders. On the trial of the former the subject of the latter—the subscription of stock and amount paid therefor—came in only as evidence or collaterally, and was only incidentally cognizable. This will not make it an estoppel against the truth, so as to prevent a stockholder from showing that the amount of paid stock was greater than \$138,000. 1 Greenl. Ev. § 528; *Coville v. Gilman*, 13 W. Va. 314, 329, 332, 333; *Henry v. Davis*, Id. p. 230, pt. 4; *Ford v. Ford*, 68 Ala. 141; 2 Black. Judgm. §§ 611, 612, 622. Facts in a controversy on a trial, but not necessarily involved in the issue, though ever so important in its determination, are not settled by a judgment, but are open to controversy in any other suit between the same parties. *Beckwith v. Thompson*, 18 W. Va. 103. Not until the case went back from this court did the circuit court take any action upon the matter of ascertaining and paying debts of the company, and settling the rights of stockholders, which it did by the reference to a commissioner to audit debts, and ascertain who were stockholders entitled to participate in the fund, and the amounts to which they were entitled. And the contention is that this \$138,000 must be taken as the basis of the total sum charged to the Shenandoah Valley Railroad Company for second mortgage bonds and income bonds, though it was a factor only in fixing the charge for income bonds, and had nothing whatever to do in fixing the charge for second mortgage bonds. I have devoted so much space to this subject of *res judicata*, because it was so elaborately discussed and strongly relied upon in the able briefs of counsel and their oral argument.

Another ground for the insistence that \$138,000 must be taken as the full amount of paid-up stock is that the commissioner, after reporting that the Norfolk & Western Railroad Company owned \$128,000 stock of the Central Improvement Company, remarked, apparently to show why he had not re-

ported more stock, that it appeared from the records of the two suits that stock had been issued aggregating \$138,000, but that he had not discovered to whom the excess belonged, and this report was confirmed without exception as to that point. In the first place, I doubt whether this can be called an actual finding as a fact that only \$138,000 stock had been paid up; and, moreover, the commissioner says: "There appears to have been stock issued and aggregating par value of \$138,000." What is meant by "stock issued"? Does it mean certificates issued? There could be stock without certificates. The order of confirmation reserved eight, if Scott's and Jewett's representatives should show themselves to be stockholders, to except to the allowance by the report of fees and commissions, but confirmed it in other respects. It is plausibly argued that as yet the claimants had no standing in court, because they had yet shown no right to stock. The fair construction of the order is, as I think it is, that, as the fixing \$138,000 concerned them as stockholders, the right to except to that is to be regarded as reserved. But perhaps this is immaterial as the decree of May 30, 1891, unequivocally confirmed that feature of the report. But it is an adequate answer to this contention that not till after said report was confirmed did the West Virginia administrators of Scott and Jewett appear in the cause by petitions, setting up the claims of their decedents to stock, and ask that all prior decrees be reheard and reversed. Upon these petitions such order of confirmation of said report would be reheard and reversed. The prior proceedings, though the foreign representatives were before the court, did not conclude the administrators appointed in this state. By their petitions they excepted to said reports and former decrees. The report found the stock paid up \$138,000 on the evidence of the record alone, as he says, on the theory that this court had unalterably fixed that sum, and that it was binding upon the stockholders *inter sese*, which we have seen is not the case. The commissioner, though he afterwards found that other stock had been paid for, felt himself bound, in making subsequent reports, by the former confirmed report. No petition to rehear was filed until one was filed in December, 1891, by Davis, administrator, and McFadden. Upon them the court should have reviewed and corrected said decree, confirming said report. No matter what we call the petitions, full, as they are, of matter showing title to cause of action, and for relief, assigning errors in former orders, and asking review, be the name what it may, petition by a stranger just coming in, petition for rehearing, or bill of review, containing matter sufficient, it will be given effect according to its matter, regardless of name. *Sturm v. Fleming*, 22 W. Va. 404; *Martin v. Smith*, 25 W. Va. 579. I regard them as

petitions of strangers intervening asking relief in the cause, and, as incident, the rehearing of former orders, and to be treated as to those orders as a petition for rehearing, and they ought to be treated certainly as liberally as petitions for rehearing as was the pleading called bill of review in *Martin v. Smith*, supra, filed by a nonresident. If we were to call it a bill of review, it would call for reversal of those orders for error of law appearing on the face of the record, not looking into evidence, but only to the face of the report; and so if we call it a petition for rehearing, and then we could look into the evidence; and so if we call it an original petition by a stranger intervening for the first time. For myself, I do not regard those orders, not carried into actual decree at the time the petitions were filed as final, but only interlocutory, and reviewable on the hearing for the error on the face of the record, even did these petitions not ask rehearing, but only relief inconsistent with such orders. *Hyman v. Smith*, 10 W. Va. 298; opinion in *Fowler v. Lewis' Adm'r*, 36 W. Va. 129, 14 S. E. 447. This appeal brings those orders up. *Lloyd v. Kyle*, 26 W. Va. 534.

Another reason suggested for adhering to the sum of \$138,000 as the basis of distribution is that the commissioner's report of October 23, 1891, fixes the distribution; and that his finding, resting on that basis, is upon a question of fact; and that the law being that, when a commissioner and the court have concurred in deciding a pure question of fact, this court will give the finding great weight, unless it plainly appears to be wrong. *Fry v. Feamster*, 36 W. Va. 454, 15 S. E. 253. By the report above mentioned, the commissioner took said \$138,000 as the amount of paid-up stock, and after deducting debts, commissions, etc., he allowed the Norfolk & Western Railroad Company, as owner of stock of the Central Improvement Company, a share in the fund for distribution among stockholders based on an ownership of \$128,050 of stock, its share being \$57,008.86, and left only a balance of the distributable fund of \$4,429.17 for other shareholders; and by decree of May 30, 1891, the court again referred the case to him to report who was entitled to said balance of \$4,429.17; and the commissioner reported, October 23, 1891, that Scott and Jewett were not entitled, and the court confirmed the report. We cannot, it is argued by counsel, apply the principle announced in *Fry v. Feamster*, supra, to this report, for the reason that it is not a finding on a pure question of fact; or, rather, the ultimate fact found is only an erroneous legal conclusion from other facts already found, which called in law for a different finding. The commissioner had found in a former report, and repeated it in this, that Scott and Jewett had subscribed and paid for \$25,000 stock, and that alone called for a report in favor of their participation in the

distribution. But, as there was some evidence raising the question whether Scott and Jewett remained still stockholders, we may not be able to say that the finding against their right to share in the fund was purely an erroneous legal conclusion. But this I say, that it being found, and rightly found, that Scott and Jewett had subscribed and paid for stock, it was incumbent on those who denied their continued ownership to prove it, and that the evidence fell very far short of proving it, and the finding against them was contrary to the evidence.

A further plea for the exclusion of Scott and Jewett is their laches. This plea is wholly untenable, but in deference to counsel I refer to it. Wherein are Scott and Jewett chargeable with laches? One counsel says, only in failing to get certificate of entry on the books to show they were stockholders. Surely, this ought not to exclude them. As to entry in company's books, they had right to presume it would be done. It was not their fault, and the commissioner reports that substantially all the company's books and papers were lost. Certificates of stock are not indispensable as evidence of stock ownership. Scott had receipts for payment for stock, but they were mislaid. It is said they should have presented their stock, so that it would have been known that the paid-up stock was more than \$138,000, so that the recovery against the Shenandoah Valley Railroad Company would have been larger. We do not know that they knew of Crumlish's suit to enforce the company's liability against the Shenandoah Valley Railroad Company. They were nonresidents. There was no convention of stockholders; no order to ascertain them until August, 1890. Scott died in 1881; Jewett in 1875. Their representatives appointed in Pennsylvania appeared to claim their stock in February, 1891, and kept on claiming it. The personal representatives appointed in this state filed petitions claiming this stock in December, 1891. Papers to prove payment for stock are lost. Neither Scott nor Jewett nor their representatives were parties, except constructively by Crumlish (a stockholder) and the company being parties. And, if these stockholders knew of the suit, would they not have right to assume that their company would furnish the true amount of paid-up stock in order to recover the true amount of the debt? Are they more remiss in this than others? And why is it assumed that the stock of the petitioners was not a part of that \$138,000? It was paid in cash, and part of the other stock was not. Was all the other stock present, and this alone absent? No other stockholder appeared but Crumlish until after the order for their convention. It would be inequitable to visit on them the burden of the failure to recover of the Shenandoah Valley Railroad Company as much as would have been recovered had their stock been known.

Both the stockholders were dead; their papers lost. No other stockholder, except Crumlish, appeared, or did more than they. It is needless here to speak of the zealous efforts of the personal representatives of Scott and Jewett, commencing in February, 1891, to secure the fruits of this stock.

As to Scott's ownership of stock, a plea of *res judicata* is relied upon as specially applicable to his ownership. In 1874 a suit in equity was brought by Jefferson county as a stockholder against the Shenandoah Valley Railroad Company to annul three contracts between the Shenandoah Valley Railroad Company and the Central Improvement Company, because, among other reasons, when two of said contracts were made, Scott was president and director of Shenandoah Valley Railroad Company, and stockholder in the Central Improvement Company, and the bill charged that he was a stockholder, and the answer of the Central Improvement Company denied that he was a stockholder, and the court held those contracts void. The fact that they were held void tends to sustain the claim that he was a stockholder. The fact that the decree finds that Walker and Bardwell were stockholders furnishes a mere implication that Scott was not. The denial in the Central Improvement Company's answer that Scott was a stockholder cannot preclude that stockholder's showing himself to be a stockholder. It cannot be possible that an answer of a corporation denying that one is a stockholder in a suit to which he is not a party, where the point comes up only incidentally as evidence, and not involving the adjudication of stockholders' rights, can conclude him against showing in another suit, having for its object the ascertainment of the stockholders and the settlement of their respective holdings, that he is a stockholder. If even Scott has been a party, the answer of a codefendant would not be evidence against him. Let us even suppose that \$138,000 must be taken as the unalterable amount of stock paid in, where even then the equity of according to the Norfolk & Western Railroad Company its full ratable quota for the \$134,000 owned by it, and denying any part to Scott's and Jewett's \$25,000, and allowing McFadden less than his ratable quota, even on the basis that he owned only \$4,000 stock, as found by the commissioner? The fund was for distribution among stockholders. The fact that it was smaller, by reason of its not appearing by evidence when the case was before in this court that there was more stock than \$138,000, than it would have been had the further evidence been present, cannot prejudice one stockholder more than another, ratably. It is a loss common to all. We may say that while the decree of March 1891, confirming the report finding \$138,000 as the amount of paid-up stock, as long as it stood, would guide the commissioner, yet it ought not

have controlled the court in its final decree making distribution. The fund was for all stockholders. Why, in equity, should they not have shared by a common percentage?

My conclusion is that Scott's estate is to be treated as a stockholder in the Central Improvement Company in the amount of \$30,000, Jewett's estate in the amount of \$5,000, McFadden in the amount of \$5,000, and the Norfolk & Western Railroad Company in the amount of \$134,000, and they are to share in the fund for distribution among stockholders ratably by a percentage common to all of them.

Another important question is, shall the special receiver have any compensation for services, and, if so, what? The commissioner credited him with \$16,416.07, apparently intended to be 2 per centum of the gross fund realized from the recovery by the Central Improvement Company against the Shenandoah Valley Railroad Company. The appellants protest against this charge on the fund, as it lessens their portion. They say he was no receiver, because the decrees appointing him were reversed. By decree in the Crumlish suit (November 29, 1887), a special receiver was appointed in the cause, and authorized to file his petition in the cause of Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah R. Co., brought to enforce a mortgage of the latter company, and by such petition to seek the recovery of the demand of the Central Improvement Company against the Shenandoah Valley Railroad Company, and to take such steps to that end as he might deem expedient, and to bring any money recovered into the Crumlish suit for distribution among those entitled thereto. The receiver gave bond under this appointment. In February, 1888, Crumlish's administrator and the receiver filed such petition in the Fidelity, etc., Co. suit, making the Central Improvement Company a party, to assert the demand aforesaid. Afterwards the decree appointing the receiver was wholly reversed. Afterwards, by decree of December 3, 1889, the Central Improvement Company recovered of the Shenandoah Valley Railroad Company \$127,000, and a special receiver was appointed to collect it. He never gave the bond required by this decree. Afterwards that decree was wholly reversed by this court. It is plain that a reversal without reservation is a reversal in toto, and ends all powers as to future action growing out of the decree or judgment. *Flemings v. Riddick*, 5 Grat. 272; 2 Freeman Judgm. § 481. After the first reversal, the circuit court adjudicated that the receiver was no longer receiver, as it re-appointed him; but he gave no bond, and it is held that until he give bond he is no receiver and has no title. *Code*, c. 133, § 28; *Donahue v. Fackler*, 21 W. Va. 124; *High, Rec.* § 121; 20 Am. & Eng. Enc. Law, 162. I think he was lawful receiver from his first appointment up to February 25, 1889, when

the first reversal occurred; but I cannot see how he was afterwards. There seems to be on the meager authorities on this particular point a difference, as to the right to charge the receiver's compensation on the whole fund, between cases where the appointment was regularly made and where it was not. In cases where it is irregularly made, it seems not chargeable on the fund, as the party in interest may object. I would think with Judge Beck in *Radford v. Folsom*, 55 Iowa, 286, 7 N. W. 604, that, if jurisdiction existed, its erroneous exercise (in the appointment) would not affect the right of the receiver (as to compensation) as long as the order of the court stands unreversed. But as the appointment is void, or becomes vacated and inoperative by reversal, how can it bind a party? Can he not avail himself of the nullity of the appointment? Perhaps that was among the reasons for which he sought reversal. In *People v. Jones*, 33 Mich. 303, it was held that, as the appointment was void for want of jurisdiction, the receiver should have no compensation. In *Verplank v. Insurance Co.*, 2 Paige, 438, the appointment was reversed, and the receiver ordered to give up property and without compensation. In *French v. Gifford*, 31 Iowa, 428, this distinction is clearly drawn by the holding that the rule that the compensation of a receiver to take charge of the assets and wind up the affairs of an insolvent corporation should be paid out of the fund in his hands generally applies to cases where he closes up the business, and settles his accounts, not to cases where the order appointing him is set aside as improperly made. It was later recognized in *Radford v. Folsom*, 55 Iowa, 276, 7 N. W. 604. See *Beach, Rec.* § 773; *Gluck & B. Rec.* § 105. These cases tend strongly to show that we cannot regard this receivership as continuing after reversal of the decree creating it. Its foundation failed.

Should a special receiver be given compensation by way of commission on receipts or otherwise? There is no fixed rule. Often commissions would be grossly excessive or often too little. In many instances there is an inclination to allow what are allowed administrators and trustees for similar services. The true rule is that he is an officer of the court, and the court may fix his compensation, giving him what is fair and reasonable under the circumstances of the particular case, rather than by any invariable rule or analogy. *Abbott v. Packet Co.*, 4 Md. Ch. 310; *Magee v. Cowperthwaite*, 10 Ala. 966; *Gardiner v. Tyler*, *42 N. Y. 505; *Gluck & B. Rec.* § 103; *High, Rec.* § 781. Where the fund is large, it is usual to allow a salary or lump sum. 1 *Post. Fed. Prac.* § 258; *Cowdrey v. Railroad Co.*, 1 Woods, 346, *Fed. Cas. No. 3,293*; *Farmers' Loan & Trust Co. v. Central Railroad of Iowa*, 8 Fed. 60; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 187. In *French v.*

Gifford, *supra*, Miller, J., afterwards Mr. Justice Miller, said: "While we concede that the receiver should receive a compensation corresponding to the high degree of business capacity, integrity, and responsibility required in cases of this character, and which was secured in the person of the receiver in this case, yet we feel it our duty to allow only such sum as will be such reasonable compensation." In *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 188, Brewer, J., said, what is obviously law, that the allowance to a receiver is a judicial act, and, while it is left to the discretion of the court, it is discretionary only in the sense that there are no fixed rules to determine the allowance, and it is not discretionary in the sense that courts may allow anything more than a fair and reasonable compensation; that the court desired to see officers of the court well paid, so that men of character and ability may be willing to accept the burden and responsibilities of these trusts, but at the same time courts must not forget that the property to be charged with such allowances is not the property of the judges, and that there are thousands all over the land who are owners, whose property by the strong hand of the law has been taken out of their custody, and who look to the courts to see that no unjust or excessive burden is cast upon them. Courts may not exercise the generosity of owners, but are closely limited to the justice of judges. In this case there were no assets to care for or pursue but the debt on the Shenandoah Valley Railroad Company, and that came by decree. In fact, very little, if any, actual money came to the hands of the receiver. The Norfolk & Western Railroad Company purchased the railroad of the debtor company, and, owning a large share of the stock of the Central Improvement Company, was simply credited with it on purchase money. The receiver says in a brief filed by himself it paid the attorney's fees and so-called "by-bid" below mentioned, aggregating \$360,000, and that that part of the fund stood for its use, and that the same company owned \$360,000 out of \$382,000 of debts audited against the Central Improvement Company; and yet the receiver is given a commission on those sums. It is not made to appear by the record what, if any, actual money went into his hands to be cared for and guarded, which constitutes a large element in the consideration for which receivers are allowed compensation. He made no report of it. He appeared in court February 28, 1893, and admitted that there was then in his hands \$61,940.03 distributable among stockholders. That sum, with commissions, debts, and counsel fee, and by-bid, made up the sum recovered against the Shenandoah Valley Railroad Company; so that, except said sum of \$61,940.03 and commission, no other actual money came to his hands; and of this the Norfolk & Western Railroad Company own-

ed the greater part as stockholder. Indeed, I see no decree directing the money to be paid him save that of November, 1887, which was reversed, as above stated. Thus, there is no ground for basing compensation on commission on the said gross sum, as was done in the report of the commissioner. We must adopt a specific sum. We find that he was a lawful receiver until February 25, 1889. Prior to that time he took some steps of importance in the cause. We cannot, as a court of equity, deny him some compensation. It is urged he resisted with the means in his hands the participation of appellants as stockholders. He did except to the report of the commissioner finding them to have paid for stock; but this was late, after all service for which he charges or can be allowed had ended. We do not see that he used the fund for that purpose. He appears to have been through years diligent, zealous, laborious, and efficient in the prosecution of the rights of the Central Improvement Company against the Shenandoah Valley Railroad Company under the most adverse and discouraging circumstances, rendering its cause at various periods of the litigation to all reasonable appearances a forlorn hope; and, though the decrees were reversed, the court still calls him and treats him as receiver. McFadden, Scott, and Jewett shared the benefit of the services. We have fixed upon \$12,000 as the total compensation of the receiver, of which Scott's and Jewett's estate and McFadden are to pay their proportionate part.

Another important matter is the allowance by the commissioner out of the fund of \$200,000 for fees of counsel employed by the receiver in the prosecution of the demand of the Central Improvement Company. While the decree of November 27, 1887, was unreversed, the special receiver employed counsel to prosecute the claim of the Central Improvement Company against the Shenandoah Valley Railroad Company; and they began proceedings and continued them until they gained their cause in the recovery of the large debt above spoken of. It is beyond any question fair and truthful to say, in a few words, that the services of the counsel were unremitting through the vicissitudes of victory and defeat in the courts, original and appellate, for 12 years, and able, laborious, zealous, and faithful, yielding to none of many discouragements often presenting themselves. Orders appointing receivers should authorize the employment of counsel, if such is the purpose, as charges are often made for them after service rendered when it is difficult to deny them. Courts are indisposed to allow receivers for counsel when their employment has not been before authorized. High, Rec. § 805. This decree did not expressly authorize the receiver to employ counsel; but it empowered him to prosecute a suit for the recovery of the claim, and "to take such other proceedings to that end as

he may deem expedient"; and, as counsel were absolutely necessary, we may say their employment was contemplated by the decree, and, at any rate, that it was an act of sound discretion, which, under the imperious nature and circumstances of the case, a court ought to approve. No case ever required the service of counsel more. True, the decree appointing the receiver fell by reversal, but we hardly think that would vacate the retainer of counsel; and, at any rate, these counsel went on term after term in open advocacy of the cause in the court which had appointed the receiver, and it thus recognized their continued relation to the cause. These services redounded to the benefit of each and every stockholder, and all must bear the burden of fair and reasonable compensation. If this court sees, as it does, that such services were essential, and that without them the debt would have been—likely would have been—lost, and the stockholders themselves had not their own counsel, it would seem just to charge, and unjust not to charge, all of them with such services, as they share in the fruits of these services. That a court of equity may allow receivers counsel fees in proper cases is beyond question. Their amount is within the sound discretion of the court. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242.

But the action of a receiver in employing his relatives or friends as counsel on his own motion is open to great abuse, except when specially directed in open court, where the interests involved may be heard, and should be watched with great jealousy by courts. Courts must realize that they are applying moneys in their grasp belonging to persons who, as the power is largely discretionary, are powerless to resist, absolutely helpless and remediless in courts of the last resort. *Mr. Justice Brewer* said in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 187: "There has been no little implied criticism in the language of appellate courts of the magnitude of the allowances made in foreclosure cases to counsel, receivers, and others. We are admonished by utterances of the supreme court to be cautious in this respect." He said: "Our duties are as sacred, our responsibilities more solemn, than those of any other parties connected with this foreclosure, for our action is almost certainly final." I say our duties are more sacred and solemn than those of any others connected with this case, not only because our action is final, but for other and higher reasons. The highest court in the land, while making an allowance, deemed it necessary to adopt a point of broad scope in the syllabus of its decision, to emphasize prudence in this matter, in the strong language following: "The practice of allowing to trustees, complainants, and receivers, and their counsel large and extravagant counsel fees and commissions, payable out of the trust fund under the control of the court, commented on and

disapproved." *Trustees v. Greenough*, 105 U. S. 527. I venture to repeat what I wrote in the case of *Fowler v. Lewis' Adm'r*, 36 W. Va. 154, 14 S. E. 447: "I certainly am disposed to be fairly liberal to my own profession, but not at the sacrifice of the interests of the many. I do not think it would confer a benefit upon that honorable profession, comprising the brightest men and leaders in society, trusted by the public with their most vital, sacred, and important interests, private and public; but it would in the end, bring the whole bar into disrepute and unpopularity, by the improper and cormorant use which would often be made of the rule by the least meritorious of its members. An abuse we know it has become where it prevails. The United States supreme court in *Trustees v. Greenough*, 105 U. S. 527, condemns the practice of allowing large fees out of trust funds now prevalent; and *Mr. Justice Miller*, in the same case, dissented, and called it a 'gross judicial abuse of the present day; namely, the absorption of a property or a fund which comes into the control of a court by making allowances for attorney's fees and other expenses.'"

In view of the increasing number of instances in this state, in these days of its progress and development, in which courts of equity are called upon to administer the assets of corporations and others, I have availed myself of this occasion to advert to principles which will be of frequent use in the courts. It might be thought that as the receiver has not shown that he has paid these counsel fees, but that the *Norfolk & Western Railroad Company* has, we could not allow anything on this score, since it is only on the theory that it is allowed as an expense of the receivership, and the fee is allowed to the receiver, not to counsel. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242. But the receiver employed the counsel and other stockholders have incurred the expense in saving assets for the common benefit, and others ought to help bear the burden. *Trustees v. Greenough*, 105 U. S. 527.

Therefore, on this branch of the case, it only remains to say what shall be allowed for such counsel fees. Some of these counsel had, before they engaged to the receiver, engaged with certain stockholders, holding a large amount of stock, to recover it, having fees in some cases for one-fourth, in some one-half, of recovery, contingent wholly on recovery, which, under the dark clouds then lowering over their stock, were not unreasonable. It may be that these stockholders assented to the sum of \$200,000. If so, that is their own act, but, of course, does not bind *Scott's* and *Jewett's* estate and *McFadden*, who stubbornly protest against any allowance to their prejudice; and we cannot fix any sum approximating that sum, and thereby charge them on that basis by charging it on the fund. We do not intend to affect in any way any arrangement which

may have been made between receiver and counsel and other stockholders; but, as to McFadden and Scott's and Jewett's estates, we must treat the fund, so far as they are concerned, not being parties to any private arrangement, as money in court, and deal with it as a court of equity. We find that in 1882, long before the receiver was appointed and authorized to go into the Fidelity Company's suit to recover the debt due from the Shenandoah Valley Railroad Company, one of the firms of attorneys employed by the receiver (the receiver being a member of it) had filed a bill in the suit of Crumlish's administrator, as a stockholder in the Central Improvement Company, to assert that debt against the Shenandoah Valley Railroad Company, and success in that suit would have procured the fund for all. It does not appear what was the engagement between said administrator and his counsel. This is mentioned as a matter touching on the quantum of counsel fees. Again, we do not see that so many as five different attorneys were essential. We fix \$8,000 as the sum to be paid by Scott's and Jewett's estates and McFadden proportionately as between themselves, for services rounding to their benefit for all fees of counsel. The receiver agreed on no fixed compensation with the attorneys, but it was to be left to the court. The amount, under any circumstances, would be within the discretion of the court. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242.

One of the attorneys for appellants makes the point that a certain contract bars any claim for counsel fees or receiver's commissions. A written agreement was made between certain attorneys for certain unnamed stockholders of the Central Improvement Company and the Norfolk & Western Railroad Company, whereby the Norfolk & Western Railroad Company purchased the holdings of said stockholders at the price of \$500,000; and it contains a fourth section, providing that the attorneys and receiver in these suits should relinquish all claims for fees or commissions except such as were paid out of said \$500,000, the receiver being aware of this contract, and signing an addendum relative to another clause. While I think that agreement would forbid attorneys and receivers from claiming any compensation from any stockholders other than those owning the stock sold by said agreement, yet, the agreement not including other stockholders, it seems to me it does not forbid the stockholders referred to in it from operating an equity outside of it, of calling upon other stockholders to bear such part of the burden as a court of equity would deem fair. I regard this claim to charge other stockholders with counsel fees as one made by some stockholders to compel others to share their burden. This agreement, or any other for counsel fees, stands out to itself as made by parties competent to con-

tract, and not binding on those standing out of such agreement.

The last matter for consideration is the allowance by the confirmed commissioner's report of a sum of \$160,000 out of the fund. I state the facts pertinent to this point. The Central Improvement Company obtained a decree against the Shenandoah Valley Railroad Company for the large sum so often above spoken of; but it was second as a lien to another of, say, \$5,800,000, including costs. It is said in evidence tending to show it that the Norfolk & Western Railroad Company owned or was in touch with this prior lien, and had formed a plan to buy the Shenandoah Valley Railroad at the then approaching sale, under decree, at a sum only covering the prior lien, and shutting out the debt of the Central Improvement Company, and thus that debt was in imminent, actual danger of total loss to creditors and stockholders. In this emergency the bulk of the stockholders of the Central Improvement Company came together, and passed a resolution authorizing a committee by them appointed to take steps in their discretion to secure payment of said debt, with power to pledge the debt as security for any money it might be necessary to borrow, or to use a portion of the debt to secure financial assistance in the purchase of the Shenandoah Valley Railroad, if a purchase should be necessary. Under this authority, after fruitless efforts in other quarters, the committee made an arrangement with the Memphis & Charleston Construction Company, backed by four individuals, by which it was to bid for the road a sum sufficient to cover the debt of the Central Improvement Company, for which service the Memphis & Charleston Construction Company was to be paid \$200,000. When the Norfolk & Western Railroad Company learned this, it agreed to and did bid a sum sufficient to cover the Central Improvement Company's debt. Afterwards the Memphis & Charleston Construction Company agreed to reduce the sum it was to get to \$160,000, and it is this sum which was charged by said commissioner's report as a proper charge upon said fund. The receiver, as such, was not a party to this contract, but in evidence says it is a fair and proper charge, under the necessity of the case. He did not pay it as receiver. It is the necessity of this expenditure to save the debt of the Central Improvement Company from absolute loss which is pleaded to charge it upon the funds. Such loss might have come, but can we assert that necessity to have in fact existed? Can it be demonstrated to us as a court, by mere opinion evidence, that such loss surely would have fallen? How can we say, with a safety or certainty warranting us in allowing such a charge, that the Shenandoah Valley Railroad, with a mileage of 255 miles, running from Roanoke City, Va., to Hagerstown, Md., through the length of the Shenandoah Valley, and its whole line

through one of the very finest and most beautiful sections of the Republic, touching or crossing three great east and west trunk lines, and in easy and close reach of another, forming an artery of connection between the great cities of the North, Boston, New York, and Philadelphia, and the South,—how can we say that this road, on actual sale, open to free competitive bidding, would not have brought \$7,000,000? If we should say so, it would be an arbitrary guess, in a legal point of view. Counsel proposes as a test that, if the court would have authorized it in advance, it ought now to be allowed, and asks whether the expenditure would not have been authorized by a court in advance. I answer that it would not. The court would let the property take its chances in the usual course at the open auction. Would a court, where a farm was to be sold for creditors having liens in different orders, at the request of some of the junior lienors, without the consent of others, make an order to pay a large sum to procure a bid, and charge it ratably upon those not consenting, so as to lessen their shares? This charge is so large a drain on the fund, and so extraordinary and out of the usual line and course of the administration of assets of an insolvent corporation by a court of equity, that a court would not allow it. It is not a charge fairly and reasonably incident to such administration. Certain ones of the stockholders authorized the expenditure. They had clear right to do so, but it was a sacrifice which they deemed prudent for the promotion of their own interests,—their individual act, to save their own property; and the mere fact that their act resulted as a consequence in saving others interested is no reason for a court to charge an expenditure of that character and amount upon those not joining in the act, and protesting against their interest being burdened with it. They had a right to stand out and run the risk of loss, and let others make a sacrifice personal to themselves if they chose. I have not met with or been cited to a case allowing a charge parallel with or analogous to this charge. The receiver has not paid it, nor could he have done so, for he can pay only such outlays as fall in the ordinary course of the business intrusted to him, such as are contemplated in his appointment. *Cowdrey v. Railroad Co.*, 93 U. S. 352; *Cowdrey v. Railroad Co.*, 1 Woods, 331, Fed. Cas No. 3,293. In extraordinary cases, involving a large outlay of money, the receiver should apply to the court in advance for authority to make the outlay. *Id.* It cannot be allowed on the ground that the receiver has paid it, but only on the ground that other stockholders incurred the expense; but that, as I have said, as to this expenditure, is one chargeable only to them.

Therefore, the decrees of the 20th day of February, 1893, and of the 28th day of February, 1893, are wholly reversed, and the de-

cree of May 30, 1891, is reversed, except that provision directing payment to U. L. Boyce of a certain debt therein specified in favor of John Lee; and so much of the decree of March 2, 1891, as may be construed to the prejudice of the rights of Charles McFadden and the estates of said Scott and Jewett is reversed, and the cause remanded, that a decree may be made according to the principles herein indicated.

(44 S. C. 227)

FAIRLY v. WAPPOO MILLS.

(Supreme Court of South Carolina. May 30, 1895.)

EVIDENCE OF CUSTOM—BROKERS—RIGHT TO COMMISSIONS—FAILURE TO PAY LICENSE FEE.

1. Evidence of custom is admissible to explain or vary an express and unambiguous contract only when the contract contains terms to which such custom has given a meaning different from that which they primarily bear.

2. In an action by a broker to recover of the seller the agreed commission of 10 cents per ton on a sale of 2,000 tons of fertilizers, a part of which quantity the seller had refused to deliver, evidence of a custom to pay commissions on only the quantity actually delivered under the contract of sale was inadmissible.

3. The fact that a broker, after having completed the sale for which the commissions were claimed, and while acting as agent for the vendee, induced the vendor to delay certain shipments under the contract, and to take a draft drawn on the vendee, and discounted, for the part of the goods shipped, and accept the vendee's note for the amount, did not affect his right to recover commissions for making the sale.

4. An allegation that the purchaser furnished by a broker had requested an extension of time on the draft drawn against the first shipment of the goods sold, because he was "not able to pay it at the time," was not equivalent to an allegation that such purchaser was insolvent, or that the broker had not furnished a purchaser who was able to pay for the goods according to the contract.

5. Where the purchaser furnished by a broker is accepted by the seller, without any misrepresentation on the part of the broker as to such purchaser's financial standing, the burden of proof is on the seller to show that the purchaser is not able to pay for the goods according to the contract.

6. An ordinance of the city of Charleston passed December, 1889, provides that brokers shall pay a license tax, and subjects to a penalty any one who engages in the business of a broker without having paid such tax; but neither the ordinance, nor the statute (Act 1881, 17 St. at Large, 582) under which it was passed, contains anything making the business of a broker unlawful, the apparent object of the ordinance being to aid the revenue of the city. *Held*, that the fact that a broker had not paid the license tax required by this ordinance was no defense against an action brought by him to recover commissions on a sale duly made.

Appeal from common pleas circuit court of Berkeley county; D. A. Townsend, Judge.

Action by John S. Fairly against the Wappoo Mills. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff filed the following complaint: "First. That the plaintiff is a broker in the city of Charleston, state of South Carolina, carrying on a brokerage business in fertiliz-

ers, phosphate rock, and similar products, and was so at the times hereinafter mentioned, and that the defendant, Wappoo Mills, was at the times hereinafter mentioned, and now is, a corporation created by and under the laws of the state of South Carolina, and having its principal office and place of business in the county of Berkeley. Second. That the plaintiff, as such broker, sold for account of said defendant, on June 5, 1890, 2,000 tons dissolved bone to the Caddo Fertilizer Company, the brokerage on which, at the accustomed rate agreed upon, was \$200, and was to be paid by the defendant. That the plaintiff has received from the defendant sixty-eight dollars on account of said brokerage, but the balance of \$132 is still due and unpaid, although demanded of the defendant. All of which will more fully appear on reference to the broker's memorandum of sale, bill, and account heretofore rendered defendant, and copies of which are hereto annexed, as Exhibits A, B, C, and made part of this complaint. Wherefore, the plaintiff demands judgment against the defendant in the sum of \$132 and costs."

Exhibit A, referred to in the complaint, is as follows: "Exhibit A. (Copy.) Charleston, S. C., June 5th, 1890. Sold for account of Wappoo Mills, of Charleston, S. C., to the Caddo Fertilizer Co., of Shreveport, La., (2,000) two thousand tons dissolved bone, guaranteed minimum analysis (13½) thirteen and one-half per centum available phosphoric acid, in bulk, f. o. b. cars here, at (\$9.85) nine and 85/100 dollars per ton of 2,000 lbs. Terms: Sight draft against B/L. Shipments: Four hundred tons per month during September, October, November, and December, 1890, and January, 1891. Seller paying brokerage at 10 cents per ton. Accepted (Fire, storm, and other unforeseen events excepted). Wappoo Mills, C. C. Pinckney, Jr., Pres't. Accepted. Caddo Fertilizer Co."

The defendant, the Wappoo Mills, answering the complaint, for a first defense, says: "(1) That it admits the allegations made in the first paragraph of the complaint herein. (2) That it denies each and every allegation of the second paragraph, except as is specifically admitted in this paragraph. (3) This defendant admits that the contract of sale attached to the complaint as Exhibit A, and made a part thereof, was brought about by the plaintiff; but this defendant alleges that there existed at the date thereof a custom in this business to pay brokerage or commission only on the amount of stuff actually sold and delivered under such contract. For a second defense, this defendant alleges: (1) That some time in the early part of the year 1890 the plaintiff, representing the Caddo Fertilizer Company, offered to purchase from the defendant, for said company, 2,000 tons of dissolved bone. That the defendant agreed to sell the said 2,000 tons dissolved bone to the Caddo Fertilizer Company upon the following terms, and no other, that is to say, for the price of \$9.85 per ton of 2,000 lbs.,

f. o. b. cars Charleston; terms, sight draft against bill of lading; shipments, 400 tons per month during September, October, November, and December, 1890, and January, 1891; seller paying brokerage at 10c. per ton; fire, storm, and other unforeseen events excepted. (2) That about the time designated for the first shipment of 400 tons of dissolved bone the plaintiff, still representing the Caddo Fertilizer Company, requested the defendant not to ship the said 400 tons, which, according to the terms of sale, ought to have been shipped at that time. (3) That about the time designated for the second shipment of 400 tons the plaintiff, still representing the Caddo Fertilizer Company, requested the defendant not to ship said 400 tons, which ought to have been shipped at that time. (4) That about the time designated for the third shipment of 400 tons, viz. some time in November, 1890, the plaintiff, still representing the Caddo Fertilizer Company, requested the defendant to ship to the Caddo Fertilizer Company a cargo of dissolved bone, by vessel, for the price of \$9.50 per ton f. o. b. vessel. That the defendant shipped by vessel 684.21 tons dissolved bone to said company, drawing upon them, at the request of the plaintiff, at thirty days, for the purchase money for same. (5) That when the said draft became due and payable the plaintiff, still representing the Caddo Fertilizer Company, urged the defendant to renew and extend the said draft for sixty days longer, for the reason that the Caddo Fertilizer Company were not able to pay the first draft at that time. That this defendant, having negotiated said first draft, was compelled to take up same, and accept the note of the Caddo Fertilizer Company, payable at sixty days. (6) That shortly after the failure of the Caddo Fertilizer Company to pay the said first draft the plaintiff, still representing the said Caddo Fertilizer Company, requested the defendant to send another shipment of dissolved bone to said company, but this defendant, considering the said agreement of sale broken, by reason of the several breaches hereinabove mentioned, refused to make the desired shipment. (7) This defendant therefore alleges that the entire amount of dissolved bone sold by it to the Caddo Fertilizer Company, as above set forth, is 684.21 tons, and admits that the plaintiff herein became entitled to a brokerage thereon of \$68.43. But this defendant further alleges that of this brokerage the sum of sixty-eight dollars have already been paid to the said plaintiff, at his request, and that there remains due to the said plaintiff on the said transaction the sum of forty-three cents, which said sum of forty-three cents this defendant has always been willing, and is now willing, to pay. For a third defense to the alleged cause of action, this defendant alleges: (1) That in pursuance of the power in them vested by an act of the general assembly passed December 17, 1881, and entitled 'An act to authorize the city council of Charleston,

to impose a license tax on all persons engaged in any business, trade or profession, in the city of Charleston,' the city council of Charleston on the 23d day of December, A. D. 1889, enacted a law entitled 'An ordinance to regulate licenses for the year 1890,' requiring all persons, firms, or corporations engaged in, or intending to engage in, any trade, business, or profession therein mentioned to obtain before January 20, 1890, a license therefor, and imposing a penalty for each offense on those who should carry on such business, trade, or profession without first taking out the required license. (2) That the plaintiff herein, the said John S. Fairly, failed to obtain during the year 1890 the proper license prescribed by said ordinance for the business conducted by him."

The following extracts from the ordinance referred to in the third defense of the answer are sufficient for an understanding of the opinion:

"An ordinance to regulate licenses for the year 1890.

"Section 1. Be it ordained by the mayor and aldermen of the city of Charleston, in city council assembled: That every person, firm, company or corporation engaged in, or intending to engage in, any trade, business or profession hereinafter mentioned, shall obtain on or before the 20th day of January, A. D. 1890, a license therefor, in the manner hereinafter prescribed. Every person, firm, company or corporation commencing business after the said 20th day of January, A. D. 1890, shall obtain a license therefor before entering upon such trade, business or profession.

"Sec. 3. If any person or persons shall exercise or carry on any trade, business or profession, for the exercising, carrying on or doing of which a license is required by this ordinance, without taking out such license as in that behalf required, he, she or they shall, for each and every offence, be subject to a penalty not exceeding \$100, as may be adjudged by the recorder or court trying the case. And the same shall be entered up as a judgment of the court, and execution shall issue against the property of the defendants as for the collection of other taxes and penalties.

"Sec. 4. * * * It shall be the duty of the city sheriff, the police and his deputies, to detect and report all parties failing to take out a license as herein required. They shall visit each and every place of business after the 20th day of January, 1890, and ascertain and report at the following regular meetings of council the names and places of business of all persons failing to take out a license.

"Sec. 7. All licenses granted under this ordinance shall continue in force until the 31st day of December, A. D. 1890. No license except such as is provided for by limitation,

per diem or month, or by amount of sales, shall be issued for less time or rate than one year. The city treasurer shall prepare a proper form to be issued in each case.

"Sec. 13. That the charge for license for any business, trade or profession not enumerated above shall be determined on by the committee on ways and means and the city treasurer conjointly.

"Class 5.

- | | |
|---|----------|
| 1. Brokers, pawn, each..... | \$300 00 |
| 2. Brokers, stock and other personal property and real estate at private sale, each | 75 00 |
| 3. Brokers, ship | 50 00 |
| 4. Brokers, street | 50 00" |

The plaintiff moved to strike out of the answer the first, second, and third defenses on the ground that they did not state facts sufficient to constitute a cause of defense or counterclaim, and asked for judgment by default.

The following is a copy of the opinion of the lower court:

"In June, 1890, John S. Fairly, a broker doing business in Charleston, S. C., sold for Wappoo Mills, a South Carolina corporation having its office and chief place of business in Berkeley county, 2,000 tons of dissolved bone, to the Caddo Fertilizer Company, of Shreveport, La. The copy of the broker's contract, made a part of the complaint, shows that the sale was 'for account of Wappoo Mills,' and that the 'seller paying brokerage at ten cents per ton.' Fairly sent in his bill for \$200 brokerage, as per the memorandum of sale, but the defendant would pay only \$68, disputing the balance. The plaintiff then sued for the balance, \$132, and to the complaint the defendant filed a lengthy answer. Plaintiff's counsel gave written notice that on the trial they would move to strike out the respective defenses (first, second, and third) of the answer on the ground that they did not constitute grounds of defense or counterclaim; and that they would ask for judgment by default if all the defenses were so stricken out. Code, § 174; Mobley v. Cureton, 6 S. C. 69. The demurrer came on to be heard at the trial; and the simple question is, admitting the truth of all the facts set out in the answer, do they constitute any valid defense or counterclaim to the plaintiff's claim for brokerage? No counterclaim is set up, so that we are only to deal with defenses. Three defenses are set up. The answer admits that the broker made the contract sued on, but states that—First, there is a custom in the fertilizer trade by which brokerage is only allowed on such stuff as is actually delivered on the contract; second, that only 680 tons were delivered, as the terms of the contract were subsequently modified by the parties; and, thirdly, Fairly had no license, as required by the license ordinance of the city of Charleston for the year 1890, and

therefore the contract he made was unlawful, illegal, and void, and he could not sue for and recover his brokerage for making it. If the making of the original contract is admitted, as it is in the answer, then none of these defenses are good, even if they are all true.

"First. As to the license, which seems the most serious question. It is admitted that, if the law requiring a license or other regulation of this character actually and in terms declares that the act or calling is unlawful unless and until the license or requirement is complied with, then the act or calling is prohibited, and a contract made under it cannot be sued on. If, however, there is no express and specific prohibition, then it is necessary to construe the act or ordinance, and see if the intent is to prohibit. 2 Benj. Sales, 526; *Harris v. Runnels*, 12 How. 84; 12 Am. & Eng. Enc. Law, 516. Now, one of the leading canons of construction in cases of this sort is the test whether or not the license or exaction is a police regulation, or a tax assessment for the security and collection of the revenue.' If the former, the calling itself is invalid, unless the requirement is complied with; but, if it is a 'tax for revenue,' then the act done is valid. The law does not operate on the business or calling, and affect that, but on the person, and punishes him with penalty or otherwise. *McConnell v. Kitchens*, 20 S. C. 436; 2 Benj. Sales, 825; *Harris v. Runnels*, 12 How. 84; *In re Jager*, 29 S. C. 445, 7 S. E. 605. Under such license and tax laws for 'revenue,' in cases almost identical with the present, the contract has been held valid, and the parties entitled to enforce it, and the agent to demand compensation for making it. *Ames v. Gilman*, 10 Metc. (Mass.) 243; *Larned v. Andrews*, 106 Mass. 436; *Mandelbaum v. Grezovich* (Nev.) 28 Pac. 121; and cases last cited above. If these be the laws of construction, then what is the character of the Charleston license ordinance of 1890? It is not pretended that it contains any provision that business conducted without license shall be illegal and unlawful until and unless a license is obtained, and, as a matter of fact, it contains no such provision. But the defendant contends it should be so construed. Now, the ordinance of 1890 is stated in the answer to have been passed in pursuance of a power vested in the city of Charleston by the act of the general assembly passed December 17, 1881, entitled 'An act to authorize the city council of Charleston to impose a license tax on all persons engaged in any business, trade or profession in the city of Charleston.' 17 St. at Large, 582. The ordinance obtains its authority from, and is limited in its scope and intention by, the act. Without the act, or beyond the scope of the act, the ordinance is void. *Charleston v. Oliver*, 18 S. C. 53. Now, does this act and ordinance intend to prohibit the business or calling, or is it an

act and ordinance for 'raising a city revenue'? We are left in no doubt as to this. In a whole series of cases affecting this very question and ordinance, and others similar to it, the courts of South Carolina have held, after argument on argument, that this was a tax for the purpose of raising revenue. *State v. Hayne*, 4 S. C. 403; *State v. Columbia*, 6 S. C. 1; *Charleston v. Oliver*, 16 S. C. 50; *Charleston v. Oliver*, 21 S. C. 325; *In re Jager*, 29 S. C. 444, 7 S. E. 605. If, then, this be the construction placed on the ordinance by the highest court of the state, and it is a 'revenue tax,' the case comes distinctly under the principle of construction already pointed out, and the business is not unlawful without the license. The defendant contended that, as there was a recurring penalty in the ordinance, this showed the calling was prohibited. This, of course, is also another test adopted to ascertain the meaning of the ordinance. But this yields to the other rule, as to the 'revenue' character of the act and ordinance, so often declared by the supreme court, and need not be considered. But one clause of the ordinance itself is conclusive of this question. The defendant contends that the intention of the ordinance is as if it read, 'it shall be unlawful to engage in business unless and until a license is obtained.' Now, the ordinance grants a license for the year 1890. The license for 1889 expired December 31st, 1889. Section 1 provides that 'all engaged in business * * * shall obtain a license on or before the 20th January, 1890.' They are allowed until January 20th to do so. But, if the construction of the defendant be adopted, then all the business transactions in Charleston between January 1, 1890, and January 20, 1890, were unlawful and illegal and void, for the granting of a license afterwards could not cure them. This construction courts could not adopt. The plain meaning of the ordinance is otherwise. It says parties can do business lawfully, but they must pay taxes for revenue. This tax can be paid any time by January 20th, but then, after that, penalties will be laid on those parties, personally, who do not pay the tax. In addition to this, an examination of the contract and pleadings shows the seller, the Wappoo Mills, residing in Berkeley county, and the buyer, the Caddo Fertilizer Company, in Louisiana. The contract cannot be held a Charleston contract because a Charleston broker made it. It is, therefore, not affected by the Charleston ordinance, and is valid, and the broker could sue for his services. In discussing this license matter, it should also be remembered that the direct question here is not between the taxing power and the citizen, but between a broker and a customer who would avoid the payment for services by pleading the license ordinances of a city not party to the suit. The words of Chief Justice Shaw in *Ames v. Gilman*, 10 Metc. (Mass.) 243, are singu-

larly apposite here: 'Whatever other disabilities a person may incur who attempts to practice law irregularly, * * * we think he does not so violate any express provision of statute as to enable one who has employed him, and had the benefit of his services, to refuse paying him a reasonable compensation.'

"The other questions, of custom and change of contract, require much less discussion. So far as the custom is concerned, the rule of law is that where there is a written contract, unambiguous in its terms, custom and usage cannot vary it. *Clarke, Browne, Usages & Cust.* 163, 164, 169; *Edw. Brok. & F.* 149. Usage cannot control the clear and unequivocal stipulations of a contract, but will be controlled by them. *Clarke, Browne, Usages & Cust.* 164; *Globe Milling Co. v. Minneapolis Elevator Co. (Minn.)* 46 N. W. 306. Now, the parties here bound themselves by a plain, written contract, in which the plaintiff, as broker, sold 'for account of the Wappoo Mills' 2,000 tons of dissolved bone, for which his compensation is to be, in the language of the contract, 'seller paying brokerage, at 10 cents per ton.' This is clear and unambiguous, and no custom could vary it, and no evidence as to such custom allowed to control it. The plaintiff cites cases directly in point, in which the very question is considered, and the custom not allowed to change the contract and rule of law: *Mordecai v. Jacobi*, 12 Rich. Law, 548; *Bower v. Jones*, 8 Bing. 65; *Ware v. Rubber Co.*, 3 Allen, 85; *Higgins v. Moore*, 34 N. Y. 425; *Paulsen v. Dallett*, 2 Daly, 40; *Cook v. Fiske*, 12 Gray, 493. Even if there was a custom, the parties gave the strongest evidence of departing from it by a contract in writing directly in the teeth of it, by its very terms.

"The last defense is that the principals afterwards varied the contract, and, finally, that the defendant declined to ship the entire 2,000 tons to the Caddo Company, for some reasons set out in the answer, and that the broker acted for the Caddo Company when the changes were made. An inspection of the pleading will show that the changes were the act and agreement of the principals themselves, and to suit their mutual convenience. The changes referred to were shipping by boat, instead of cars, and a slight change of price to meet this variance, and some modification as to the time of shipment and mode of payment. But the principals agreed to this themselves, and the contract, in the two particulars affecting the broker, is not pretended to have been altered. The number of tons bought and sold was still 2,000, and the seller was still to pay the broker 10 cents per ton. None of the changes, therefore, affected him. It was also contended that the Caddo Company did not pay one draft at maturity, but arranged an extension with the seller, and therefore it was argued that the Caddo Company could not complete the contract. The pleading does not

show that they could not complete it. And, even if it did, the broker is not responsible for that. Cases were cited to show that the broker must bring a customer not only willing, but able, to complete the contract. But this rule refers only to real estate, where specific performance is the remedy, and not uniformly held,—even as to real estate the courts being divided. But as to personal property, where the breach of the contract sounds in damages, it has never been followed. There is therefore nothing in subsequent changes which is shown could have affected the broker's compensation. But with all the subsequent modifications, and non-performance or otherwise, the broker has nothing to do at all, in the absence of fraud and bad faith on his part. And this is nowhere alleged. What are the duties and business of a broker, and the law as to it? 'A broker for sale is a mere negotiator or middleman between the seller and purchaser.' 2 Am. & Eng. Enc. Law, 571; *Higgins v. Moore*, 34 N. Y. 424; *Vinton v. Baldwin*, 45 Am. Rep. 448. His duty is ended, when he brings the parties together, and furnishes a purchaser. He is then entitled to his commissions, whether the property is actually delivered, and the money paid, or not. *Edw. Brok. & F.* p. 148; *Higgins v. Moore*, 34 N. Y. 424; note to *Walker v. Osgood*, 93 Am. Dec. 177; 2 Am. & Eng. Enc. Law, 578, and notes and cases. Where he effects a contract binding on both parties, and which may be enforced, his brokerage is earned, even if the contract be not carried out. This is no concern of his. See authorities cited above; 2 Am. & Eng. Enc. Law, 580, 581. This law is recognized in every court, including the United States supreme court. In 2 Am. & Eng. Enc. Law, 580, and cases, it is summarized thus: 'Where a broker has bound the parties by authorized contract, any inability or refusal of the principal to fulfill the contract he had authorized should not affect the agent's right to compensation.' Cites *Love v. Miller*, 21 Am. Rep. 192, and numerous other cases. Among all these cases agreeing on this subject, the following are directly in point, and control the present discussion: *Love v. Miller*, supra; *Vinton v. Baldwin*, 45 Am. Rep. 447; *Cook v. Fiske*, 12 Gray, 493; *Paulsen v. Dallett*, 2 Daly, 40. The plaintiff brought the parties together by a valid contract. He did his whole duty, and, in the absence of fraud or improper conduct, earned his brokerage. Whether the seller and buyer afterwards changed the contract in some particulars, or whether one of them—the defendant in this case—saw fit to decline to complete the same, for reasons stated in his answer, is no concern of the broker. He made the contract his principals wanted, and for which the defendant agreed to pay, and should have his compensation. Thus, carefully considered, the answer, even if admitted to be true, really shows no valid defense nor counterclaim to the plaintiff's

suit. All of its three defenses are without merit on their face, and should therefore be stricken out. This being so, the plaintiff should be allowed to have judgment by default for his claim, to wit,—one hundred and thirty-two dollars, and costs."

From this decree the defendant appealed, and filed the following exceptions: "First. Because the presiding judge erred in holding that the answer of the defendant contained no defense to the action. Second. Because the presiding judge erred in striking out the first defense contained in the said answer, and in holding that no custom can vary the contract set out in the complaint herein, and that no evidence as to a custom which would vary the said contract can be allowed to control the contract. Third. Because the presiding judge erred in striking out so much of the second defense set out in the answer as alleges that the plaintiff himself proposed and brought about changes in the original contract which resulted in a reduction of the amount of material sold by the plaintiff, and that he further erred in construing said defense to allege that the said changes were the acts and agreements of the principals themselves, and that they did not affect the plaintiff. Fourth. Because the presiding judge erred in striking out so much of the second defense of the answer as alleges that the party for whom the plaintiff purchased was not able to pay for the material according to the terms agreed upon. Fifth. Because the presiding judge erred in holding that the rule which requires a broker to produce a customer able, as well as willing, to complete the contract, in order to entitle him to commissions, applies only to contracts for the sale of real estate, and does not apply to contracts for the sale of personal property. Sixth. Because the presiding judge erred in striking out from the answer the third defense therein set forth, and in not holding that the plaintiff could not recover commissions in this action, in consequence of his failure to take out his license to carry on his business as required by an ordinance of the city of Charleston, S. C., entitled 'An ordinance to regulate licenses for the year 1890.' Seventh. Because the presiding judge erred in holding that, under the said license ordinance, it was not unlawful for the plaintiff to carry on his business without first obtaining a license under said ordinance. Eighth. Because the presiding judge erred in construing the contract set out in the complaint as not made in the city of Charleston, and therefore not affected by the said license ordinance, when it is plainly alleged in the pleadings that the said contract was made in the said city of Charleston."

Ficken & Hughes, for appellant. Smythe & Lee, for respondent.

McIVER, C. J. The plaintiff brings this action to recover the amount of his commissions as a broker, agreed upon by the spe-

cial contract, as he claims, upon the amount of a sale of 2,000 tons of a certain fertilizer, negotiated by the plaintiff for the defendant to the Caddo Fertilizer Company, the commissions being 10 cents per ton. The defendant, in its answer, admits the allegations contained in the first paragraph of the complaint, which, in substance, are that the plaintiff is a broker in the city of Charleston, S. C., carrying on a brokerage business in fertilizers, etc., and that defendant is a duly-chartered corporation under the laws of this state, having its office and place of business in the county of Berkeley. Defendant denies each and every allegation in the second paragraph of the complaint, except such as is specifically admitted in the answer, to wit, "that the contract of sale attached to the complaint as Exhibit A, and made a part thereof, was brought about by the plaintiff; but this defendant alleges that there existed at the date thereof a custom in this business to pay brokerage or commission only on the amount of stuff actually sold and delivered under such contract." The contract of sale thus referred to is a contract for the sale of 2,000 tons of the fertilizer mentioned, by defendant to the Caddo Fertilizer Company, upon the terms therein mentioned, among which were that the fertilizer should be delivered "f. o. b. cars here" (Charleston), and shipment to be made of "four hundred tons per month during September, October, November, and December, 1890, and January, 1891. Seller paying brokerage at 10 cents per ton." This contract is dated "Charleston, S. C., June 5th, 1890," and is signed by the defendant company, through its president, and "Accepted. Caddo Fertilizer Co." The defendant, in its answer, sets up a second defense, alleging that the purchase was made by the plaintiff, "representing the Caddo Fertilizer Company," on the terms above stated; that about the time designated for the first shipment of 400 tons the plaintiff, still representing the Caddo Fertilizer Company, requested defendant not to make said shipment; that about the time designated for the second shipment the plaintiff, still representing the Caddo Fertilizer Company, requested defendant not to make said second shipment; that about the time designated for the third shipment the plaintiff, still representing the Caddo Fertilizer Company, requested defendant to ship to said company a cargo of the fertilizer, "by vessel, for the price of \$9.50 per ton f. o. b. vessel," and that defendant did ship by vessel 684.21 tons of said fertilizer to the said company, "drawing upon them, at the request of the plaintiff, at thirty days, for the purchase money for same"; that when this draft became payable the plaintiff, still representing the Caddo Fertilizer Company, "urged the defendant to renew and extend said draft for sixty days longer, for the reason that the Caddo Fertilizer Company were not able to

pay the draft at that time," and the defendant, having negotiated said draft, was compelled to take up the same, and accept the note of the Caddo Fertilizer Company, payable at 60 days; that shortly after the failure of the Caddo Fertilizer Company to pay the first draft the plaintiff, still representing the said company, requested defendant to send them another shipment, but defendant, "considering the said agreement broken by reason of the several breaches hereinabove mentioned, refused to make the desired shipment." The defendant therefore alleges that the entire amount of fertilizers sold by it to the Caddo Fertilizer Company is 684.21 tons, upon which, it is admitted, defendant became liable to pay the brokerage agreed upon, to wit, the sum of \$68.43, all of which has been paid, except the sum of 43 cents, which defendant has always been, and is now, willing to pay. For third defense the defendant alleges that the plaintiff never obtained a license as broker for the year 1890, as required by an ordinance of the city council of Charleston. This ordinance was, by consent, incorporated in the case, and is printed in the record, and its terms will hereinafter be more particularly referred to. While we have thus endeavored to state substantially the pleadings, it will be necessary, for a more full understanding of the questions involved in this appeal, that the reporter should embrace in his report of the case copies of the complaint, with the exhibit thereon, the answer, and the ordinance referred to in the third defense.

The plaintiff gave notice that on the trial of the case he would move to strike out the first, second, and third defenses set up in the answer, upon the ground that the allegations therein made do not state facts sufficient to constitute either a defense or counterclaim, and also for judgment by default. This motion was heard by his honor, Judge Townsend, who granted this motion, and held that the plaintiff was entitled to judgment by default for the amount of his claim, to wit, the sum of \$132. From this judgment defendant appeals on the several grounds set out in the record, which need not be repeated here, as they, together with the decree of the circuit judge, should be incorporated in the report of the case.

While the controversy presented by this appeal arose upon the motion to strike out the several defenses set up in the answer, it is practically nothing more nor less than a demurrer to the answer, and will be so considered. It follows, therefore, that all the facts well pleaded in the answer must be regarded as true; and the general question is, conceding the facts stated in the answer, whether they are sufficient to sustain any one or more of the defenses relied upon. Counsel for appellant, in their argument here, while conceding that the answer, in form, sets up but three defenses, yet claim

that the answer really sets up four distinct defenses, inasmuch as two of them have been somewhat inartistically united together as one. We see no objection to so regarding the answer, and will therefore consider the several defenses as stated in the argument of counsel for appellant. The first is thus stated: "That there exists a custom in the fertilizer trade by which brokerage is only allowed on the amount of material actually delivered under a contract, whatever may be the amount named in the contract." The question raised by this defense has been before the courts of the several states, as well as those of England, in very many cases, most of which, we suppose, have been cited by the counsel in their elaborate arguments. We have examined all of the cases cited to which we have been able to obtain access, and in the light of these authorities, without undertaking to cite all of them, we propose to consider the question which we are called upon to decide. It seems to us that the very decided weight of authority is in favor of the proposition that evidence of custom and usage is not admissible to explain or vary the terms of an express contract, whether written or verbal, unambiguous in its terms, unless to show the meaning of certain terms used in such contract, which, by well-established custom or long usage, acquired a meaning different from that which they primarily bear, for the reason that when parties, in making a contract, use terms which, by usage or custom, have acquired a certain meaning, they must, in the absence of any evidence to the contrary, be assumed to have used such terms in such acquired sense. In the absence of any authority in this state upon this question (for we do not think the case of *Mordecai v. Jacobi*, 12 Rich. Law, 547, throws any light upon the question), we are compelled to resort to the authorities elsewhere. In *Globe Milling Co. v. Minneapolis Elevator Co.* (Minn.) 46 N. W. 306, the question was whether the title to certain grain sold vested in the vendee. By the terms of the contract of sale the grain was sold for "cash on delivery," which had not been complied with; but vendee sought to sustain his claim by proof of a custom prevailing in that locality, whereby the title was regarded as having passed when certain things were done, whatever might be the terms of the sale agreed upon by the parties. But the court said: "A local usage cannot be proved to contradict a contract. * * * If, by the contract of sale of this wheat, it was for cash on delivery, the usage cannot make it a sale on a credit." In *Page v. Cole*, 120 Mass. 37, the action was to recover damages for the breach of a contract for the sale of a "milk-route," and evidence as to the meaning and effect which that term had acquired by usage prevailing in that locality was held competent. In *Wells v. Bailey*, 49 N. Y. 464, the action was to recover the amount due plaintiff for plastering which he had con-

tracted to do at so much per square yard, and it was held competent to prove that the custom was to measure the openings for windows and doors, as well as the solid walls. In that case it was said that: "Every legal contract is to be interpreted in accordance with the intention of the parties; and usage, when it is reasonable, uniform, and well settled, not in opposition to fixed rules of law, *not in contradiction to the express terms of the contract* [*Italics ours*], is deemed to form a part of the contract, and to enter into the intentions of the parties." In *Hinton v. Locke*, 5 Hill, 437, the action was on a contract to pay the plaintiff so much per day for his services, and it was held competent to show that the universal custom in that locality was to count a day as 10 hours. Of course, the term "day" could not be regarded as meaning 24 hours, and hence it was competent to show how many hours were regarded as a day. In that case, however, *Branson, J.*, in delivering the opinion of the court, expressly disapproves of the case of *Smith v. Wilson*, 3 Barn. & Adol. 728, where, upon a contract to pay so much a thousand for all the rabbits in a certain warren, it was held competent to show that in that part of the country the custom was to construe the term "thousand" as meaning 100 dozen or 1,200, because he said that would be allowing the custom to contradict the express terms of the contract. His language is: "No usage or custom can be set up for the purpose of controlling the rules of law. Nor is such evidence admissible where it contradicts the agreement of the parties." In *Ware v. Rubber Co.*, 3 Allen, 84, the plaintiff claimed one-half commissions on goods consigned to him for sale, but not sold, and turned over to consignor, basing his claim upon a custom prevailing in that locality. Held, that evidence of such a custom was incompetent. *Chapman, J.*, in delivering the opinion of the court, used this language: "This being a written and express contract, the evidence offered in respect to the usage of commission merchants to charge one-half commissions when goods consigned to them in the ordinary way for sale are taken back is not applicable to this case, for an express contract cannot be controlled or varied by usage." And this was the point upon which the case turned. In *Ford v. Terrell*, 9 Gray, 401, the action was upon a contract to build an octagon cellar wall at 11 cents per foot, and the question was as to the mode of measurement to be adopted in order to ascertain the amount of work done. The court seems to have held that, as the contract was silent as to the mode of measurement, it was competent to introduce evidence as to the custom or usage in such cases by which the mode of measurement should be determined; citing 1 Greenl. Ev. § 292. In *Barton v. McKelway*, 22 N. J. Law, 165, the action was on a written contract for the delivery of a specified number of morus multi-

caulis trees, of not less than one foot in height, and the question was as to the mode of measuring the height of the trees. Held, that it was competent to show that it was the universal custom prevailing among dealers in such articles to measure only the ripe, hard wood, rejecting the green, immature top. The court, in its opinion, say that the true office of such evidence is "to interpret the otherwise indeterminate intention of the parties, and the nature and extent of their contract, and fix and explain the meaning of words." In *Wilcox v. Wood*, 9 Wend. 346, the question was as to when—at what hour—a lease from the 1st of May to the 1st of May in a succeeding year terminated; and it was held competent to show that, by universal custom, such a lease would terminate at 12 m. on the 1st of May. In *Grant v. Maddox*, 15 Mees. & W. 737, the court went as far as in any other case which we have examined. In that case the action was upon a contract to pay the plaintiff, for her services as an opera singer, so much per week for each week in the three years for which she engaged; and the controversy was as to whether plaintiff was entitled to receive the stipulated sum for each week during the whole of the three years, or only for each week during the theatrical season of those years. The court held that it was competent to prove a custom by which a year was regarded as only the theatrical season, and not the whole calendar year. In *Higgins v. Moore*, 34 N. Y. 417, the question was whether a purchaser of grain in the city of New York, negotiated by a broker, would be discharged by the payment of the purchase price to the broker. Held, that he would not, as the broker's agency terminates when he makes the sale, and he has no authority to receive the purchase money, and that evidence of any local usage in New York to the contrary was not admissible to control the general rule of law. In *Bower v. Jones*, 21 E. C. L. 447, it was held that, where there was an express agreement that the principal should be responsible for bad debts, proof that the custom of the trade was that commissions should not be allowed on bad debts could not be received, because in violation of the express terms of the agreement.

From this review of the cases cited above, as well as from the examination of others, which we have not deemed it necessary to cite, it is obvious there is not entire harmony in the decisions; but we are of opinion that the proposition laid down at the outset of this discussion is supported by the weight of authority, as well as by reason.

Our next inquiry is whether the contract which constitutes the basis of this action is of such a character as to require or warrant a resort to evidence of custom or usage in order to explain any ambiguity therein, or to interpret the meaning of terms used therein which have acquired some secondary meaning. We are unable to discover any

ambiguity in the terms of the contract. The amount of the article sold, the price, the times of delivery, and the time and mode of payment, are all distinctly specified; and we are equally unable to discover any terms used therein which require any interpretation. We do not see, therefore, how the first defense can be sustained.

The second defense set up in the answer is thus stated in the argument of counsel for appellant: "That the plaintiff himself brought about such changes in the original contract of sale as precluded his right to commissions under it." An examination of the answer will show that this defense, as above stated, is not therein stated, for all the allegations in reference to the several changes in the terms of the contract of sale are stated to have been proposed or insisted upon by the plaintiff as agent of the purchaser, and not as broker; the language of the answer, in each instance, being that the several alterations were requested by the plaintiff, "representing the Caddo Fertilizer Company," and not by him as broker. Now, it is conceded that the plaintiff had effected a valid contract for the sale of the fertilizers, assented to in writing by both vendor and vendee, as evidenced by the signatures of both of these parties. It seems to us that the plaintiff's connection with the matter as broker terminated, and he was then entitled to his commissions. If, afterwards, acting as the agent or the representative of the purchaser, the plaintiff sought to procure from the defendant some modification of the terms of the sale, we do not see how this could affect his right to commissions which had previously been earned.

The third defense set up in the answer is stated in the argument of counsel for appellant in these words: "That the customer or purchaser produced by the plaintiff was not able to pay for the material according to the terms agreed upon." In the first place, we do not find any allegation in the answer that the purchaser, the Caddo Fertilizer Company, was not able to pay for the fertilizer purchased, and there is no allegation of insolvency. The nearest approach to such an allegation is that the purchaser did not meet the draft drawn upon it when it became payable, and requested an extension "for the reason that the Caddo Fertilizer Company were not able to pay the first draft *at that time.*" (*Italics ours.*) This allegation does not usually or necessarily imply insolvency. *Akers v. Rowan*, 33 S. C. 451, 12 S. E. 165. And something more is necessary to establish a charge of insolvency. It only implies an inability to meet the draft at maturity, and not an inability to pay the debt, or a want of sufficient assets to do so. The case just cited shows that the interpretation placed upon the words "insolvent" and "insolvency," as used in the United States bankrupt act, by the supreme court of the United States, is not recognized here in cases

not arising under such bankrupt act, but that those terms must be interpreted as signifying "that condition in which a debtor is found when his property is insufficient to yield a fund sufficient to pay his debts, through the agency of the process of law." It is very manifest that there is no allegation in the answer which would bring this case within the rule above stated, and hence, upon this ground, the allegations of the answer are not sufficient to sustain this third defense.

In addition to this, while it may be true, as a general proposition, that a broker, before he is entitled to his commissions, must produce a purchaser willing and able to comply with the terms of the contract of sale, yet if the purchaser produced by the broker is accepted by the seller without any misrepresentation on the part of the broker as to the financial ability of the proposed purchaser, and without the suppression by the broker of any knowledge he may have as to the financial condition of such purchaser, then the burden of proof is upon the seller to show that the proposed purchaser is not able to comply with the terms of the contract. It seems to us, after a careful examination of the cases cited upon this point, some of which we will notice below, that the true rule upon this subject is well stated in *Coleman v. Meade*, 13 Bush, 358, as follows: "The broker undertakes to furnish a purchaser, and is bound to act in good faith in presenting a person as such, and when one is presented the employer is not bound to accept him or to pay the commission, unless he (the purchaser) is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms then * * * agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned. But if, as was the case in *McGavock v. Woodlief* [20. How. 221], the principal rejects the purchaser, and the broker claims his commission, he must show not only that the person furnished was willing to accept the offer precisely as made, but, in addition, that he was an eligible purchaser [by which we understand, was a person able to carry out the contract], and such as the principal was bound, as between himself and the broker, to accept." This distinction between a case in which the seller accepts the purchaser offered by the broker and a case in which the seller rejects such purchaser, which we think is a just and proper distinction, appears to be ignored in some of the cases, and disregarded or rejected in others. In *Kimberly v. Henderson*, 29 Md. 512, it was held that a broker is not entitled to his commissions unless he finds a purchaser able and willing to carry out his contract, and a sale is actually made. In that case the broker did find a purchaser, who was accepted by the seller,

and the contract was actually executed; but as the contract contained a stipulation that, if either party failed to comply with the contract, he should pay to the other the sum of \$1,000, and as the proposed purchaser failed to comply, and paid the forfeit, the court held that the broker could not recover his commissions on the purchase price agreed upon, but only to the amount of the forfeit received by the vendor. That case is not, therefore, exactly in point. The cases of *Duclos v. Cunningham*, 102 N. Y. 678, 6 N. E. 790; *Iselin v. Griffith*, 62 Iowa, 688, 18 N. W. 302; *McLaughlin v. Wheeler* (S. D.) 47 N. W. 816,—simply hold the general doctrine that a broker, before he can claim his commissions, must produce a purchaser able and willing to comply, and do not go into the question of the effect of the seller's accepting the proposed purchaser. The case of *Butler v. Baker* (R. I.) 23 Atl. 1019, in its dicta, is the strongest cited by appellant upon this point. In that case the broker found a purchaser, and presented him to the owner of the land, who accepted him, and entered into a contract upon the terms proposed. But when the last payment was to be made the purchaser was unable to do so, and the court held that the broker was not entitled to his commissions. The conclusion reached in that case seems to have been rested partly upon the ground that the vendor knew nothing of the financial condition of the purchaser, and was not informed as to his condition by the broker, which the court said it was his duty to do. It is also there said that the cases differ as to the question upon whom the burden of proof rests as to the financial condition of the purchaser,—some holding that the burden of proof is upon the broker, upon the ground that he undertakes to find a purchaser able and willing to buy,—and cites the cases, among which we find the case of *Coleman v. Meade*, supra, which, as we have seen, does not so hold, when the vendor accepts the purchaser, but just the contrary, and then cites other cases showing that the burden of proof rests upon the vendor, concluding that portion of the opinion in these words: "It is not necessary for us to decide this question, for the reason that no testimony was offered by the broker to show the purchaser's financial ability, while the defendant did offer such testimony as would justify the jury in finding that the purchaser was unable to comply with the contract." It is obvious, therefore, that the case of *Butler v. Baker* affords no authority as to the question of the burden of proof. In *Love v. Miller* (Ind. Sup.) 21 Am. Rep. 192, it was held that, where a broker employed for that purpose produces a purchaser who enters into a valid contract with the owner of certain real estate for the purchase of the same, the broker has earned his commissions, notwithstanding the fact that the purchaser afterwards declines to perform his part of the

contract. In that case nothing is said as to the financial ability of the proposed purchaser. In *Vinton v. Baldwin* (Ind. Sup.) 45 Am. Rep. 447, it was held that a person employed to procure a loan, for a commission, is entitled to his commission on finding a person able and willing to make the loan, although the proposed borrower afterwards declined to accept the loan. In that case the court likened the case to that of a broker employed to sell real estate, in which case, the court said, "it is uniformly held that the commissions are earned when a purchaser is found, able and willing to buy on the terms proposed, * * * and does not depend upon the ultimate consummation of the sale."

From this review of the authorities, and after due consideration of the reasons upon which they are based, we are of the opinion that the facts stated in the answer are not sufficient to sustain the third defense, and therefore there was no error in sustaining the demurrer to that defense.

It only remains for us to consider what is stated in the answer as to the third defense, but styled in the argument the "fourth defense." That defense, it is claimed in the argument of the counsel for appellant, raises the following question: "Can a broker who has not procured a license to do business, required by a valid city ordinance, maintain an action to recover his commissions?" It is alleged in the answer, and the demurrer admits it to be true, that the plaintiff had failed to procure a license to do business as a broker in the city of Charleston for the year 1890, during which the transaction here in question took place, as required by an ordinance passed by the city council of Charleston under the authority conferred upon said city council by an act of the general assembly of this state (Acts 1881; 17 St. at Large, 582). This act simply invests the city council with authority to require the payment of a license fee from any person engaged in any calling, business, or profession within the limits of the city of Charleston, with certain exceptions, which need not be stated, and authorizes the city council to pass such ordinances as may be necessary to carry the intent and purposes of the act into full effect. The intent and purpose of the act, as declared in its title, is to authorize the city council to impose "a license tax" on persons engaged in any business in the said city. But there is nothing in the act declaring it to be unlawful for a person to engage in any business for which a license may be required without obtaining such license. In pursuance of the authority thus conferred, the city council of Charleston, in December, 1889, passed an ordinance (set out in the record) which provides substantially as follows: Section 1: "That every person * * * engaged in, or intending to engage in, any trade, business or profession hereinafter mentioned, shall obtain on or before the 20th

day of January, A. D. 1890, a license therefor," etc. Section 2 provides that "if any person or persons shall exercise or carry on any trade, business, or profession, for * * * which a license is required by this ordinance without taking out such license * * * he, she or they shall for each and every offense, be subject to a penalty not exceeding \$100, * * * and the same shall be entered up as a judgment of the court, and execution shall issue against the property of the defendant, as for the collection of other taxes and penalties." The other provisions of the ordinance do not seem to be pertinent to the question made in this case, except that brokers are mentioned as amenable to the provisions requiring a license. It will be observed that the ordinance contains no express provision making it unlawful for a person to engage in business as a broker, but simply imposes a penalty upon a person who does not obtain a license. It is conceded, and properly conceded, that if the law requiring a license actually, and in terms, declares that the business in question is unlawful unless the requirement of a license is complied with, then the carrying on of the business without such license is prohibited, and a contract made under it cannot be enforced in a court of justice; for, as is said in one of the cases hereinafter cited, it would be "altogether anomalous, not to use any harsher term, to hold that a court of justice should enforce a contract founded upon an act which is absolutely forbidden by the lawmaking department of the government," or, as is said in another case, "it would indeed be a strange anomaly if a contract made in violation of a statute, and prohibited by a penalty, could be enforced in the courts of the same country whose laws are thus trampled upon and set at defiance." See *McConnell v. Kitchens*, 20 S. C., at page 439, and *O'Donnell v. Sweeney*, 5 Ala. 468. It seems to us, however, that even where the statute does not, in express terms, declare the act unlawful, or prohibit the carrying on of the business in question without a license, yet if it appears, from a consideration of the terms of the legislation in question, that the legislative intent was to declare the act unlawful, or to prohibit the carrying on of the business without a license, then no contract in pursuance of such business can be enforced. In other words, the inquiry is as to the legislative intent, and that may be found, not only in the express terms of the statute, but also may be implied from the several provisions thereof. See *Harris v. Runnels*, 12 How. 79, and *Niemeyer v. Wright*, 40 Am. Rep. 720. An important element which enters into the inquiry as to the legislative intent seems to be whether the license is required simply as a mode of raising revenue,—a tax, pure and simple,—and that the penalty is imposed as a means of enforcing the payment of such tax, and not for the purpose of prohibiting

the business; for, while some of the cases do lay down the broad proposition that the imposition of a penalty implies a prohibition, we do not think that such is the necessary implication, as it may be imposed simply for the purpose of enforcing the payment of the license tax, and, if so, then prohibition is not to be implied. We will next notice the cases cited in the argument, which, we think, show that the weight of authority, as well as of reason, supports the views hereinbefore set forth.

The case of *Westmoreland v. Bragg*, 2 Hill (S. C.) 414, is not in point, for the reason that the statute not only forbids the carrying on of the business of an apothecary without a license, but also expressly declares all contracts made by an unlicensed apothecary in the course of his business "utterly void and of no effect." In *McConnell v. Kitchens*, 20 S. C. 430, the action was upon a contract for the sale of fertilizers, which the court held illegal and void because the act regulating the sales of such articles had not been complied with, and that such act was not designed simply for the collection of revenue, but to protect the public from imposition and fraud, and hence a sale of any such article without a compliance with the requirements of the statute was illegal and void. It is obvious that the case does not apply to the case now under consideration. In *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, the action was on a contract for the sale of wine, held to be "spirituous or vinous liquor," by a person not having a license so to sell, and the court held that the contract could not be enforced. But in that case the ordinance of the city of Chicago requiring a license expressly forbade the sale of spirituous or vinous liquor without a license, and did not, as in this case, simply require a person engaged in such business to obtain a license. That case, therefore, differs from the case now under consideration. In *Holt v. Green* (Pa. Sup.) 13 Am. Rep. 737, it was held by a divided court (Sharswood and Williams dissenting) that a commercial broker who had not procured a license as required by the act of congress is not entitled to recover his commissions upon a sale made by him. The court, in its opinion, admits that there is a conflict of authority upon the question. In *Johnson v. Hulings* (Pa. Sup.) 49 Am. Rep. 131, the court simply follows *Holt v. Green*. *Buckley v. Humason* (Minn.) 16 Lawy. Rep. Ann. 423, 52 N. W. 385, simply decides that, where a statute or an ordinance duly authorized makes a particular business unlawful for unlicensed persons, any contract made in such business by one not authorized is void. In the notes to that case a good many authorities are collected which seem to show that the weight of authority is in favor of the view that the mere requirement of a license does not make the

business unlawful without such license, unless the statute or ordinance either expressly or impliedly declares the business to be unlawful if carried on by a person without a license; and this implication may arise from the fact that the statute has in view the protection of the public health or morals, or the prevention of frauds upon the public. In the case of *Mandlebaum v. Gregovich* (Nev.) 28 Pac. 121, the true distinction in cases of this kind is well pointed out in the following language: "Numerous authorities are cited by respondent's counsel which announce the general doctrine 'that a penalty implies a prohibition, though there be no prohibitory words in the statute, and that the agreement in violation of the statute prohibiting or enjoining an act absolutely, or only under a penalty, cannot be enforced.' This principle is applied in all cases where the subject-matter of the contract is forbidden by the statute [citing the cases], or is in violation of a statute for the protection of the public against imposition or fraud [citing cases, but omitting the case of *McConnell v. Kitchens*, supra, which is on that line], or for the protection of the public health or morals [as in the case of sales of spirituous liquors], or where the contract is against public policy." But the court goes on to show that the contract there in question did not fall within either of those classes, and hence there was no illegality in the sale, but simply an illegality in the conduct of the seller, in not procuring a license, for which he may be subjected to a penalty, but the sale itself was not unlawful. In *Shippey v. Eastwood*, 9 Ala. 200, the action was on a note, to which the defense was that the note was given on Sunday, in violation of the statute forbidding the transaction of any worldly business on Sunday, with certain exceptions, and subjecting the offending party to a penalty; and it was held that the contract, made on Sunday, was void. The court does go on to say: "It has been repeatedly held that a penalty inflicted by a statute upon an offense implies a prohibition, and a contract relating to it is void, even where it is not expressly declared by the statute that the contract shall be void." But this is a mere dictum, for in that case the statute did, in express terms, forbid the making of any contract, except as excepted, on Sunday, and hence there was no necessity for implying a prohibition from the imposition of a penalty. The case of *Woods v. Armstrong*, 54 Ala. 150, is very much like our own case of *McConnell v. Kitchens*, supra, and falls under that class of cases mentioned in *Mandlebaum v. Gregovich*, supra, where the sale of the fertilizers was made in violation of a statute intended to prevent imposition or fraud. The cases of *Johnson v. Hudson*, 11 East, 180; *Cope v. Rowlands*, 2 Mees. & W. 149; and *Smith v. Mawhood*, 14 Mees.

& W. 452,—show that the true inquiry in all cases of this kind is whether the legislative intent was to declare the business unlawful, if carried on without a license, or simply to impose a penalty upon the person who engages in such business without a license. If the former, then no contract made in the pursuit of such business can be enforced; but if the latter, then it may be, and the penalty is simply for the purpose of requiring the person engaging in the business to pay the license tax imposed.

Looking at this case in the light of these authorities, it seems to us that there is nothing either in the statute, or in the ordinance passed in pursuance of such statute, which indicates an intention to declare the business of broker unlawful, if carried on without a license, but that the real object was to enforce the payment of the license tax by imposing a penalty on the person who may engage in such business without paying the license tax. The history of the act of 1870, under which the city council of Charleston undertook to impose license taxes on certain occupations pursued within the city of Charleston, as well as that of the act of 1881-82, above referred to, which was passed to repair the defect in the act of 1870, may be traced in the case of *Charleston v. Oliver*, 16 S. C. 47, and the case between the same parties, practically, in 21 S. C. 318, and shows very clearly that the sole object of this legislation was simply to enable the city council of Charleston to impose license taxes in aid of the revenue of the city, and not for the purpose of making any business or occupation unlawful. Indeed, the very terms of the city ordinance show that it was not the object to make the business of a broker unlawful, for it expressly contemplates that the business of a broker may be lawfully carried on in the city of Charleston for a part of the year—until the 20th of January of that year—without a license, which is a clear indication that it was no part of the legislative intent to condemn the business of a broker, as contrary to the public policy of the city, and that the imposition of a penalty on a person who engages in the business of a broker after the date without obtaining a license was solely for the purpose of enforcing the payment of the license tax imposed on brokers, and not for the purpose of declaring such business unlawful. We do not think, therefore, that there was any error in sustaining the demurrer to what is stated in the answer as a third defense, which is, however, claimed in the argument to be a fourth defense.

Under this view, the other questions discussed in the argument, as to the place of the contract, and as to the effect of the interstate commerce law, do not arise, and need not, therefore, be considered. The judgment of this court is that the judgment of the circuit court be affirmed.

(116 N. C. 271)

**WYATT et al. v. WHEELER & WILSON
MANUF'G CO. et al.**

(Supreme Court of North Carolina. May 18, 1895.)

Appeal from superior court, Wake county;
Henry R. Starbuck, Judge.Action by L. R. Wyatt and others against
the Wheeler & Wilson Manufacturing Company
and others. There was a judgment for defend-
ants, and plaintiffs appeal. Affirmed.Strong & Strong and J. N. Holding, for plain-
tiffs. Argo & Snow, for defendants.**FAIRCLOTH, C. J.** For the reasons assigned
in Carr v. Coke (at this term) 22 S. E. 16, the
judgment of the court below is sustained. Af-
firmed.

MONTGOMERY, J. (concurring). This case presents the same question that was heard in Carr v. Coke (at this term) 22 S. E. 16, i. e.: Can the courts go behind the records of the general assembly to consider the method by which an act was passed when the act, on its face, is in due form, ratified by the genuine signatures of the presiding officers, in the presence of their respective houses assembled, and filed with the secretary of state, as the custodian of all the legislative acts. In Carr v. Coke, supra, there was no allegation of forgery whatever, and any argument based on such ground is misleading, unjust to his honor below, and aside from the legal question involved. It was stated in that case that the question was one of jurisdiction, and that was the sole question under review, and the reasoning and the authorities are there to be found.

A suggestion has been made and followed up by elaborate arguments to the effect that in numerous instances in the cases of grants by the state of the same land to two parties, at different dates, this court has gone behind the great seal of the state attached to the grants issued by the executive,—a co-ordinate branch of the state government; and it is concluded that if the court can go behind the great seal of the state, and declare the act of the executive in issuing a grant to the junior enterer to be void because the second entry was obtained in fraud and with notice of first entry, therefore the court can as well go behind the legislative record, and declare the act void because it was procured by fraud and the like. There is no room for this suggestion, and the argument based on it, I think, finds no support in the Reports of this court. The whole is based, I think, on a misapprehension of the facts in this case, as well as of the law laid down by this court in cases heretofore decided. No case decided by this court can be found in which it is held that any grant of land by the state with its seal affixed by the executive is void or invalid (except when the entry or grant is so defective that the land cannot be located) for the reason that the grant was obtained by fraud upon the rights of the first enterer, who was the junior grantee, nor any case in which it is held, as is stated in the argument, that "equity vacates a patent which the governor signs * * * because it is procured in fraud of the superior right of a single citizen." On the contrary, this court has uniformly held that the grant or patent issued to the second enterer (first grantee) passes the legal title to the grantee, and declares that he holds it in trust for the first enterer (second grantee), for the reason that he obtained his grant with notice of the equity of the first enterer, and in fraud of his rights, and the court orders the said grantee to convey the legal title to the equitable owner; and so these co-ordinate departments work in harmony. And, in case of future litigation in which the title was involved, the owner would have to invoke this grant, obtained by fraudulent conduct of the first grantee, in order to establish his title. In the late case of Grayson v. English, 115 N. C. 358, 20

S. E. 478, his honor below adjudged that the plaintiffs "hold the legal title to land in controversy in trust for the defendant, and that said plaintiffs execute to the defendant a good and sufficient deed, releasing all their right, title, and interest in said lands"; and this court affirmed the judgment below, on numerous authorities, Associate Justice Avery delivering the opinion of the court, and saying: "The junior enterer, being affected by it [notice], would hold under any grant taken out by him subject to the right of the person holding the older entry to take out a grant also, and have the senior grantee declared a trustee, and ordered to convey to him." So we find, upon the authorities, that this court has not declared the "older grant issued by the head of the executive department null and void," but has allowed it to stand, and adjusted the equities between interested parties. In this case, if his honor had impaneled a jury, and had the pleadings read in the usual manner, and, when evidence was offered for the plaintiff's purpose, had held the evidence incompetent, the same question as the present would have been presented; and a useless formality can have but little bearing upon the important question intended to be presented by the plaintiff. There is no error.

OLARK, J. (dissenting). This case resembles much that of Carr v. Coke (at this term) 22 S. E. 16, an investigation of the same fraud being asked, and it is unnecessary to repeat the reasons given in the dissenting opinions filed in that case. In this case the plaintiffs claim under an assignment executed in accordance with the laws heretofore in force in this state, and which legislature after legislature, including the present one, has declined to alter. The plaintiffs contend that such assignment is valid, and that their rights are not affected by the pretended "assignment law," which, after being defeated on its passage in the present general assembly, was surreptitiously and fraudulently procured to be signed by a deception practiced on the speakers. The action was dismissed below on the ground that, taking the allegations to be true,—and, indeed, they were not seriously controverted on the argument,—the court had no jurisdiction to right this great wrong and fraud. Without passing upon the doubtful question whether the validity of the statute can be properly questioned in the somewhat collateral way it is presented in this case, I cannot concur in the reasons given for the decision by the court. It would seem that certainly the speakers of the two houses should have been allowed to testify that this fraud had been practiced on them, and that their signatures had not been knowingly and intentionally placed to a bill which they knew had not been passed, but which had been defeated. This was due to them, to the legislature, and to the people. The people are entitled, as a sacred and inviolable right, to be governed by no laws save those enacted by their representatives duly and legally assembled. The act of a corrupt and hired villain, whose proper place is in the penitentiary, should by no process of reasoning or refinement of logic be imposed on the people, in express contradiction to a vote of their general assembly. The power of consolidated wealth, acting through the channel of a purchased and hiring lobby, is a growing evil in all American legislation. The solemn and unmistakable issue in this case, brushing aside all mere technicalities, is simply this: Shall the law be what the representatives of the people declare it shall be, or shall the will of powerful and menacing combinations of capital, acting through the lobbyists, with which they everywhere assail legislative action, override and be substituted for the popular will? To a fearful extent this has been the result in congress and in many state legislatures, but by more devious methods. This is the first instance in which one of these combinations, failing to secure its end by influencing legislation in the usual mode, has boldly and cynically defied the action of the general assembly, and set aside its negative vote.

by fraudulently substituting the defeated bill as a genuine one, and procuring the unintentional signatures of the speakers. For the first time in American history accumulated capital and its hirelings have dared to take so bold a step.

We are asked to say that such action is beyond the power of the courts. The plaintiffs have no power to call the legislature together, and they may be unable to satisfy the governor that their wrongs, great as they are, are sufficient to tax the public with the expensive precedent of re-summoning the legislature whenever the fraud of a lobbyist is discovered. There is an easy, a cheap, and speedy remedy by setting aside the signatures as fraudulent, upon the testimony of the speakers to that effect, and the verdict of a jury. Upon the verdict of a jury every man is dependent for the protection of his property, his reputation, his liberty, and his life. Surely it is a competent tribunal to decide whether the signatures to a piece of paper were knowingly and intentionally affixed by the speakers with the assent of their respective houses, or whether the bill had been defeated on its attempted passage, and, notwithstanding such defeat, the signatures and certificate of the speakers had been thereafter procured by a bold and shameless fraud. Reduced to its last analysis, the question is simply whether legislatures shall legislate, and whether the time-honored institution of "twelve good men and true" shall be trusted to declare, upon the testimony of the presiding officers of the two houses, that a gross fraud was perpetrated on them in procuring their signatures to a bill which had not been enacted by the two houses, but had been tabled. This is not a conflict of authority between the legislature and the court, nor is the court asked to go behind the authenticated declaration by the legislature of any action it has taken. The very question to be investigated is whether the legislature authorized such authentication. The demurrer admits that it did not. The court is simply asked to say which it will regard as valid,—the action of the legislature itself in voting down this bill, or that of a lobbyist in afterwards, by fraud, procuring the unintentional and untrue certificate of the speakers that it had passed. It is not an occasion when public policy or individual rights can tolerate the suppression of an investigation. The investigation should be full, free, and searching. "The lights should be turned on," not off. No one who is honest and pure and of good repute need fear an investigation; others have no claim to be protected from it.

AVERY, J. (dissenting). But for the direct answer in the concurring opinion filed in this case to my argument in *Carr v. Coke*, 22 S. E. 16, I should be content to concur in the clear and concise presentation of the points made by Justice **CLARK**. Dr. Wharton, one of the most eminent authorities on criminal law, says: "Forgery," at common law, is defined by Sir William Blackstone as the fraudulent making or altering of a writing to the prejudice of another's rights, and, by Mr. East, as the false making, male animo, of any written instrument." The plaintiff alleged (1) that a written enrolled bill was fraudulently made; (2) that it was used to the prejudice of the rights of all of the people of North Carolina, in that it restricted the debtor in his right to dispose of his property, and in that it deprived the creditor of the means of securing what was due to him. The judge below holds that, admitting all this, the court has no power to remedy the great wrong to which the people are reluctantly submitting. The act of the hireling, who was instrumental in perpetrating a fraud so prejudicial to the public, certainly had all of the turpitude of the most heinous of technical forgeries, and it is needless to discuss the question whether an indictment would lie for that offense. Society can better afford to condone the crime of the ignorant negro who so clumsily signed the name of Major Vass

to an order for 10 pounds of bacon (*State v. Collins*, 115 N. C. 716, 20 S. E. 452) than the great wrong of procuring the enrollment and ratification as a law of an instrument prepared by an expert agent of foreign capitalists. Yet the perpetrator of the petty offense is sentenced to hard labor in the penitentiary, while the instrument, as well as the authors, of the most gigantic fraud known to history, are safely entrenched behind a constitutional quibble. Under the circumstances, I fail to comprehend how I have been unjust to the learned judge who heard the case below in characterizing the conduct for which he held that the law afforded no redress as morally, if not legally, a forgery. In the presence of a great danger, which threatens the very security of popular government, it seems to me little less than trifling to waste time in discussing the speculative question whether an indictment would lie against wrongdoers if discovered, when the burning question before us is whether the courts can or will first incidentally lend their aid in the detection of the guilty parties by ferreting out the fraud and vacating the covinous instrument.

It is solemnly asserted that there is no room for the suggestion that the courts had ever gone behind a grant for land issued by the governor, and that "the argument based on it finds no support in the reports of this court." Is it true or untrue that equity has vacated patents signed by the chief executive for 100 years? It is conceded that the courts have ordered a senior grantee holding under a junior entry to convey to the junior grantee, whose right was founded upon an older entry, because the latter was "the equitable owner." If the claimant under the younger grant holds the equitable estate, it follows, of necessity, that the prior grant by the governor, under the great seal of the state, was ineffectual to convey what it purported to pass,—the beneficial ownership in the land; and when the courts, in the exercise of their equitable jurisdiction, required the holder of the legal title to convey to the true owner, they gave precisely the same redress that was afforded in all other cases where a deed for land had been successfully impeached for fraud. A. gives to B. \$1,000 to buy for him a tract of land that is to be sold by the clerk of the court at public auction. B. purchases the land, pays for it with A.'s money, and causes the clerk to convey to him instead of A. The only remedy that A. has now is to file a complaint in the nature of a bill in equity, and ask that B. be compelled to convey the legal title, which he has procured by fraud, to the rightful owner. Would it be misrepresentation of the law in such a case to say that equity vacated the deed which the clerk signs, because it has been procured in fraud of the superior right of the man who furnished the money to pay for the land? It is familiar learning that parties were under the former practice compelled to resort to a court of equity for remedy in a vast majority of cases of fraud, and, even where courts of law could take cognizance, there was generally a concurrent jurisdiction in the courts of chancery. 8 Am. & Eng. Enc. Law, p. 651. It is equally familiar learning that, where parties were compelled to invoke the aid of a court of equity to avoid the operation of a conveyance of land, it was because in a court of law the grantee in the deed which they sought to impeach was deemed to be the owner, and to hold the legal estate, but subject to the right of the true owner to resort to equity, and force him to convey. In all such cases the deed is declared ineffectual to pass the beneficial interest; and, when its operative force is destroyed, it is properly said to be vacated. The grant is vacated for fraud, whether a decree for cancellation be made or a reconveyance ordered to the party having the right to assert an equity. In either case the court exercises its equitable jurisdiction to vacate or set aside a conveyance. *Adams, Eq. 174*. In the supposed case of constructive trust which has been used for

illustration the conveyance is set aside or vacated by compelling the fraudulent grantee from the clerk or commissioners to convey the legal estate to the rightful equitable owner, just as the senior grantee is compelled to convey to the junior grantee, who has the right to claim equitable ownership. In either case the holder of the legal estate is in law the owner, and will hold the property, unless the true owner invoke the aid of equity to undo the fraud. The parallel may be extended by calling attention to the fact that neither the clerk nor the governor are necessary parties to the proceeding to vacate the deed or grant. It is equally unnecessary to make the two presiding officers, who have appended their signatures to the forged bill, parties to the suit brought by an interested party to set aside or vacate what purports to be a ratified act, and have it declared inoperative as a law. It is no misrepresentation of fact or law to state that they have merely appended their signatures, as the representative heads of the legislative department (in accordance with the requirements of article 2, § 23, of the constitution), to a bill, just as the governor signs and attaches the seal of the state to a grant, in compliance with article 3, § 16. With all of the additional light that has been thrown upon the issues of law involved, I am still unable to comprehend why the courts are prohibited from declaring that a paper signed by the heads of the legislative branches is inoperative because the attestation was obtained by fraud, while it is admitted to be competent for the same tribunals to adjudge that the governor's grant does not pass the equitable interest, which is the true and rightful ownership of land. The only difference seems to be that the signatures to the one instrument are obtained in fraud of the rights of the whole body of the people of the state, while but a single individual is interested in setting aside the other.

But supposing, for the sake of argument, that when the judicial arm of the government declares that the grant of the governor has failed to pass the equitable estate, which it purported to convey, it is not trenching upon the independent province of the executive department, because the court concedes that the legal estate passes. What will be said to the suggestion that under the act of 1798, which is still in force (Code, §§ 2786, 2787; Rev. Code, c. 42, § 29; Rev. St. c. 42, § 3), courts of law were empowered where it was alleged that a grant had been issued since the 4th of July, 1776, by means of "false suggestion, surprise, or fraud," to repeal and vacate the patent, and that a copy of the decree may be filed in the office of the secretary of state as notice that the court has declared the grant of the governor null and void? Does not this statute provide for vacating a patent both as a conveyance of the legal and equitable estate because it has been issued "in fraud of the rights of a single citizen"? This proceeding (formerly a *scire facias*; now a petition) was allowed to be instituted in a court of law only by a senior against a junior grantee, the distinction being carefully drawn that the remedy of the senior enterer against the senior grantee of the same land for fraud in procuring his grant was in chancery. *O'Kelly v. Clayton*, 2 Dev. & B. 246; *Crow v. Holland*, 4 Dev. 417; *Carter v. White*, 101 N. C. 30, 7 S. E. 473. So that a grant issued in fraud of the rights of an older grantee on the birthday of American Independence has been ever since its execution liable to be repealed and vacated by a common-law court, and pronounced ineffectual to convey any interest either in law or equity, because it could be shown to have been obtained by fraud. If the courts can go back nearly 120 years to vacate for fraud a grant signed by the governor, and order its decree to be filed in the office of the secretary of state as notice to the world, why should it imperil the independence of the legislative department to declare null and void, and vacate for

fraud, forged paper deposited in the very same office, and purporting to be a statute, signed by presiding officers, when it was in fact the covinous work of a forger?

It is suggested that where a junior grantee causes a senior grant to be set aside for fraud, if future litigation should arise involving the title, the former "would have to invoke this grant, obtained by the fraudulent conduct of the first grantee, in order to establish his title." Is this a sound legal proposition? I think it is very clearly untenable. When such junior grantee is compelled to eject a trespasser, he need offer, in order to establish his *prima facie* right to recover, nothing but the grant to himself from the state. *Mobley v. Griffin*, 104 N. O. 115, 10 S. E. 142. Should the trespasser, whether he should be the original senior grantee or his heirs or another, set up the older grant in order to show a better outstanding title, it would only render it necessary to offer in reply the record of the suit in equity in which the grant was vacated, in order to estop the grantee or his heirs or to disprove the allegation of another that there was a better outstanding title. *Isler v. Harrison*, 71 N. O. 64; *Davis v. Higgins*, 87 N. C. 300, and cases cited. If the junior grantee, after obtaining his decree to set aside the senior grant, should attempt to use it in deraigning his title against a trespasser in possession, the latter could still compel him to rely upon the junior grant by offering in evidence the record of the same suit, showing that the grant relied on had been declared invalid.

I regret that it has become necessary to draw in question such plain elementary principles in order to sustain the soundness of the conclusion reached by the court in these cases. I still confidently maintain, upon the plain principles stated and the authorities cited, that, when a grant from the governor fails to pass the equitable estate as against a more meritorious claimant, the courts, in so declaring and decreeing a conveyance of the legal estate to the rightful owner, adjudge the grant ineffectual originally and void as a conveyance of the equitable or beneficial estate.

(95 Ga. 236)

JONES et ux. v. HURST.

(Supreme Court of Georgia. Jan. 14, 1895.)

AMENDMENT OF PETITION — RESCISSION OF SHERIFF'S DEED.

1. The amendments to the sheriff's petition were properly allowed. There was enough to amend by. The amendments were germane, and they did not set up a new and distinct cause of action. If, at the last trial, any question as to these matters could otherwise have arisen, the direction given by this court in this case when it was here before put the right to amend beyond question, and the propriety of allowing the amendments offered was therefore free from doubt.

2. There was no error in overruling the demurrer to the petition as amended. The verdict was in exact accord with the substantial justice of the case, and there was no error requiring a new trial.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Action by C. W. Hurst against Lindsey E. Jones and wife and others. Judgment for plaintiff, and defendants Jones and wife bring error. Affirmed.

Johnston & Brinson, for plaintiffs in error. J. S. & W. T. Davidson, W. E. Simmons, and E. H. Callaway, for defendant in error.

LUMPKIN, J. This case was before this court at the March term, 1893. See 91 Ga. 338, 17 S. E. 635. The judgment of the lower court in overruling the demurrer filed by Jones and wife to the petition of Hurst, the sheriff, was then reversed, with direction that the latter be permitted to amend as indicated in the opinion which appears in the volumes above cited. Amendments were made and the case tried again, resulting in a verdict setting aside the sheriff's deed to Mrs. Jones, and the case is brought here again by Jones and wife, who seek to reverse a judgment refusing a new trial.

The only question of any consequence now presented is whether or not the trial judge ought to have allowed the amendments in question over objections alleging that the original petition of the sheriff contained nothing to amend by, and that the offered amendments were not germane, but sought to introduce a new and distinct cause of action. We think the court was right in allowing the amendments. The original petition of the sheriff contained allegations amply sufficient to authorize setting aside the sale made by him to Mrs. Jones. The defect of the petition was that he failed to allege any reason why he himself had any right to ask that it be set aside. He did not, however, distinctly deny that he had received and violated the order which had been sent to him to postpone the sale, which fact, had it been stated in his petition, would have shown that he had become subject to liability, and therefore had a right to attack the sale. He simply failed to allege enough, and, as stated in the former opinion, was intentionally and deliberately guilty of suppressing the facts concerning his own failure of duty. We are still of the opinion that his liability in the respect indicated was the gravamen of the sheriff's right of action; and, as he had alleged in his petition everything else substantially necessary, we thought, and we still think, he should be permitted to make the additional averment essential to complete his cause of action. The expression used by the writer on page 341 of 91 Ga., and page 635, 17 S. E., "that he alleged nothing which would give him the right to disturb or interfere with the sale," does not mean that he had alleged nothing showing that the sale ought to be set aside, but simply that the sheriff had failed to allege facts showing a right on his part to attack it. If, however, at the last trial, any doubt as to the propriety of allowing the amendments could otherwise have existed, it was removed by the direction this court had already given in the case. We said: "In order that no misunderstanding may arise in the further progress of this litigation, however, we have directed that this right [to amend his petition as indicated] be still preserved to him;" meaning, of course, the sheriff. We thought the record disclosed good reasons for giving this direction, notwithstanding the evasions in the sheriff's petition.

Under section 4284 of the Code, we had undoubted authority to give this direction; and, even if the trial judge were of the opinion that the amendments were not allowable under the strict rules of practice, he was nevertheless right in obeying the direction given by this court. We do not care to again go over the facts of this complicated litigation. We are abundantly satisfied that the verdict was in exact accord with the substantial justice of the case, and, except as above indicated, no question is now presented for adjudication requiring further notice. Judgment affirmed.

(95 Ga. 120)

HOOD v. CULVER.

(Supreme Court of Georgia. Nov. 26, 1894.)

NEW TRIAL—BRIEF OF EVIDENCE.

Whether or not a report of evidence taken by an auditor, which was filed in court and submitted to the jury on the trial of exceptions to the auditor's report, could be properly approved as a brief of the evidence introduced at that trial, yet when the same was in fact approved as such brief by the trial judge, and no exception to this action was taken, and the order of approval was never vacated nor set aside, the paper in question was at least so far a brief of evidence as to be amendable by substituting for it a proper and correct brief, duly made out, and approved by the judge; and it was not erroneous either to allow such an amendment to be made or to refuse to dismiss the motion for a new trial for want of a proper brief of evidence, in case the movant should file the amended brief within a reasonable time fixed by the judge's order.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Eliza Hood against W. A. Culver. From an order denying a motion to dismiss a motion for a new trial, and allowing an amended brief of evidence to be filed, plaintiff brings error. Affirmed.

R. J. Jordan, J. A. Anderson, and Dorsey, Brewster & Howell, for plaintiff in error. Jno. C. Reed and M. Foote, Jr., for defendant in error.

SIMMONS, C. J. This case was referred to an auditor, who made a report, to which exceptions were filed by both parties, and these exceptions were submitted to a jury. The only evidence introduced before the jury was the evidence contained in the report filed by the auditor, which was read to them by agreement of counsel. The jury found against the exceptions of the plaintiff, and he made a motion for a new trial, which concluded as follows: "Movant files herewith the report of the evidence in said case submitted by the auditor with said report, as the brief of evidence, and he prays that the court approve the same, as it contains all the evidence introduced on the trial." The court granted a rule nisi, which contained these words: "The brief of evidence mentioned in said motion is hereby ordered to be filed with the same, and it is

hereby approved." The motion was amended by alleging that "the defendant's counsel contended that all of the evidence reported by the auditor was pertinent to the issue then on trial, and should therefore be read to the jury; to which the plaintiff's counsel assented; and, the court ordering accordingly, all of said evidence was therefore read to the jury." The rule nisi set the hearing of the motion instant, but it was not heard until more than 30 days after the filing of the motion. At the hearing, the defendant moved to dismiss the motion, on the ground that no brief of evidence had been filed as contemplated by the act of 1889, and that the brief approved and filed was an original record in the case, and could not be taken from the files of the court and treated as a part of the evidence. After argument, the court passed an order that the motion to dismiss be sustained unless the movant for new trial should, on or before a date mentioned in the order, file an amended brief of the evidence in conformity to law, and that the motion for a new trial be reset for hearing on that date. Before that day, the movant filed a brief of evidence in compliance with the order. The granting of this order is excepted to by the defendant.

It was insisted in the argument before us that the movant for a new trial had no right to use as a brief of the evidence an original paper belonging to the files of the court, and that the original report of the evidence, which was attached to his motion for a new trial as a brief of the evidence, was not a brief of the evidence at all, within the meaning of the statute, and, being void, there was nothing to amend by; hence the court erred in allowing the movant to substitute a copy of the same as a brief of the evidence after the time for filing a brief of the evidence had passed. Whether original papers can ever be properly used in making up a brief of evidence or not, we are satisfied that the plaintiff in error did not make the proper motion in the court below. Admitting, for the sake of the argument, that it was improper to use the original papers as the brief of evidence, and that it was improper for the judge to approve the same as a brief of the evidence, yet we do not think this approval was void. The most that could be said of it would be that it was erroneous. If the judgment approving this as a brief of the evidence was not void, but simply erroneous, it was a valid judgment until set aside, and the plaintiff in error ought to have moved to vacate it, instead of moving to dismiss the motion for a new trial. *Tate v. Griffith*, 83 Ga. 153, 9 S. E. 719; *Lewis v. Mortgage Co.* (last term), 21 S. E. 224. If he had made a motion to vacate the judgment approving this as a brief, and the motion had been granted, a motion to dismiss would have been in order, because no brief of the evidence would have

been filed within the time prescribed by law. The judge having approved the paper in question as a brief of the evidence, and the judgment of approval not being void, there was a sufficient brief to authorize him to pass the order allowing the movant to amend by substituting, within the time specified, a copy of the paper which he had approved as a brief of the evidence. Judgment affirmed.

(95 Ga. 78)

RICHMOND & D. R. CO. v. MITCHELL.
(Supreme Court of Georgia. Nov. 26, 1894.)

**ATTACHMENT—DEMURRER—TIME OF INTERPOSING
—REMARKS OF COUNSEL—INJURY TO EMPLOYE
DEFECTIVE RAILROAD TRACK.**

1. While, under section 3310 of the Code, the defendant in an attachment case may appear and defend at any time before final judgment, all defenses must be submitted and disposed of in their proper order; and consequently such defendant cannot, after pleading to the merits, and a term has passed, interpose and have adjudicated special demurrers to the plaintiff's declaration, relating only to matters of form, and not vital to the plaintiff's cause of action.

2. The improper language used by counsel for the plaintiff in their arguments to the jury was not, in view of the rebuke administered by the presiding judge, and the instructions given by him to the jury with respect thereto, of such character as to authorize the declaring of a mistrial, or the granting of a new trial. Its injurious effect, if any, was doubtless counteracted by the action taken by the judge.

3. The plaintiff, an employé of a railroad company, having been injured by a locomotive of the defendant in the state of Alabama, and the employer being, under the law of that state, liable to answer in damages for personal injuries received by an employé in the service or business of the employer, when such injuries are "caused by reason of any defect in the condition of the ways, works, machinery or plant connected with, or used in, the business of the * * * employer," and there being evidence introduced by the defendant from which, in connection with evidence introduced by the plaintiff, the jury could reasonably infer that the track of the defendant, at the place where the plaintiff was injured, was full of coal and coke, in most places as high as the rails, and in some places higher, and was "dangerous for men to switch around at night"; that the track had been in this condition for some time; and that the injuries complained of were attributable to these obstructions on the track,—a verdict in the plaintiff's favor was not unwarranted.

4. No error requiring the granting of a new trial was committed, either in admitting or rejecting evidence, or in the charges complained of: the requests to charge, so far as legal and pertinent, were sufficiently covered by the general charge; the verdict was not excessive; and, on the whole, there was no abuse of discretion in refusing a new trial, especially as this is the second verdict in the plaintiff's favor which has had the approval of the trial judge.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by W. J. Mitchell against the Richmond & Danville Railroad Company, lessee. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

In opening argument, Mr. Slaton, of counsel for the plaintiff, referred to statements in

evidence of Regan, Shaffer, Bond, and Hardee, and used substantially the following language in reference thereto: "Such statements are not worthy of credit. They are made by men in the employment of defendant, and were doubtless extorted from them by fear of losing their jobs." Defendant's counsel arose, and reserved an exception to this language, on the ground that there was no evidence to justify such aspersions upon the person making such statements, or upon the defendant, and that the counsel had gone outside of the record, in a manner calculated to inflame the jury, and thereupon moved the court to declare a mistrial on account of such improper statement. The court reproved plaintiff's counsel, who withdrew and retracted the remark. The court also stated to the jury that the remark was improper, and that they must not consider the same, and withdrew from them, as far as it was possible for the court to withdraw it, the effect of such statement. Counsel for the defendant renewed his motion to declare a mistrial, on the ground that such language was uncalled for and unpardonable, and that it was impossible for the court, by a formal withdrawal of such remark from the jury, or caution to them not to be influenced thereby, or for the counsel, by a formal retraction of such language, to avoid the natural prejudice which would be excited in the mind of the jury. The motion was overruled. Mr. Glenn, of plaintiff's counsel, in his closing argument to the jury, in commenting upon the "contract" by which plaintiff had agreed with defendant not to go in between cars for the purpose of coupling or uncoupling without a stick, which contract is in evidence, stated to the jury that the supreme court had passed upon that contract, that the case had been to the supreme court, and that the jury in the former trial of the case must have given plaintiff a verdict. Defendant's counsel arose, and reserved an exception and objection to this language, and to his allusion to the fact that the former jury had given plaintiff a verdict. The court instructed the jury to withdraw, and defendant's counsel urged the motion to declare a mistrial, on the ground that it was the second instance in the trial where counsel had gone out of the record, and had commented in an improper manner upon facts not properly before the jury. Plaintiff's counsel withdrew the remark, and the court instructed the jury that they were not concerned at all with what any former jury had done in the case, and must not be influenced by allusions to what such jury had done or had not done. Thereupon defendant's counsel insisted upon a mistrial, on the ground that it was impossible for the court, by withdrawing such language from the jury, and by instructing them not to be influenced thereby, to relieve defendant of the effect produced by such statement, and that it was impossible for counsel, by a withdrawal of such language, or by any such disclaimer, to re-

lieve defendant of the prejudice naturally to be excited in the mind of the jury by reference to a former verdict in the same case. The court refused the mistrial.

Jackson & Leftwich, for plaintiff in error.
Glenn & Slaton, for defendant in error.

LUMPKIN, J. 1. Section 4191 of the Code provides that all demurrers to bills in equity (now called "equitable petitions") must be made at the first term; and rule 28 of the superior court provides that "all matters appearing on the face of the declaration or process, that would not be good in arrest of judgment, shall be taken advantage of at the first term, and be immediately determined by the court." New Rules of Court (1893) p. 13; Code, p. 1349. This rule is, of course, applicable to actions at law. It is well settled, however, in Georgia practice, that in actions either at law or in equity a motion to dismiss, based upon the ground that the declaration or petition fails to state a cause of action, may be entertained even at the trial term. As to defects of form, we understand it now is, and has ever been, the rule that advantage of them must be taken by special demurrer at the first term. The section of the Code first above cited settles this question as to equity practice, and we think the rule of court settles it as to proceedings at law. Such seems to have been the opinion of Crawford, J., in Maddox v. Randolph Co., 65 Ga. 216, which was an action for damages, brought on the law side of the court. On page 217 he uses the following language: "All objections appearing upon the face of the declaration which would not be good in arrest of judgment should be taken advantage of at the first term, and a demurrer should have been taken at that time, to have brought the defendant within the rule of court; and as that term had passed, and the general issue been filed, this was a defense more appropriate to plea than motion." This view is also supported by Mayor, etc., v. Maguire, 84 Ga. 174, 10 S. E. 603. It appears that McGuire had brought an action against the municipal authorities to recover damages alleged to have been caused by the creation and maintenance of a nuisance. The defendants demurred to the declaration on various grounds, one of which was that it set forth no legal cause of action. The demurrer was sustained and the declaration dismissed, and upon writ of error the judgment was reversed; this court holding that the allegations in the declaration were sufficient, if sustained by proof at the trial, to entitle the plaintiff to damages. See Maguire v. Mayor, etc., 76 Ga. 84. The next trial of the case in the superior court resulted in a verdict for the plaintiff, and the case was again brought to the supreme court, one of the errors assigned being the refusal of the trial judge to sustain a demurrer to so much of the declaration as complained of damages

occasioned more than four years prior to the bringing of the suit. With reference to this question, Chief Justice Bleckley said: "Besides, the bill of exceptions states that the demurrer was made in writing at the trial term, and it was then too late to demur specially to any part of the declaration; this court having held in 76 Ga. 84, supra, that a cause of action was set forth, and the twenty-eighth rule of the superior courts requiring that all matters appearing on the face of the declaration or process, not good in arrest of judgment, shall be taken advantage of at the appearance term." See 84 Ga. 176, 10 S. E. 603. We may therefore assume that in actions brought in the usual way, by petition and process, special demurrers, relating only to matters of form, or to defects, the existence of which would not be cause for arrest of judgment, are cut off after the appearance term.

Section 3309 of the Code declares that a general judgment may be rendered against a defendant in an attachment case after compliance with the provisions of that section in relation to giving the defendant written notice of the pendency of the attachment; and section 3310 provides that in such cases the defendant may appear and make his defense at any time before final judgment is rendered against him. It certainly cannot have been the intention of the legislature to put a defendant in attachment cases upon any better or more favorable ground than defendants in ordinary suits. The notice and service provided for in section 3309 take the place of process and service in common-law actions. The effect of both is to bring the defendant into court, subject him personally to its jurisdiction, and render him liable to a judgment binding upon all his property. When he comes into court he may demur, generally or specially, or he may defend by plea; but he cannot, after pleading to the merits and a term has passed, begin over again, and raise objections to the declaration because of alleged defects in matters of form merely. He might, of course, move to dismiss the action on the ground that the declaration failed entirely to state a cause of action, but this is quite a different matter from demurring specially to particular portions of the declaration. Assuming that a cause of action is stated, the office of a special demurrer is to eliminate all improper, superfluous, and unnecessary matter, or to compel the plaintiff to give the defendant definite and specific information with sufficient fullness and certainty to enable him to make his defense, or, upon the plaintiff's refusal so to do, to send his case out of court. If, notwithstanding defects in the declaration merely formal, or which would not be good in arrest of judgment, the defendant is ready to file a plea to the merits, and does actually file it, he is in the attitude of saying he does not need any fuller or more definite information as to the

plaintiff's alleged cause of action, but is prepared to meet the case without such additional information. He has a perfect right to waive imperfections in the declaration of the kind indicated; and if he does so he ought not—certainly, not after the term is passed—to be allowed to insist upon objections which he has already had full opportunity to make, but of which he has made no endeavor to take advantage. To hold otherwise would put it within the power of a defendant to force the court to go through a long and tedious investigation to no purpose, expending much time and labor which might have been saved to all concerned. The case with which we are now dealing presents just such an instance. A trial of this action was had upon the merits, resulting in a verdict against the defendant; a motion for a new trial was made and overruled; the case was brought to this court, the judgment below reversed, and a new trial granted. After all this had been done, the defendant, at the next trial, presented and insisted upon special demurrers raising numerous questions as to the sufficiency of the plaintiff's declaration, but none of them vital to his cause of action. This, certainly, in a common-law action, would not have been allowable; and we hold that in an action brought by attachment the same rule, to the extent above indicated, should prevail.

2. The use of irrelevant or improper language by counsel in addressing a jury will not, in every instance, authorize the court to declare a mistrial, or grant a new trial. The language complained of in the present case, the substance of which, as well as the action taken by the court with reference thereto, is stated by the reporter, while not at all proper or becoming, was not, we think, so seriously calculated to prejudice the minds of the jury, or to lead them to find a wrong verdict, as to require any further correction than was administered by the presiding judge.

3, 4. In the third headnote we have stated in a condensed form that portion of the law of Alabama, pertinent to the facts of the present case, under which an employé of a railway company is entitled to recover damages for injuries received in the company's service. We have also endeavored to state very briefly the facts upon which the verdict for the plaintiff is sustainable. It is not clear that the plaintiff, upon closing his evidence, had made out a case; and therefore the motion for a nonsuit might, perhaps, properly have been granted. The defendant, however, doubtless for strong reasons, introduced, without objection on the part of plaintiff's counsel, *ex parte* statements made by a number of the servants of the company. These statements contained evidence of value to the defendant, but we think they also contained evidence from which the jury could very reasonably infer that the track,

at the place where the plaintiff was injured, was in a defective and dangerous condition, and had been so for some time before the injury occurred. This evidence, in connection with that introduced by the plaintiff, so far authorized the jury to find that there was a "defect in the condition of the ways" of the master, to which the plaintiff's injuries were attributable, that we feel constrained to let the verdict stand; it having been approved by the trial judge, and this being the second verdict in the plaintiff's favor.

We shall not undertake to further state or discuss the numerous grounds of alleged error appearing in the record; the case, upon its substantial merits, being covered by what has already been said. Judgment affirmed.

(59 Ga. 69)

BENSON v. ABBOTT et al.

(Supreme Court of Georgia. Nov. 26, 1894.)

ACTION ON NOTE—PARTY PLAINTIFF—DEFENSES.

1. A promissory note, payable to the order of a named payee, not having been indorsed or otherwise assigned in writing, so as to vest the legal title in the person to whom the same was delivered as collateral security, the action upon the note was properly brought in the name of the original payee for the use of the person to whom the same was so delivered.

2. Where such a note was by the payee, before its maturity, delivered to another, who took the same bona fide, either as a purchaser or for the purpose of holding it as collateral security, but by mistake or inadvertence the note was not indorsed or otherwise transferred in writing, the holder took it subject to all the equities between the original parties to the note existing at the time of such delivery, and which arose out of the transaction upon which the note was given. This is true, although at the trial the note was transferred in writing by the original payee to the usee. (Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action on a note by Abbott, Parker & Co., for the use of another, against Charles F. Benson. Plaintiff had judgment, and defendant brings error. Reversed.

Jas. L. Key, for plaintiff in error. S. J. Hall and Dorsey, Brewster & Howell, for defendants in error.

ATKINSON, J. The questions made by the record in this case arise upon the following state of facts: Abbott, Parker & Co., upon a promissory note, made payable to themselves or order, for the use of the Maddox-Rucker Banking Company, brought suit against Benson, as one of the joint makers thereof, the other joint maker (Couch) being dead. This note, previous to the commencement of the action, had been by Abbott, Parker & Co. placed with the Maddox-Rucker Banking Company as collateral security for a loan to them, but the deposit of the note was by delivery only, unaccompanied by any indorsement or other assignment in writing. The defendant pleaded, in substance, that, while apparently a principal upon the note, and jointly liable as such with Couch (the other

maker), he had no interest in the consideration thereof, was in fact a mere surety, and that this was known to Abbott, Parker & Co. at the time they received the note in question; that Couch was a horse dealer, and, upon the representation of himself and of the payee of the note that the same was to be used by Couch in the purchase of horses for himself and upon his own account, he was induced to sign the same, and that he signed the note as an accommodation to Couch, and not otherwise; that in fact Couch was the agent of the payee, and, while they permitted him to use the horses purchased as his own, they concealed from the defendant the real relation existing between themselves and Couch; that, during the time Couch so held the horses, he executed a mortgage upon them in favor of the defendant to indemnify him against loss upon his contract of suretyship; that he himself regarded the horses as the property of Couch until after his death, which occurred before the suit was brought; that, since the death of Couch, Abbott, Parker & Co. have converted the horses to their own use, and refuse to allow any part of the proceeds realized from the sale of them to be applied to the payment of his mortgage, or to the extinguishment of the note sued upon; that, until after the death of Couch, he was not advised of the claim of title to these horses upon the part of Abbott, Parker & Co., and then only when the administrator of Couch demanded them, and the payees refused to deliver them, alleging as a reason therefor that the horses belonged to them, and were not the property of Couch; that in the whole transaction Couch was acting for them as their agent, and upon their account only; that the estate of Couch is insolvent, and that by the wrongful act of the payees in concealing the true relation between themselves and Couch, and also by the misinterpretations of Couch, acquiesced in by them, by means of which the note was originally procured, and as well by the subsequent conversion of the horses, Abbott, Parker & Co. had deprived him of his security, and had greatly increased his risk. The plaintiff introduced its note, and closed. A motion for a nonsuit was made, upon the ground that the suit could not be maintained without evidence of an indorsement to Maddox-Rucker Banking Company, which was overruled. The defendant introduced witnesses whose testimony tended to establish the plea, and, if accepted as true, might so establish it. The plaintiff introduced witnesses who contradicted the defense, and, in addition, introduced at the trial a written assignment of the note in question, which was as follows: "We hereby indorse to the Maddox-Rucker Banking Company one note, dated March 20th, 1893, signed by J. H. Couch and C. F. Benson, and payable to us, on which note there is a credit of five hundred dollars; this note having been transferred to said bank, for value received, before due, and the indorsement at the time of the transfer having been omitted by acci-

dent or mistake; said transfer having been made March 26th, 1893. This April 12th, 1894. [Signed] Abbott, Parker & Co." The evidence showed that the note had not previous to bringing the suit been transferred to the uses in writing. Upon the coming in of this evidence, it appears from the bill of exceptions that the court, upon the motion of plaintiff's counsel, directed a verdict for the plaintiff, upon the ground that as the evidence showed the note was received for value by the uses in this action, without notice, it took the same free from the equities alleged in defendant's pleas.

1. The judgment overruling the defendant's motion to nonsuit was correct. It is one of the elementary rules of pleading, distinctly recognized by the Code, that, unless there be some statutory provision to the contrary, an action must be brought in the name of the person holding the legal title to the thing sought to be recovered. In order to pass the legal title to a promissory note, which is made payable to a named payee or order, there must be either an indorsement or assignment in writing by the payee. Mere delivery is sufficient to vest the equitable interest in a person to whom, for value, it is delivered; but in order to so invest the holder of such a paper with both the legal and equitable interest as to enable him, in his own name, to maintain an action thereon, there must be a formal indorsement or assignment. In the case now under consideration the payees of this note delivered the same as collateral, without indorsement or assignment, to the present holders; thus investing them with an equitable interest, but reserving in themselves the legal title. The suit is brought by those holding the strict legal title, and for the use of the person holding the beneficial interest. This is technically accurate, and therefore the refusal to nonsuit the plaintiff was correct.

2. In order to determine whether the court erred in directing a verdict, it is necessary, first, to inquire whether the defense set up was sufficient in law; and, secondly, if it was sufficient in law, was the defendant precluded from making it by reason of the plaintiff's position as a bona fide holder of the paper sued on? We think that where one signs a promissory note ostensibly as a joint maker, but he is in fact a mere surety, without interest in the consideration, this fact of suretyship may well be pleaded to an action by one who takes with notice of the alleged surety's true relation to the paper; and if the person receiving such paper, either by a misrepresentation of material facts induces, to his prejudice, the alleged surety to become such, or if he hereafter appropriates to his own use a security which he by act or deed has led such surety to believe would be applied to his indemnity against loss, he thus increases by his act the risk of the surety, and thus discharges him from liability. In dealing with this question we must assume that the witnesses for

the defendant have spoken truthfully, as this judgment, directing a verdict, is equivalent to sustaining a demurrer to the sufficiency of the defendant's evidence, and is to be so considered. This evidence, standing alone, if undisputed, so far proves the facts as that the jury might be authorized to find: (1) That Benson was a mere surety. (2) That Abbott, Parker & Co. knew that fact when Benson became such, and induced him so to do. (3) Couch used the money realized upon the note in buying horses for himself, and that Abbott, Parker & Co. so dealt with him as to justify Benson in believing the horses were his. (4) That, to indemnify Benson against loss, Couch mortgaged these horses to him. (5) That the horses so mortgaged were afterwards taken possession of by Abbott, Parker & Co., and appropriated to their own use, under a claim that Couch was their agent. (6) That Couch is insolvent. If these facts are granted, then the risk on this surety has been increased. By the act of the original payee he has been deprived of the only indemnity he could secure, and the effect of this would be to discharge him from liability at the suit of Abbott, Parker & Co., and as well at the suit of their privies, occupying no better position.

We come now to consider whether the usee named in this suit is such a bona fide holder for value of the note in question as will protect it against the equities existing between the original parties thereto. That the usee was such a bona fide holder seems to be the real ground upon which the presiding judge placed his judgment directing a verdict. A bona fide holder of a negotiable promissory note, who takes it for value, before maturity, without notice of equities existing between the original parties thereto, takes it free from such equities. This rule is founded in the necessities of commerce, and is designed to strengthen the confidence of the commercial world in the integrity of these tokens of wealth. Until its maturity it may pass upon its face, accredited only by the indorsement of the payee, who thereby avouches to the world that as between himself and the maker there is no latent equity. He who emits such a paper in the first instance takes the consequences of finding his promise to pay in the hands of one to whom it has been so avouched. If he has been defrauded by the payee in the procurement of the paper, he has placed it in the power of the payee to impose it upon another, and, if one of two innocent persons must suffer, it should be he who first is at fault. Upon this theory, the reason of the rule operates, without injustice, upon the maker. The holder of such paper, however, if he would invoke an estoppel as against the secret equity of the maker, must see to it that the paper is properly indorsed to him. He must have not only an equal equity, but he must have the superior right. A fail-

ure of the payee to indorse, though he actually deliver, leaves the legal title still in the original payee; for indorsement is the method appointed by law for the due transmission of title to this class of commercial paper, and, in the absence of indorsement, the holder cannot enforce its payment without the use of the payee's name. He has a qualified interest only; cannot, in a strict technical sense, be deemed a holder; and the defect in his holding, resulting from a want of a perfect title, leaves him outside the class of persons who, within the rule stated, are protected against these defenses. Aside from these considerations, it has been for a long time well-settled law that one who, without indorsement, though for value and without notice, takes a note payable to order, takes it subject to all defenses which would have prevailed against the original payee. It will be observed that the rule under consideration, and which protects the holder against such equities, applies only to commercial paper which is negotiable. Unless a promissory note is made payable to bearer, it is not *proprio vigore* negotiable in the strict legal sense. It is wanting in the final requisite, which imparts to it the quality of negotiability; namely, indorsement. By this act alone can it become negotiable, and therefore it follows that he who receives it before indorsement does not take it as a negotiable paper; and, not being thus negotiable, he takes subject to the equities between the parties. Except in case of negotiable securities, the law indulges no presumptions in favor of the holder. He is not presumed to be such either *bona fide* or for value, but, on the contrary, it charges him with notice of, and he takes subject to, all defenses which, originating in the contract, might be set up by the maker. Not only is this true where the purpose is to invest the holder with the absolute unqualified title to the paper, but it is likewise true where it is intended only to pledge it as collateral to another liability. In either case the negotiability of the paper is of the very essence of the holder's claim to protection against equities. If pledged as collateral, without indorsement, a subsequent indorsement will pass the legal title, so as to enable the indorsee in pledge to maintain an action in his own name; but such indorsement, if postponed until after maturity, leaves the holder thereunder affected with all the pre-existing equities.

The Code (section 2138) declares that promissory notes and other evidences of indebtedness may be delivered in pledge, and section 2139 declares the receiver in pledge of promissory notes is such a *bona fide* holder as will protect him, under the same circumstances as a purchaser, from equities between the parties. Section 2788 declares that the holder of a note as collateral security for a debt stands upon the same footing as a purchaser. He is thus placed upon

the same plane as a purchaser. The right of a purchaser for value is to be protected against equities only when, by indorsement, the paper is rendered negotiable, and he is invested with the legal title. So with a pledgee. So with the person who holds the paper as collateral security. They all stand upon the same footing. In each case indorsement is the condition of absolution. It is true that notes of the character now under consideration may be pledged as collateral security by manual tradition only, but, for such delivery to be effective as against pre-existing equities, it must be accompanied with the legal requisites to transmission of title. The pledgee must be a holder, a *bona fide* holder, in due course of trade; and a regular indorsement by the payee is necessary to constitute him such. Our attention is directed to the case of *Smith v. Jennings*, reported in 74 Ga. 551, as bearing upon and ruling a principle otherwise than is herein expressed. In that case the proceeding was in equity to enforce the alleged lien of a judgment against certain land, a deed to which, together with a promissory note for the purchase money thereof, had been delivered in pledge. Whether or not the deed alone could have been delivered in pledge, so as to vest an interest in the pledgee, is not material. When accompanied, however, by the note for the purchase money, its delivery had the effect to vest in him an equity; and in a contest between this judgment creditor and the pledgee the latter was entitled, under the rule that he who seeks the aid of a court of equity in vindication of a supposed equitable right must do equity, to have his debt first paid before the thing pledged could be appropriated to the payment of other debts of the pledgor. As between the judgment creditor and the pledgee, the equity of the latter was superior. His interest in the thing pledged had vested prior to the rendition of the judgment. The lien of the judgment, assuming that it could attach at all, would attach only to the interest of the defendant in execution in the thing bailed, and that interest was an equity of redemption. In that case the equities of the judgment creditor arose outside the contract. In this the equity of the surety inheres in the contract itself. In that case notice or want of notice could not affect the lien of the judgment. In this case notice or want of notice is the one potential circumstance to charge the holder of this paper with, or absolve him from, the equities between the parties. In that case the right of the maker to make his defenses to an unindorsed promissory note was not called in question. Here it is the direct issue between the parties. So it appears that there is no conflict between the principle there declared and that here ruled. Indeed, it is apparent that the two cases involve the application of distinct principles, each equally well established.

The views herein expressed, defining the rights of the holder of an unindorsed promissory note made payable to order, are in perfect harmony with the great current of approved authority; and we are thus led to conclude that in the case now under review, the paper in question having gone into the hands of the usee without indorsement or assignment (whether this occurred through inadvertence or otherwise is immaterial), they took it charged with notice of and subject to the pre-existing equities; and, though an assignment was in fact executed at the trial, this could not avail as against equities in favor of the maker which sprang out of and inhered in the contract itself. As to whether the proposed defenses were well made out we express no opinion. We leave that where the trial judge should have left it,—to a jury,—and accordingly direct a new trial. Judgment reversed.

LUMPKIN, J., disqualified and not presiding.

(36 Ga. 138)

CITY OF ATLANTA v. HUNNICUTT et al.
(Supreme Court of Georgia. Dec. 4, 1894.)

CONSTRUCTION OF SEWER—REMEDY OF LANDOWNER—DAMAGES—INSTRUCTIONS.

1. Where a sewer within the limits of a city is constructed upon the land of a citizen, and after its completion an assessment is levied against him for his pro rata share of its cost as an abutting landowner, which assessment, upon demand by the city authorities, is duly paid, the jury, under such circumstances, upon the trial of an action to recover the value of the land appropriated in constructing the sewer, would be authorized to infer that the sewer was constructed by direction of the municipal authorities, and a motion for a nonsuit upon the ground that it did not appear that such sewer was so constructed was properly denied.

2. Where the charter of a municipal corporation permits one whose land has been appropriated without condemnation for the construction of a sewer to give notice, and have his damages assessed according to a method provided by the charter, such remedy is merely cumulative, and the landowner, certainly in the absence of an express statutory provision to the contrary, may have his election either to adopt the statutory remedy of assessment or prosecute his action at law for the recovery of damages, and the mere failure of such owner to give notice of his claim for compensation will not amount to a waiver of his right, even though he may have known that his land was being so appropriated.

3. The servitude imposed upon private property by the construction of a public sewer thereon involves such an actual possession by the public of that portion of the land taken up by such sewer as excludes the owner from the occupancy thereof. For such an appropriation of his property to the public use an action accrues to the owner, and the measure of his damages is the value of the land so appropriated. In estimating such value, the fact that the owner could still apply the premises to any use not inconsistent with the servitude for sewer purposes may properly be considered by the jury.

4. While the charge of the court was not altogether as full and clear as it might have been in distinguishing between the assessment of damages as for an appropriation of the fee and the assessment of damages as for an appropriation for

sewer purposes only, yet, where the declaration alleged the appropriation of the land and the purpose thereof to be for the construction of sewers, and where the evidence shows both the value of the land and the extent of the appropriation, it is not at all probable the jury could have been misled by any supposed obscurity of statement by the trial judge, and, inasmuch as the jury, upon inspection of the premises at the request of the defendant, returned a verdict which is in entire harmony with the preponderance of the testimony upon the amount of damages, mere minor inaccuracies in the charge of the court will not require a reversal of the judgment refusing a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by C. W. Hunnicutt and another against the city of Atlanta. Plaintiffs had judgment, and defendant brings error. Affirmed.

The following is the official report:

Hunnicutt & Payne sued the city of Atlanta for the value of land taken and damages to land by constructing a sewer through it, and obtained a verdict for \$500 "as compensation for land appropriated, and no damages allowed." The motion for new trial made by defendant was overruled. The motion was upon the ground that the court erred in refusing to nonsuit the case on each of the two grounds on which a nonsuit was moved, to wit: That it was not shown by the evidence, when the plaintiffs closed their case, that the sewer complained of was constructed by the defendant, or under its authority, or that the land alleged to have been taken as the route or right of way of said sewer was taken by the defendant, or under its direction; that the plaintiffs' own testimony shows that after the construction of the sewer, to the construction of which they had made no objection, they voluntarily paid the amount of the assessment against their property on account of the construction of said sewer; and the defendant contended that such voluntary payment of the assessment, when taken with the fact that the sewer was built through the plaintiffs' property, with their knowledge, and without objection on their part, and without any demand for an assessment or ascertainment of the value of the right of way or damages to their property, all of which was done before the act of 1889, under which the sewer was constructed, had been construed by the courts, and held not to authorize the defendant to enter upon private property, and construct sewers thereon, and levy assessments upon the abutting private property, without first acquiring the right of way by purchase, condemnation, or dedication, should be held to be such a waiver by the plaintiffs of their right to payment for the strip of land in question as to amount to an estoppel, which would bar the right of the plaintiffs to recover in this action. Also because the verdict is contrary to the evidence, and without evidence to support it, in that the testimony does not show that the defendant appropri-

ated the strip of ground in question, or that it was done by its authority; because the verdict is contrary to the preponderance of the evidence on the subject of the value of the ground taken, and is excessive, and out of proportion to the proven value of the ground taken; because the court, throughout the charge, treated the property taken for the easement as a direct appropriation of the land, and not as an easement, and in no place explained to the jury what an easement was, and the kind of taking the defendant was guilty of in building this sewer through the plaintiffs' property. Error in charging: "So, if you find from the evidence in this case that the plaintiffs were at the time the owners and in possession of this real estate described, and that the defendant, the city of Atlanta, entered upon said property for the purpose of constructing a sewer, and appropriated any part of it for that purpose, the plaintiffs would have a right to recover from the city of Atlanta the value of the property, whatever the proof shows that to be, by consent of counsel that value is to be fixed now, so you look to the evidence and determine, first, whether the city of Atlanta did appropriate any part of plaintiffs' property for that purpose for public use, and, if so, how much, and how much it is worth,—what is its value in the market now. Whatever the proof shows that to be, the plaintiffs would have a right to have a verdict for, without any deduction. In addition to the value of the property appropriated, the plaintiffs say that in doing the work the balance of their property has been damaged." Alleged to be error, not only because misleading, but because it presents a different case from that made by defendant, virtually allowing the jury to find the value of this strip in fee, and not as an easement. While the taking of the land for sewer purposes is to a certain extent an appropriation of it, it is not an absolute taking or appropriation. Defendant contended that from this charge the jury were authorized to find that the defendant absolutely took the strip, and has a right to use it as a true owner in fee would; and from the size of the verdict it seems that the jury took this view of the case under the charge of the court. The evidence as to the value of the property actually taken was extremely indefinite. One of the witnesses for the defendant testified that with a sewer of the dimension of the sewer in question a strip of land which would be necessary for the city to have an easement over, to go and come, and keep the sewer in repair, for safety, ought to be 20 feet wide, and that a strip 20 feet wide, running 270 feet through plaintiffs' property (as this did), would be worth about \$250. Another witness for defendant testified that fair compensation for the use of such a strip, independently of the benefit or damage to the other property, the owner still being allowed to use it for every other purpose, would be some four

or five hundred dollars. There was some evidence for the plaintiffs that the property was worth some \$5,000 an acre. The evidence for plaintiffs upon the subject of the land having been taken by defendant as right of way of the sewer, and as to voluntary payment of the assessment by plaintiffs, was that one of plaintiffs did not know what was being done until after it was done. The other plaintiff testified that he knew nothing of it until a large part of the work had been done; that he saw a lot of men one morning, very early, and went down to see what they were doing; that he thinks the city marshal called on him to pay the assessment of \$693.98, and he told the marshal he certainly would not pay it until he (witness) went before the council, and saw what they would do; that for some cause he did not go, and the marshal levied, and that "they" issued a *fi. fa.*, and served it, and witness paid it. Plaintiffs introduced a receipt, signed by the city marshal, to plaintiffs, dated April 4, 1893, for \$693.40, "Sewer, Orme St. ex."; and also introduced a plat, and evidence showing that the sewer entered the property from Orme street, near Pine, and ran across the property to Merritt's avenue. What plea was interposed by the city does not appear.

J. A. Anderson and Fulton Colville, for plaintiff in error. Arnold & Arnold for defendant in error.

ATKINSON, J. The official report filed in this case sufficiently states the facts necessary to a proper understanding of the questions made.

1. We think the motion for a nonsuit was properly overruled. We think the testimony showed beyond serious controversy both that the land alleged to have been taken as the route or right of way of the sewer in question was taken by the defendant, and that the same was appropriated under its direction. It was shown that this sewer was constructed by hands employed by the defendant's agents, and working under their direction. It was shown that for this identical sewer an assessment was levied against the landowners whose land was appropriated for their proportionate share of the cost of the sewer in question. It was shown that, upon a demand made by the duly-authorized agent of the defendant, the landowners paid this assessment. So that, even if there were no affirmative evidence of the fact that the land in question was appropriated by the defendant for the construction of this sewer, this subsequent assessment levied, and this subsequent demand for the payment by the owners of the land of their proportionate share of the cost of this sewer, affords the strongest possible inferential evidence of an appropriation by the defendant of the land in question for sewer purposes. Therefore the refusal to grant the nonsuit upon the ground herein stated was correct.

2. The defendant moved a nonsuit upon the further ground that the plaintiffs' own testimony showed that after the construction of the sewer they voluntarily paid the amount of the assessment against their property on account of the construction of the sewer, and made no objection to the construction thereof at the time it was being built. It was insisted that upon these facts the court was bound to presume conclusively that, if the plaintiffs had a just demand for compensation by reason of the appropriation of their premises, they had abandoned their claim, and the courts should hold the plaintiffs estopped by their conduct. Estoppels are never favored by the law. They arise only in cases where parties upon the record make admissions adverse to their interest, and upon which the courts have acted; or they arise in those cases where, in dealings with each other, one of the parties, by his conduct, has so induced another to act to his prejudice as that the latter will be seriously affected if the former be permitted to repudiate his act. The facts upon which these presumptions arise must be clearly proven. The property of a private citizen cannot be taken for a public use without just compensation being first paid. It is the right of a person whose land is being so appropriated to demand compensation in advance of appropriation, but the mere existence of this right cannot, in any sense, cause a failure to exercise the same to operate as a forfeiture of the right. The owner may well forego the payment in advance or the assessment in advance of his damages without forfeiting the right in an ordinary suit ultimately to recover the value of his premises thus appropriated. This right to the common-law remedy for the recovery of damages for the wrongful appropriation of one's property is one that inheres in our very system of laws, and, unless the same be expressly superseded by some statutory enactment providing a special remedy, the latter will be presumed to be merely cumulative of the former, and the owner may have his election as to which remedy he will adopt. The City Code of Atlanta provides: "That in case of any sewer or sewers or parts of the same, being built or laid over or through private property, if the owner of such property claim damages for the occupation of said lands by such sewer and construction of the same thereon, give notice of such claim, but a failure to give such notice shall in no wise affect or prejudice the right of such owner to bring suit for damages sustained. But upon giving notice of such claim for damages as aforesaid, then assessors shall be appointed to assess damages to said land by reason or on account of the construction of any such sewer through or upon the same, said assessors to be appointed, notice given and their award made as in case of property taken for opening, widening or straightening streets under

the charter and laws of said city." Thus it will be seen that not only does the act in question recognize the existence of the right to maintain the form of action instituted in this case, but expressly declares that the special remedy by assessment according to the method prescribed in that act shall in no manner operate against the plaintiffs' right to recover damages. The plaintiffs' right to recover damages would only be perfect when the appropriation was complete, and it cannot, therefore, in any just sense, be said that, because they did not object to the completion of the very work upon which their right of action would depend, they, in consequence, have no cause of action. We think the court properly refused the nonsuit upon this latter ground.

3. The construction of a sewer upon the land of another involves, to a certain extent, an appropriation of that land to the use of the public. It involves the appropriation of an easement in the premises, and the easement created by the act of appropriation may be of such a character as to amount to a practical appropriation of the fee. For the appropriation of his premises to this public use the owner is entitled to compensation in damages, and, under the city charter of Atlanta, if there be a corresponding advantage to his other property lying adjacent, such advantage, if capable of being estimated in money, may be set off against the damages allowed for injuries to his property resulting from the building of the sewer. As to the property actually appropriated and covered by the sewer, the owner would be entitled to have its value allowed without any deduction because of any supposed advantage to that particular piece of property. See *Smith v. City of Atlanta*, 92 Ga. 119, 17 S. E. 981. In the assessment of damages, however, it is appropriate that the jury should take into consideration the nature of the easement, the character of the occupancy, the extent of the appropriation, to consider whether or not, even though partially appropriated to the public use, it may not still be capable of being applied to the private advantage of the owner. All of these are considerations which should enter into and determine the jury in their assessment of damages. The charge of the court, we think, fairly submitted this question to the jury. The verdict is in perfect harmony with the preponderance of the sworn testimony in the case, and, in addition thereto, we find from an inspection of the record that by consent of counsel for the respective parties the jury went out, attended by a bailiff, and chaperoned by some of the parties or their representatives, and made a careful examination of the premises, observed the extent of the appropriation of the land, estimated the damages, and fixed them at the sum represented by the verdict in this case. So that, even if we were inclined to look critically into the question as

to whether the damages are excessive, it would be impossible to reach an intelligent conclusion in regard thereto, this court being unable to say how far and to what extent the judgment of the jury was predicated upon what they saw, rather than upon what they heard. We are fully persuaded that the verdict is right, that no error of law was committed upon the trial, and the judgment of the lower court is therefore affirmed.

(95 Ga. 106)

REED v. SOUTHERN EXPRESS CO.

(Supreme Court of Georgia. Nov. 26, 1894.)

INJURY FROM ANIMALS—LIABILITY OF OWNER—SCIENTER.

Where an ordinary draft horse attached to a vehicle is momentarily left standing in a street, adjacent to a sidewalk, and bites one passing by upon the sidewalk, the owner of the horse is not liable for the injury thus occasioned, it not appearing that the horse was or had ever been of a vicious nature, or that the owner had any reason to apprehend the animal would become so.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by M. Reed against the Southern Express Company. From a judgment of nonsuit, plaintiff brings error. Affirmed.

R. J. Jordan, for plaintiff in error. Erwin, Du Bignon & Chisholm and Dorsey, Brewster & Howell, for defendant in error.

SIMMONS, C. J. Ordinary draft horses attached to a wagon of the express company were momentarily left standing, unattended, in the street, adjacent to the sidewalk, in front of a railroad depot, while the servant of the company who had charge of them went into the depot. The plaintiff was then passing along the sidewalk, and, as she passed where the horses were standing, one of them turned his head around, and bit her, thus injuring her severely. She brought this action against the express company to recover for the damages thereby sustained, alleging that it was negligence to leave the horses near the sidewalk unattended. She does not allege that the horse that bit her was vicious, or, if it was vicious, that the company or its servant had knowledge of the fact; nor is there any evidence, except as to what occurred on this occasion, which would tend to show that the horse was vicious. She relied solely upon the ground that the horse was left near the sidewalk unattended. She was nonsuited by the trial court, and brings that judgment here for review.

Under these facts we do not think the defendant was liable. There is no general propensity on the part of horses to bite persons who come near them, and, when this is done at all, it is done by one that is exceptionally vicious. Where no such disposition has been

discovered in a horse, the owner is under no obligation to anticipate that it will suddenly bite some passer-by who chances to come within its reach, and is not bound to guard against such an occurrence; and if the horse does bite somebody, and is not wrongfully in the place where this happens, the owner will not be held liable for the injury. The rule on this subject has been stated thus: "If domestic animals, such as oxen and horses, injure any one in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury, unless he knows they are accustomed to do mischief; and such knowledge must be alleged and proved. But, if they are wrongfully in the place where they do the mischief, the owner is liable, though he had no notice that they were accustomed to do so before." 1 Am. & Eng. Enc. Law, art. "Animals," p. 578, and authorities cited. See, also, Cooley, Torts (2d Ed. 402) pp. 341, 343. In this case it appears that the horse was in its rightful place in the street; and it not appearing that the defendant or its servant in charge of the horse had any reason to suppose, before the injury occurred, that the horse was vicious or had a tendency to bite persons, the injury was not one which the defendant was bound to anticipate and guard against; and the leaving of the horse unattended was not such negligence as would entitle the plaintiff to recover. Of course, if the horse had before manifested a disposition to bite people, and the defendant or its servant knew of it, it would be negligence to leave the horse standing near the sidewalk unattended. Judgment affirmed.

(95 Ga. 103)

WARD v. BARNES, Sheriff, et al.

(Supreme Court of Georgia. Nov. 26, 1894.)

COSTS—WHEN LIABILITY ATTACHES—EXPENSES OF KEEPING PROPERTY LEVIED ON—RES JUDICATA.

1. Although a different rule prevails in equity, in cases at law pending in the courts of this state such costs and expenses of litigation as may be incurred abide the result of the suit, and are chargeable against the party cast therein. In such cases the property of the defendant cannot, in any event, be appropriated to the payment of such costs or expenses until final judgment against him.

2. Where a mortgage upon personal property is foreclosed, the mortgage execution levied, an affidavit of illegality interposed, and the final result is a dismissal of the levy and quashing of the execution, and where in the meantime the sheriff levying the execution has incurred a necessary expense for the custody and keeping of the goods levied upon, such expense is not a proper charge against the property of the defendant; and the court has no power to order such goods sold, and the proceeds, or any part thereof, applied to the payment of such expense, nor has the sheriff any lien thereon which may be enforced by retention of the property, or otherwise.

3. It having been adjudged that the year's support of the petitioner had been lawfully set apart, and no exception by the sheriff having been taken to this judgment, it is conclusive between

the parties upon this question, and the widow was entitled to an order directing the delivery of the property to her.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Application of Louise K. Ward for an order directing J. J. Barnes, sheriff, and others, to deliver to her certain property, and from an adverse ruling she brings error. Reversed.

J. H. Gilbert, for plaintiff in error. Calhoun, King & Spalding, for defendants in error.

ATKINSON, J. Mrs. Ward applied to the superior court for a rule directing the sheriff to deliver to her certain personal property which had been set apart to her for a year's support. The answer of the sheriff averred that the property was held by him under a *fi. fa.* issued under proceedings to foreclose a mortgage on the property in question made by Mrs. Ward's deceased husband; that he had paid expenses of storage of the same, for which he claimed a lien upon the property, and declined to deliver the property until the amount of such claim should be paid. The court below sustained this position of the sheriff and refused to order delivery without payment by Mrs. Ward of the storage fees, which ruling is now assigned as error.

The record shows: That, in the lifetime of Mr. Ward, proceedings were taken in Muscogee superior court to foreclose a chattel mortgage on the goods in question made by Mr. Ward, in which a *fi. fa.* was issued to the sheriff of Fulton county, who took possession of the goods, and that they have since continued in the possession of said sheriff. He caused them to be stored, and at the date of said petition had paid storage fees amounting to upwards of \$120. That illegality to the foreclosure was filed on behalf of Mr. Ward, and that, the case thereby made being called in its regular order, the levy was dismissed for want of prosecution. That prior to such dismissal, Mr. Ward having died, this plaintiff in error, his widow, took proceedings for a year's support, wherein it appearing that the property in question comprised all the estate of said deceased, and was not \$500 in value, the same was duly set apart to her. That after dismissal of the levy she duly notified the sheriff of her title to said property, and of the dismissal of said levy.

No question of fact is involved here, the sole question for determination of this court being whether or not, upon the facts herein stated, and as found by the court below, the alleged lien of the sheriff for storage fees is or is not superior to the claim of title of the plaintiff in error by virtue of the assignment to her as a year's support. Upon this state of facts the proposition has been pressed upon this court with great

earnestness that the sheriff—being without interest in the litigation, and, with respect to the property seized, he occupying the position of an involuntary depositary, incurring expense in its keeping—is entitled to a lien thereon as bailee, which attaches to the thing bailed, without respect to its ownership. In the first place, we cannot agree to the proposition that the sheriff is an involuntary bailee. He assumes a highly honorable and greatly responsible trust when he accepts, at the hands of the public, his official position; and, along with its honors and emoluments, the law imposes upon him duties and responsibilities of no mean degree. Among these is the duty to faithfully execute all the processes of the courts which may be placed in his hands, and safely to keep and preserve all property which by virtue of such process is committed to his care. For these good offices the law provides compensation,—not, in its strict commercial sense, adequate, in all cases, it is true, but such, supplemented by the honors of public preferment, as is at least satisfactory to him, else he had declined the honor. He is the depositary chosen of the law the voluntary repository of its trust; and for the payment of his services, the law provides, he must look to the party cast in the suit. In the second place, we cannot agree that the mere seizure of goods at the suit of a plaintiff who subsequently fails in his action creates any such right in favor of the officer executing process against the defendant as would authorize the court to seize and sell a defendant's property in satisfaction either of strict statutory costs, or other expenses of litigation. The seizure and sale of the goods of a citizen, and the appropriation thereof to the use of another, involve the exercise of one of the highest attributes of a sovereign power. To justify such extreme measures, there must be something more than an alleged default in a debtor; there must be the decision of a court of competent jurisdiction awarding judgment against the person offending. In a civil suit a defendant must be first convicted either of the tort or breach of contract, the basis of the action, before his goods can be appropriated to the use of any person other than himself. It is true that for purposes of preservation they may be sometimes sold, but the proceeds cannot be applied until final judgment against him. The final judgment alone determines whether he can be deprived of his property, for it is a familiar and deeply-cherished principle of our organic law, that a man may not be deprived of life, liberty, or property except by due process of law. "Due process" means the judgment of a court of competent jurisdiction, proceeding according to regular and legally appointed methods, after due notice, against the offending party. To say that a plaintiff, by simply commencing an action, and putting in motion the expensive machinery

of a court, can commit the estate of a defendant to the payment of such expenses or such costs as may be incurred, without a final judgment finding him, in any sense, an offender, is confiscation, pure and simple, and abhorrent to every principle of justice and right. Aside from these considerations, it has been repeatedly held by this court that whenever a public officer, in the rendition of a public service, exacts from a citizen payment for such service, he must be able to justify his demand upon indubitable statutory authority. In the matter of the exaction of costs, the law leaves nothing to their discretion, nor does it set up any liens resting upon supposed equities in favor of its ministerial or executive officers. Whenever it has failed to provide, this failure is equivalent to a denial of compensation.

The rule herein stated does not prevail, in its strict severity, in equity courts. In the chancery courts, in the enforcement of purely equitable rights, and in the application of purely equitable remedies, the rule was early adopted that these matters were left largely to the discretion of the chancellor, who, upon equitable principles, might apportion the expense of litigation among the parties in proportion each to his own default. This rule, however, has never obtained in the common-law courts. This is the first time in this state, in so far as we are advised, where, in the prosecution of ordinary common-law remedies, it was sought to set up a species of equitable lien against one who, according to the record, is an unoffending defendant; and such a doctrine we cannot now approve as sound, either in law or reason. This disposes of the other question in the case, for inasmuch as the officer holding the property has no lien of any character for the service alleged, and inasmuch as the defendant in execution had died pending the litigation, and the plaintiff in error, being his widow, had caused the property levied upon to be regularly set apart to her as a provision for a year's support, she was lawfully entitled to the possession. The court therefore erred in directing a sale of the property for the payment of the alleged expense of litigation, and erred in refusing to make the rule absolute awarding to her the possession. Judgment reversed.

(95 Ga. 110)

SAMPLES v. CITY OF ATLANTA.

(Supreme Court of Georgia. Nov. 26, 1894.)

DEFECTIVE BRIDGE — LIABILITY OF CITY FOR INJURIES — INSTRUCTIONS.

Although a traveler may know that, because of the defective construction of a public bridge in a city, there is some danger in driving over it, still he may recover from the city for injuries sustained in so doing if it clearly appears that the danger was not obviously of such character that driving over the bridge would necessarily amount to a want of ordinary and reasonable care and diligence, and if it also appears that in

driving over the bridge the plaintiff did in fact observe such care and diligence. In such case, the mere fact of driving over the bridge would not of itself authorize a finding that the plaintiff, by so doing, consented to the injuries thereby occasioned. Consequently it was error to charge as follows: "If you believe from the evidence that the plaintiff was acquainted with the bridge, and knew of the danger of driving over it, and nevertheless did so, you should find that he consented to the injury, and therefore that he cannot recover; for it is a principle of law that no man can recover damage from another where he consented to his injuries."

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action for personal injuries by John B. Samples against the city of Atlanta. There was a verdict for defendant, and a new trial denied. Plaintiff brings error. Reversed.

P. F. Smith and Gaines & Etheridge, for plaintiff in error. J. A. Anderson and Fulton Colville, for defendant in error.

LUMPKIN, J. In the case of Bentley v. City of Atlanta, 92 Ga. 623, 18 S. E. 1013, this court held that, although the McDaniel street bridge, which crosses over the tracks of the East Tennessee, Virginia & Georgia Railway Company, had been raised by the railway company, the duty of keeping this street free from a permanent or long-continued nuisance devolved primarily upon the municipal government, and that, consequently, the city was liable if, by the improper construction of that bridge, it amounted to a public nuisance, and was unsafe for general use. In the case at bar the plaintiff was injured, in an attempt to drive across this identical bridge. Under the facts in evidence the city is to be treated as being in the attitude of inviting the public to use this bridge as a part of McDaniel street, which was a very public and much-traveled thoroughfare. It appears that the city permitted the bridge to remain open for general travel, and that its condition, shape, and general structure had been the same for some considerable time prior to the plaintiff's injury. In legal contemplation, therefore, the city was keeping and maintaining the bridge in this condition at the time the injury to the plaintiff occurred. He had crossed the bridge with his wagon the day before. This was his only opportunity of knowing what its condition was. The bridge, as to strength, surface, and condition of repair, seems to have been unobjectionable. The only complaint of it in the present case was that there was a considerable incline in the approach forming one end of it, which made the descent quite steep, and, to a certain extent, dangerous. It was because of this abrupt declivity that the bed of the plaintiff's wagon was thrown out of place and precipitated upon his team, causing him to be thrown out and hurt. There was a verdict for the defendant, and the plaintiff assigns error upon the overruling of his motion for a new trial. We shall discuss none of the

numerous grounds contained in this motion save that which complains that the charge copied in the headnote was erroneous, and unwarranted by the facts in evidence. Taken in its literal sense, this charge is open to the criticism that it states a principle of law not pertinent nor applicable to the facts of this case. Surely, a man who is merely negligent in voluntarily pursuing a course which he knows to be attended with danger cannot be said to consent to such injuries as may follow, however much reason there might be to conclude that he assumed the risk of sustaining injury. However, we are not inclined to be hypercritical, and will take it for granted that our distinguished brother of the trial bench never really intended that the language he employed should be accredited with its usual and literal significance. We think it the more probable that he meant by this charge to state the well-known rule of law that one who voluntarily attempts a rash, imprudent, and dangerous undertaking is to be presumed to have assumed the risk incidental thereto, and cannot afterwards complain if he is injured. Giving to the charge this construction, its vice lies in its assumption that if the plaintiff knew of the danger of driving over the bridge, attempting to do so was per se negligence on his part, amounting to a want of ordinary diligence. We do not understand this to be a correct exposition of the law applicable to the facts of this case. The plaintiff's acquaintance with the bridge was very slight indeed, and his knowledge of the danger of using it must have been correspondingly slight. Besides, it must not be forgotten that this was a public bridge, forming a part of a public street in a city, over which all people having occasion to use the street at that point were expected to cross. There was no warning of any sort that it was unfit or unsafe for travel, and there was no appearance of danger about it, save only the steepness of the grade at one of its ends. In view of these facts, we entertain no doubt at all that the charge cut strongly against the plaintiff. There is greater or less danger attending the use of many public bridges and highways. Sometimes the danger is very slight indeed, so slight as to be of but little consequence; again, the danger is somewhat greater, and more carefully to be guarded against by one who takes the proper care for his own safety, and still again, the danger may be so very great and apparent that the only proper way to shun it would be to avoid altogether coming within its reach. Between the extremes there is every conceivable degree and kind of danger. Where the danger is exceedingly small and trivial, it may not be at all negligent to disregard it; where it is exceedingly great and obvious, it would be negligence per se to incur the hazard of being injured by it. In other cases it would be open to question whether incurring such possible or probable hazard would be consistent with ordinary care, and in cases of

this kind the question of contributory negligence is one for determination by the jury. The case at bar belongs to the class just indicated, and the court could not properly, as matter of law, conclusively determine that the plaintiff's knowledge of the defective construction of the bridge, and the use of it notwithstanding such knowledge, absolutely barred all right of recovery. Certainly, in view of the limited knowledge which the plaintiff must necessarily have had as to the character of the bridge and the extent of the danger incident to its use, he can hardly be said to have "consented" to the injury, or even be regarded as having voluntarily braved a known and inevitable danger, trusting to chance or good fortune for coming out uninjured. We do not mean to say that in every conceivable case the fact that a person injured knew of the danger to which he voluntarily exposed himself would not of itself preclude him from a recovery. It is possible that a person's acquaintance with the defective or unsafe condition of a bridge or other portion of a highway might be such that it would put him upon notice as a prudent man that an attempt to travel over the same would be inevitably attended with a certain, fixed, appreciable, apparent, and forbidding danger; in which case, knowing and appreciating the extent of the hazard, and the probability of his being injured, he nevertheless may choose to take the risk, trusting to the extra precautions he mentally resolves to take as a means of defeating the threatened disaster. He does not, however, consent to the injury which may follow, else why should he take precautions to avoid or defeat the peril? Again, where the danger lurked under cover, and was not readily apparent to a casual observer, however prudent he might be, the person injured might have peculiar means of knowing or apprehending the danger, because of familiar acquaintance with the defect in question, or from past experience with defects of a similar character. For example, if a man were seriously injured while passing over a defective portion of the highway today, though the danger appeared to him only slight, and he used reasonable care to avoid it, he would not be justified in making another attempt to pass to-morrow over the same defect, nor, indeed, over a similar place, which appeared equally dangerous. Other instances might be cited where the conduct of the party, under the peculiar circumstances of a particular case, would so plainly appear inconsistent with the claim that he was acting with that degree of diligence to be expected of him that a court would be justified in holding as matter of law that he could not recover. The case of *Tift v. Jones*, 74 Ga. 469, seems to afford an illustration of this kind. We do not wish to be understood as laying down a rule applicable alike to all cases in which it may appear that a party injured knew in advance of the danger to which he subjected himself, but the law an-

nounced is to be regarded as controlling the present case, and only such others as are akin to it by reason of their own peculiar facts and general complexion.

The view we have taken of the question under consideration is abundantly supported by an overwhelming array of the most respectable and reliable authorities. In many of them we find such apt and pertinent expressions, we shall take the liberty of quoting from them literally and extensively, believing that in so doing the matter will be presented much more clearly and forcibly than we could hope to do in our own language. Before so doing, however, it must not be forgotten that under the rule, of force in this state, allowing partial recovery in cases of contributory negligence on the part of the plaintiff, it is still more proper to enforce the doctrine we are endeavoring to establish. Mr. Bishop, one of the most distinguished law writers of this country, after stating the duty of a municipality to keep its highways in repair, and that the traveler is required to use only ordinary care, says: "But if, in a particular instance, he has knowledge that the way is in an ill condition, he must, should he use it, apply a greater or still greater care, according to the demands of the special fact. And the danger may be so imminent, and the necessity for passing over it so slight, that the court can pronounce the going upon it negligence in law, whereupon any resulting injury will be without recompense. Yet ordinarily, as the laying out of the way has established its legal necessity, the mere facts that one, knowing of a defect, passes over it, will not defeat his claim should he suffer harm." *Bish. Noncont. Law*, § 1013. The text is sustained by a large number of cases, some of which we shall ourselves refer to more particularly before closing this opinion. In 4 *Am. & Eng. Enc. Law*, p. 35, under the title "Contributory Negligence," it is stated: "But, even though the person injured knew of the danger, or had reason to apprehend it, yet it does not necessarily follow that he has been guilty of contributory negligence. Notwithstanding his knowledge of or reason to apprehend danger, he may have been in the exercise of ordinary care to avoid injury; and in such event his injury may be solely due to the negligence of another." See, also, the numerous authorities cited in note 2, under the headline, "But Knowledge of Danger not Negligence, per se." Again in *Elliot, Roads & S.* p. 470, it is said the fact that a traveler "voluntarily attempts to pass, with knowledge of the defect or obstruction, is not ordinarily conclusive evidence of a want of due care; but if he has, or ought to have, notice thereof, he must exercise such care as the circumstances demand, and if an ordinarily prudent person would not attempt to pass, under the circumstances, he will be guilty of contributory negligence." Section 221 *Jones, Neg. Mun. Corp.*, is as follows: "Many

cases have arisen where it has been shown by municipal corporations that the persons who have endeavored to hold them responsible for defective ways were themselves aware of the existence of the defects, and effort has been made to establish the rule that knowledge of a defect in and subsequent user of a walk would estop a person injured from claiming damages. But this is not the law, for 'such knowledge does not always bar a party from a right of recovery.' If a person knows that a walk is defective, he may use it if his act in so doing is reasonably prudent. He is not obliged to give up a walk provided by the corporation, or else use it at his peril, but he is obliged to exercise reasonable care. He may continue to go where the corporation sanctions his going, but he can no longer assume that the walk is safe. He knows that it is not so, and his conduct must be regulated by this knowledge. Especial care is due from him, and, unless he exercises reasonable care, in view of all the circumstances surrounding his conduct, he will be negligent." In treating of the voluntary exposure of one's self to danger, *Beach* observes: "Knowledge, however, in this respect, does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed, or to which he lawfully exposes himself. This certainly is not contributory negligence. When knowledge is fastened upon the plaintiff, it is presumptive evidence of contributory negligence; but it is a disputable presumption, and may be rebutted by proper evidence of the exercise of ordinary care under the circumstances."

We might content ourselves with resting upon the foregoing extracts, all of which seem to be supported by the authorities they cite. We will, however, notice a few of the very large number of cases which we have examined and which more closely bear upon the question in hand. Thus, in *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893, it was held that: "The fact that a person uses a street or sidewalk after he has notice that it is out of repair is not necessarily negligence. Persons are not to be entirely debarred from the use of a street because it may be defective or somewhat dangerous; but where danger exists, and it is known, ordinary prudence would require of those using such street greater vigilance and care and caution, corresponding with the danger, to avoid injury." Again, in *Lowell v. Watertown Tp.*, 58 Mich. 568, 25 N. W. 517, it was held that knowledge of a defect in a country road along which a man was walking on a dark night did not necessarily establish his negligence, but was only a fact for the jury to consider in determining whether he was negligent or not. The supreme court of Indiana, in *Turnpike Co. v. Jackson*, 86 Ind. 111, laid down the doctrine that reasonable care by a traveler did not

require that he should forego travel over places known to be dangerous, unless to do so was inconsistent with reasonable prudence; and that previous knowledge of the dangerous condition of a turnpike would not alone prevent a recovery for injuries occasioned because of such dangerous condition. Contributory negligence cannot be imputed to a pedestrian who was injured because of a washout in a sidewalk, merely because he had knowledge of the defect. *City Council of Montgomery v. Wright*, 72 Ala. 411. "Previous knowledge of the condition of a street or sidewalk is not conclusive evidence of contributory negligence, so as to bar a recovery by a person injured in consequence of its being out of repair, unless its condition is such that, under like circumstances, a person of ordinary prudence would not venture upon or over it." *McKenzie v. City of Northfield*, 30 Minn. 456, 16 N. W. 264. And to the same effect, see *Owen v. City of Chicago*, 10 Ill. App. 465, and *City of Aurora v. Brown*, 12 Ill. App. 122. In the latter case it was held that a party, knowing the defective condition of a sidewalk, was not entitled to recover because he did not take the necessary precautions to prevent a fall. In *Smith v. City of St. Joseph*, 45 Mo. 449, the doctrine is stated to be that: "The fact that a person injured by a defect in a highway or street had previous knowledge of the defect is not conclusive evidence of negligence on his part. It is a fact to be submitted, with other evidence, to the jury; and in an action to recover damages for an injury caused by such defect it is only necessary for plaintiff to show that he exercised ordinary care to avoid the accident." In the New York court of appeals, in *Bullock v. City of New York*, 99 N. Y. 655, 2 N. E. 1, the rule is laid down that "persons have a right to use the sidewalk of a street, although knowing it is in an unsafe condition; and, if injured, it is a question for the jury whether they were guilty of any carelessness which contributed to the injury." In *Osborne v. Railway Co.*, 21 Q. B. Div. 220, it appeared that the plaintiff was injured by falling on the steps leading to the defendant's railway station. He knew that the steps were dangerous, but went down carefully, holding the handrail; and it was held that the defendant did not show that the plaintiff, with a full knowledge of the nature and extent of the danger, had voluntarily agreed to incur it, so as to make the maxim, "*Volenti non fit injuria*," applicable, and therefore he was entitled to recover. The case of *Dempsey v. City of Rome* (decided by this court March 26, 1894) 94 Ga. 420, 20 S. E. 335, is in line with the array of authorities above cited. But why multiply further the citation of authorities? The law is plain and clear, and in a nutshell is as follows: If the danger arising from a defect in a bridge or other portion of the highway within the limits of a city is obviously of such character that

no person, in the exercise of ordinary prudence, would attempt to pass over the same, or, in other words, if such an attempt would, of itself, plainly and unequivocally amount to a want of ordinary care and diligence, the court may so instruct the jury as matter of law. But in other cases the mere knowledge of the existing defect will not prevent a recovery on the part of one who is injured because of the defect, if the use of the bridge or highway in which the defect exists is consistent with ordinary care, and it further appears that the plaintiff did in fact exercise such care. All cases of this kind should be submitted to the jury, who, in determining what would be ordinary care in the particular instance should take into consideration and carefully weigh all the facts and circumstances; and nothing short of the care which a person of ordinary prudence would exercise with reference to the existing conditions should be held sufficient on the part of the plaintiff. It is not our present purpose to express any opinion or intimation as to the merits of the case now under review. A new trial is ordered because the plaintiff was deprived by the above-quoted charge of the court of the benefit of having the jury pass upon one of the main issues involved, the decision of which may turn the scale either the one way or the other. Judgment reversed.

(95 Ga. 229)

COOK v. BANKS.

(Supreme Court of Georgia. Dec. 21, 1894.)

BILL OF EXCEPTIONS — AMENDMENT — SALE OF LAND — DEFECT IN QUANTITY — ABATEMENT OF PRICE.

1. Although the act of December 18, 1893 (Acts 1893, p. 52), provides "that the bill of exceptions in any case, or the certificate thereto, may be amended at any time before the final argument thereon in the supreme court, so as to make such bill of exceptions or certificate conform to the truth of the case and the forms of law," yet, as this act does not declare whether the amendments to which it refers are to be allowed by order of the trial judge or of this court, and does not in any manner point out how such amendments are to be made, or provide for any procedure in the premises, or for service on the opposite party, the act, in view of these defects and omissions, is, as to the matter of such amendments, too imperfect and incomplete for practical enforcement.

2. There was no error in refusing the request to charge. The charge complained of, though not entirely free from verbal inaccuracy, taken in connection with the whole charge, submitted substantially the doctrine announced by this court in *Estes v. Odom*, 18 S. E. 355, 91 Ga. 600. The evidence warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Newton county; Richard H. Clark, Judge.

Action by Georgia A. B. Banks, guardian, against S. O. Cook. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Pace, for plaintiff in error. E. Womack, for defendant in error.

LUMPKIN, J. 1. We are cheerfully willing to give due and conscientious obedience to the enactments of the general assembly with reference to proceedings and practice in this court. While we honestly think there has been, in some instances, legislation too favorable to incompetent or negligent practitioners of the law, we are not inclined to question the authority of the lawmaking power to take care of those who either cannot or will not take proper care of themselves, nor do we wish to be understood as protesting against the exercise of such authority. After all, we have little doubt that the real purpose of the general assembly in so legislating has been to guard the rights of parties, and not merely to shield delinquent attorneys from the consequences of their professional sins of omission or commission. In the spirit above indicated, we have faithfully endeavored to find a way to practically enforce that portion of the act of December 18, 1893, which is quoted in the headnote, but have been unable to do so. The difficulties in the way are pointed out in the headnote itself, and are so obvious as to be apparent at a mere glance. If the general assembly will indicate even loosely how bills of exceptions are to be amended, and define some sort of procedure for accomplishing this purpose, we will carry out their wishes to the best of our ability.

2. This was an action upon a promissory note given to Banks by Cook for the purchase of land. The defense was, in substance, that the land was sold by the tract, and was described in the bond for titles given to the defendant as containing 600 acres, "more or less"; that the seller had falsely and fraudulently, or through mistake amounting to fraud, represented to the defendant that the tract did in fact contain 600 acres, but upon subsequent careful and accurate survey, it was found to contain only 471 acres. The court was requested to charge: "If you believe from the evidence that Cook did not have equal opportunity with Banks to judge of the number of acres, and Banks misrepresented to Cook the number of acres by mistake and innocently, and Cook acted on said misrepresentation to his detriment, Cook would be entitled to apportionment of price, to be measured by the deficiency, if deficiency be shown, and was gross." This request was properly refused. Its vice was that it assumed that the deficiency in question would, as matter of law, absolutely entitle the defendant to an abatement in the price, although there was no actual fraud perpetrated by the seller, and although the deficiency may not have been "so gross as to justify the suspicion of willful deception or mistake amounting to fraud." See Code, § 2642. The deficiency was, in the present case very large. We do not mean to say that the jury would not, as matter of fact, in view of the entire evidence, have been authorized to find that it was sufficiently large to au-

thorize an apportionment in the price under the provisions of the section above cited; but whether or not they should so find was a question for them, upon which the court rightly declined to pass.

Further complaint was made because of the following charges to the jury: (1) "Now, you have the case before you, and, in the first place, you will determine whether the deficiency is so gross as to justify the suspicion of willful deception, or mistake amounting to fraud. Consider the property, the number of acres, the improvements upon the property, and all the circumstances connected with the sale." (2) "You will observe that the law is, in any deficiency in land so gross as to justify the suspicion of willful deception, you must have, in the first place, in order to find for the defendant, the suspicion of willful deception; and, in order to arrive at that conclusion, you will get all the language of the bond for titles, and the language of the contract previously entered into, and which was consummated by the bond for titles, and all the circumstances, as I said, in connection with the case. But our supreme court has said, in a recent decision, that even this is not sufficient to have a deduction on account of the deficiency, not even that of the suspicion merely of willful deception or mistake amounting to fraud; that that is not sufficient. But it also says that if you have that suspicion of willful deception or mistake amounting to fraud, then you must come to the conclusion as to whether there was fraud by willful deception, or mistake amounting to fraud, practiced by Mr. Banks upon the defendant, Cook; and, if you come to that conclusion, he would then be entitled to deduction pro rata of the number of acres which the tract of land has fallen short." We confess that these instructions, taken by themselves, are not perfectly clear, nor free from verbal inaccuracy. It is evident, however, that the judge was endeavoring to state to the jury the doctrine laid down by this court through Chief Justice Bleckley in *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355, and, taking these isolated and fragmentary extracts in connection with the whole charge, we cannot but reach the conclusion that the judge's purpose was substantially accomplished. We think there was sufficient evidence to warrant the finding in the plaintiff's favor, and, on the whole, have concluded to allow the verdict to stand. Judgment affirmed.

(94 Ga. 801)

HARPER v. MAYOR, ETC., OF JONESBORO.

(Supreme Court of Georgia. Dec. 21, 1894.)

ACTION AGAINST CITY—REVOCATION OF BUILDING PERMIT—FIRE LIMITS.

It appearing from the plaintiffs' petition, fairly and properly construed, that prior to the time when one of them obtained from the municipi-

pal authorities of Jonesboro a "permit" to tear down an existing wooden building and erect in its place another such building, there had been established in the town certain "fire limits," within which, if any wooden building could be lawfully erected at all, the same could not be done without a permit, and it further appearing that this plaintiff failed to comply with certain material terms expressed in the permit granted to him, and such compliance being a condition essential to its validity, and no sufficient reason for his failure to comply being alleged, the revocation of the permit, and refusal by the municipal authorities to allow the erection of the new building after the old one had been torn down, afforded no cause of action against the corporation, even if it could otherwise be held liable.

(Syllabus by the Court.)

Error from superior court, Clayton county; Richard H. Clark, Judge.

Action by Glenn Harper against the mayor and council of the town of Jonesboro. Judgment for defendant, and plaintiff brings error. Affirmed.

Doyal & Doyal, Watterson & Kimsey, and W. M. Wright, for plaintiff in error. Dorsey, Brewster & Howell and Hutcheson & Key, for defendant in error.

ATKINSON, J. Harper applied to the town authorities of Jonesboro for permission to replace an old building with a new one. It appears that the old building was of wood, and he desired to construct the new one of like material. Long previous to this there had been adopted an ordinance fixing certain limits within the town of Jonesboro within which parties would not be authorized to construct frame buildings. It seems that the mayor and council in session adopted a resolution authorizing the petitioner to repair, or take down and rebuild, his old wooden building, upon condition that he, or those holding under him, should not place any obstruction on the sidewalk, nor any floor nor covering which required posts should be placed there, but that he might place one similar to that in front of the adjoining building, but, before this permit should go into effect, he should subscribe and agree to this condition. It appears that, though he stated to the clerk of the council that he agreed to the conditions, he at no time subscribed thereto. Afterwards the mayor and council revoked the permit, and refused to allow him to construct his building. He brings suit for damages.

The power to regulate the construction of buildings within its limits, and to prescribe the material out of which buildings within certain limits can be constructed, is one necessary to be exercised by municipal corporations. It is essential to the safety of person and property in towns and cities that there reside somewhere a power so to regulate the construction of buildings as that one person, by the use of improper or combustible material, may not endanger the property of an adjacent proprietor. The exercise of this power, by the passage of an ordinance establishing fire limits, imposes obligations

which are equally binding upon all the citizens of the municipality, and likewise upon the council itself. The passage of an ordinance is a legislative act, accompanied with a certain degree of formality, and, unless in the ordinance itself there be some provision by which the city authorities reserve the right to abrogate its terms by a less formal method of procedure, no change can be made in such an ordinance except by the passage of another, qualifying, repealing, or modifying its terms. See *Eichenlaub v. City of St. Joseph* (Mo. Sup.) 21 S. W. 8. There is no suggestion in this petition that any ordinance was passed by the council modifying the ordinance in question in favor of this plaintiff. It is not so alleged in the petition, but, the plaintiff himself, recognizing the binding force of the ordinance, filed a petition requesting permission from the mayor and council to violate this ordinance. The mayor and council, upon simple resolution, it appears, unaccompanied with any of the formalities incident to the enactment of town ordinances, granted this petition, imposing upon the applicant certain conditions before even this permission could be made effective. It does not appear that these conditions were complied with by him. Indeed, the contrary appears from the averments of the petition. If this plaintiff assumed to act upon the informal authority granted by the mayor and council, he himself not complying with the conditions upon which the alleged permission was granted, and thereupon tore down his old building, he cannot complain if the mayor and council declined to permit him to rebuild. They cannot waive the binding force of a valid town ordinance, and are not estopped to insist upon its enforcement whenever the public interest may seem to require it. We think, therefore, the court did not err in sustaining the demurrer to the plaintiff's declaration. Let the judgment of the court below be affirmed. Judgment affirmed.

(95 Ga. 202)

REED v. DAVIS.

(Supreme Court of Georgia. Dec. 21, 1894.)

CONSTRUCTION OF WILL—DIRECTION FOR SALE BY EXECUTOR—TITLE OF WIDOW.

A will, in one item, directed the sale by the executor, either publicly or privately, of specified realty, including a dwelling house; the conversion into cash of the choses in action and other personality of the testator; and the investment by the executor of the funds thus coming into his hands in certain securities, "except that there shall be retained out of said amounts the sum of fifteen hundred dollars, which my executor is to invest in a house for my family, as he and my wife may think best." In another item, the executor was empowered to change "the investment" mentioned in the preceding item, should circumstances render it necessary either to make a better investment or save loss from declining securities. The will further directed that the income of the estate should be applied annually to the support of the testator's widow and children, and that, as the latter became of age or married, the executor should turn over to them their por-

tions of the estate. The executor did not, at once, sell the dwelling house belonging to the testator, but retained it "as a suitable residence for the family," and so stated in a return to the court of ordinary. Seven years later he conveyed it to a married daughter of the testator, in a settlement with her of her portion of the estate, she and her mother being, at that time, the only surviving devisees and legatees. Held that, under the terms of this will and the facts stated, the legal title to the dwelling house remained in the executor until his conveyance to the daughter; that it has never passed, in whole or in part, into the widow; and that she has no interest in this property which can be reached by the levy of an ordinary execution against her, although the same was based on a judgment rendered before the conveyance by the executor to the daughter.

(Syllabus by the Court.)

Error from superior court, Newton county; J. N. Glenn, Judge pro hac vice.

Writ of error by Mrs. Wille Reed from a judgment in favor of J. B. Davis, administrator. Reversed.

E. F. Edwards, for plaintiff in error. L. L. Middlebrook, Capers Dickson, J. F. Rogers, and A. D. Meador, for defendant in error.

LUMPKIN, J. The headnote states very fully the material facts upon which this case turned, and our conclusion upon the same. The retention by the executor of the dwelling house owned by the testator at the time of his death was, in effect, an investment by the former in that dwelling house as a home for the family under the direction given in the will. If the executor had followed the instructions of the will literally, and accordingly had sold this house along with the other realty, and then invested \$1,500 in another house for the use of the family, it cannot be doubted that, according to the scheme of the will, the title to the latter was to be vested in the executor, and not in any particular member or members of the family while they remained together. This must be so, because the will provides for a change in the investment, upon certain conditions, and, of course, contemplated that such change would be made by sale and reinvestment to be conducted by the executor. Treating the house left by the testator as such an investment, we think the legal title certainly remained in the executor until he divested himself of it in winding up the affairs of the estate. When he did part with it, he conveyed it to the testator's daughter; and we find absolutely nothing in the record authorizing the conclusion that the legal title to this particular property, or any share or interest in the same, was ever in any manner vested in the widow. She therefore had no interest in it which could be sold under an ordinary execution against her, although the judgment from which that execution issued was in fact rendered before the executor conveyed the legal title to the daughter. We are therefore satisfied that the claim filed by the latter should have

been sustained, and it should accordingly have been adjudged that the property was not subject to the execution. Judgment reversed.

(95 Ga. 192.)

HAWKINS v. McCALLA et al.

(Supreme Court of Georgia. Dec. 21, 1894.)

ADMINISTRATION OF DECEDENT'S ESTATES—ASSETS—DEATH OF EMPLOYE—RIGHTS OF WIDOW.

1. Where an accident insurance company underwrites the risk of an employer, and by its policy undertakes to indemnify him against loss by reason of negligent injuries to employes, this constitutes no contract between the employes and the insurance company. In case of the homicide of an employe, his widow is entitled to recover therefor, and, if the insurance company chooses to admit its liability and pay to the employer the amount due on the policy in consequence of such homicide, the sum so paid constitutes in no sense assets of the estate of the deceased employe, and therefore an equitable petition filed by creditors of such deceased employe to enjoin the payment of such sum to his widow is not maintainable.

2. If, at the death of an employe, any sums were due to him by the employer, either for wages or otherwise, such debts are assets of the deceased, and may be reached in the ordinary course of administration.

(Syllabus by the Court.)

Error from superior court, Rockdale county; Richard H. Clark, Judge.

Action by Isaac C. Hawkins against the Union Paper-Mills Company and others. From a judgment dismissing the action on demurrer, plaintiff brings error. Affirmed.

J. N. Glenn, for plaintiff in error. J. R. Irwin and A. C. McCalla, for defendants in error.

SIMMONS, C. J. The petition of Isaac C. Hawkins against the Union Paper-Mills Company, A. C. McCalla, and Mrs. Hayden Hawkins was demurred to by the defendants separately, the demurrers were sustained, and to this ruling the plaintiff excepted. It appears from the petition that the plaintiff was a creditor of William Hawkins, a deceased employe of the Union Paper-Mills Company, who, while at work in the service of the company, received injuries which caused his death; that the company, in order "to meet any risk or liability for accidents caused by negligence on the part of itself or its employes, had taken out accidental or other policies of insurance, and, at the time of the injury and death of said William, had a policy or policies in its favor to cover its liability for such death," and "to meet this liability it negotiated with and obtained from the insurance companies with which it took the policies \$450 or other sums to pay for the injuries and death of said William." The petition also alleges that the paper-mills company was due the deceased at the time of his death about \$25 for wages, and still owes this sum to his estate, and that the deceased died intestate, and without any property in hand, and no letters of administration upon his es-

tate had been granted or applied for. The petitioner prayed for an injunction against the payment of any of this money to the widow of the deceased until his claim against the deceased was paid, and that the money be applied to that claim.

1. The contract of the insurance companies, as appears from the petition, was a contract to indemnify the paper-mills company against loss by reason of its liability to employes, and was not a contract with or for the benefit of the employes themselves; and, if the paper mills company was liable for the homicide of this employe, his widow was entitled to recover (Code, § 2971; Acts 1887, p. 43); and the statute which gives her this right expressly provides that no recovery had under its provisions "shall be subject to any debt or liability of any character of the deceased husband." Any sum, therefore, which may have been paid by the insurance companies to the paper-mills company to cover its liability in this case, was in no sense assets of the estate of the deceased employe.

2. If anything was due the deceased by the paper-mills company at the time of his death for wages or otherwise, such debts were assets of the deceased, and could be reached by the ordinary course of administration. It follows from what we have said that the court did not err in dismissing the petition. Judgment affirmed.

(94 Ga. 804)

MALLERY v. YOUNG et al.

(Supreme Court of Georgia. Dec. 21, 1894.)

CAVEAT TO WILL—FRAUD—EVIDENCE—DECLARATIONS OF TESTATOR.

The only ground of the caveat insisted upon at the trial being that the propounder and another had falsely and fraudulently represented to the testator that the caveatrix was not in fact his niece, and had by means of this fraud and deception induced him to disinherit her, and there being no evidence whatever that any such representations had ever been made except the declarations of the testator himself, the caveat was not sustained, and the verdict setting aside the will was without evidence to support it. The declarations of the testator were admissible to show the state of his mind at the time of executing the will, but were not admissible for the purpose of showing that the facts stated by him were true.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Proceeding by Mary A. Young and another to set aside a will. There was a judgment for caveatrix, and John E. Mallery, executor and propounder of the will, brings error. Reversed.

The following is the official report:

John E. Mallery, as executor, propounded a paper for probate in solemn form as the will of James Ellerbee, who died on April 11, 1893. This paper was dated April 22, 1892. The first item of it provides for the payment of debts and for burial. By the next two the testator bequeaths to his cousins, John

E. Mallery and his sister, Sarah Welsh, all of the real estate except 180 acres herein given to Willie Edenfield, whom, it is recited, the testator raised. By the fourth item the sum of \$175 is given to the trustees of Salem Baptist Church, to be used by them in paying existing debts and to make future improvements. By the fifth, all the residue of real and personal property is given to John E. Mallery and Sarah Welsh; and by the sixth, John E. Mallery is appointed executor. Caveats were filed by Mary A. Young and by the executive committee of the Georgia Baptist Convention, the latter claiming under an alleged will of February 11, 1889. At the trial all the grounds of caveat were abandoned except the following, added by amendment by Mrs. Young: "Because the will propounded is not the last will of James Ellerbee, because she is the niece of said testator, being the only daughter of [Louis Ellerbee, the brother] of said testator, and his nearest of kin; that said John E. Mallery and Sarah Welsh deceived said testator as to his true relationship to herself, by repeatedly representing to said James Ellerbee that she, Mary A. Young, was not the daughter of Louis Ellerbee, but the daughter of the widow of said Louis Ellerbee by her second husband; that said James Ellerbee intended to leave his property to her, and would have done so but for said fraud and deception." The jury found in favor of the caveatrix, and a motion by the propounder for a new trial was overruled. The motion alleges that the verdict is contrary to law and evidence, and makes the following assignments of error on the charge of the court: (1) The court charged "that the very nature of a will requires that it shall be freely and voluntarily made; and anything that negatives or destroys this freedom, such as fraud practiced on testator's mind, whereby the will of another is substituted, voids the will." It is alleged that there was no evidence on which to base this charge, it being admitted by the caveators in open court, to the court and jury, that the will propounded was not obtained by any undue influence. (2) The court charged: "The issue is narrowed to one question, and that is whether or not those legatees under this will, Mr. Mallery or his sister, or both, persuaded the testator that Mrs. Young was not his niece, and whether under this influence he made this will." It is alleged that this was not a correct statement of the issue in the case. (3) The court charged: "If you find she was his niece in point of fact, and that they persuaded him she was not his niece, and he so acted, then this will should not be set up." It is alleged that there was no evidence on which to base this charge, and that it is not a correct statement of the law. (4) The court charged: "So there are only two questions in this case: First, was she his niece; and, second, was he persuaded and satisfied she was not his niece, and

under these influences and persuasions was this will made? These are the questions for you to determine. If you find that issue in favor of the propounder, then you should set up the will; on the other hand, if you find in favor of Mrs. Young, then you should find against the will." Error is specified for the same reasons as stated in the second and third grounds. (5) The court charged: "A will executed under a mistake of fact as to the existence or conduct of the heirs at law of the testator is inoperative, so far as such heir at law is concerned, but the testator shall be deemed to have died intestate as to him." It is alleged that this was not applicable to the facts of this case, and was not a correct statement of the law. (6) It is further complained that the court wholly failed and omitted to instruct the jury what proved facts would establish the factum of the will, and make a prima facie case for the propounder, and put the burden on the caveators.

Hines & Felder, Hines & Hale, Brannen & Moore, and L. E. Bleckley, for plaintiff in error. Steed & Wimberly, G. W. Williams, H. D. D. Twiggs, D. R. Groover, and Harrison & Peeples, for defendants in error.

ATKINSON, J. The official report states with sufficient accuracy the contentions between the parties in this case. The verdict was for the caveatrix. Her contention was that she was the next of kin of the testator; that the testator had been induced by the representations of John E. Mallery and Sarah Welsh, who are the principal legatees under the will, to believe that she was not of kin to him; and that, acting under this belief, he had executed the will whereby his estate passed to them instead of to herself. The errors of law complained of go rather to the sufficiency than to the competency of the evidence submitted in the case, and therefore, the real question in the case turning upon the sufficiency of the testimony, it is not material to consider any of the other errors of law alleged to have been committed. It is shown by the testimony in this case that Mary A. Young, the caveatrix, was the niece of the testator. Of this fact he was well advised at a date anterior to the execution of the will. It is not claimed that the testator did not have testamentary capacity. It is not claimed that he was ignorant of the relationship between himself and the caveatrix, and the plaintiff in error contends that there is no evidence whatsoever of undue influence upon the part of these legatees exercised over or operating upon the mind of the testator, save only the declarations of the testator himself to the effect that they had persuaded him that the caveatrix was not his niece. The fact that they had so persuaded him is denied on oath by each of the legatees, and no witness swears to the contrary. Evidence is said to be that which demonstrates and makes clear a question of

fact at issue. Sufficient evidence is such as is satisfactory to the purpose,—satisfactory in its legal sense,—such as satisfies the law as to the existence of a given fact; and, if such evidence of the fact be not submitted, then the evidence may be fairly said to be insufficient to sustain a verdict based thereon. It is a rule of law, well established by a strong and almost unbroken current of authority,—one which has been recognized by this court (see *Dennis v. Weekes*, 51 Ga. 25, headnote 6), one which has been approved by the courts of last resort in a large majority of the states of the Union where a similar question has been under review, and one which has been accepted by the best text writers upon the law of evidence,—that the declarations of a testator, where the issue is of fraud or undue influence in the execution of a will, are not admissible to prove the actual fact of fraud or the exercise of an improper influence by another. They may be competent to establish the influence and effect of the external acts upon the testator himself, their operation upon his mind, but not as evidence of the fact itself that the undue influence was external. See 2 Whart. Ev. § 1010; Schouler, Wills, § 243. As to the facts themselves, such declarations amount to no more than hearsay evidence, and to permit a person to destroy, annul, and revoke a will voluntarily and solemnly executed, by mere oral declaration, contrary to the testamentary scheme expressly declared in a written instrument, is to overturn and destroy one of the most salutary of the elementary rules of evidence. We quote from some of the most thoroughly well-considered cases the following expressions: In *Jackson v. Kniffen*, 2 Johns. 31, Thompson, J., says: "To permit wills to be defeated, or in any manner whatever impeached, by the parol declarations of the testator, appears to me repugnant to the very genius and spirit of the statute, and not to be allowed"; and in *Stevens v. Vanderve*, 4 Wash. C. C. 265, Fed. Cas. No. 13,412, Washington, J., says: "The declarations of a party to a deed or will, whether previous or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than the admission of it, to control the construction of the instrument, or to support or destroy its validity." In *Provis v. Reed*, 5 Bing. 435, where written declarations of the deviser, made after his will, were offered in evidence, Best, C. J., said: "We shall not, for the first time, establish a doctrine which would render useless the precaution of making a will. It would be contrary to the first principles of evidence." These citations might be multiplied, but are, of themselves, we think, sufficient to establish the correctness of the proposition stated. Upon reading this record we find no evidence whatever of any undue influence operating upon the mind of the testator, save that resting for its support upon the declarations of the testator, to the effect that John Mallery and Mrs. Welsh had induced him to believe

that the caveatrix was not of kin to him. In the absence of some testimony outside of these declarations which establishes this fact, it cannot be adjudged that this verdict rests upon any evidence at all. The circuit judge, therefore, should have set it aside, and upon that ground awarded a new trial. Let the judgment of the court below be reversed. Judgment reversed.

(95 Ga. 97)

FORD et al. v. HARRIS et al.

(Supreme Court of Georgia. Nov. 26, 1894.)

DEDICATION OF EASEMENT—OBSTRUCTION—RIGHTS OF PURCHASER—EQUITY PLEADING—NONSUIT.

1. Where the owner of land in a city had it surveyed and laid off into lots, caused a plat of the same to be made which referred to a designated strip of land, shown on the plat, as an avenue, this strip belonging to the owner of the lots, and being so situated as to afford an outlet from the lots into a public street of the city, and where, after distributing copies of this plat, the owner sold the lots at public auction, representing that they were sold by the plat, and in the deed to the purchaser mentioned this plat as descriptive of the property, the purchaser at the sale and his successors in title acquired the right to use this strip as a way to and from the lots, and the seller had no right to subsequently close the strip, or to maintain an obstruction in it existing at the time of the sale. The easement thus acquired by the purchaser and those holding under him would not be lost by mere lapse of time or nonuser, unless expressly abandoned.

2. One who held by bond for titles under the successor in title of the first purchaser was entitled to maintain against the original vendor a proper proceeding for the purpose of establishing the right to have the strip kept free from obstructions.

3. The equitable petition as originally filed was, in substance, sufficient to authorize a decree

adjudicating the plaintiffs' right, as against the defendants, to the easement in question; but a general demurrer to the petition having been sustained, with leave to amend "by electing to proceed for damages or for specific performance," and the plaintiffs having amended "by electing to proceed for the specific performance of the contract by opening the avenue," and there being no contract alleged or proved of which the court could decree a specific performance, there was no error in granting a nonsuit.

4. Inasmuch, however, as the case, upon its substantial facts, seems to be meritorious, direction is given that the plaintiffs have leave, at or before the time when the remittitur from this court is entered in the court below, to amend their petition by adding thereto such allegations and prayers as may be suitable to obtaining the relief above indicated, or such other relief, by injunction or otherwise, as may then seem appropriate.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

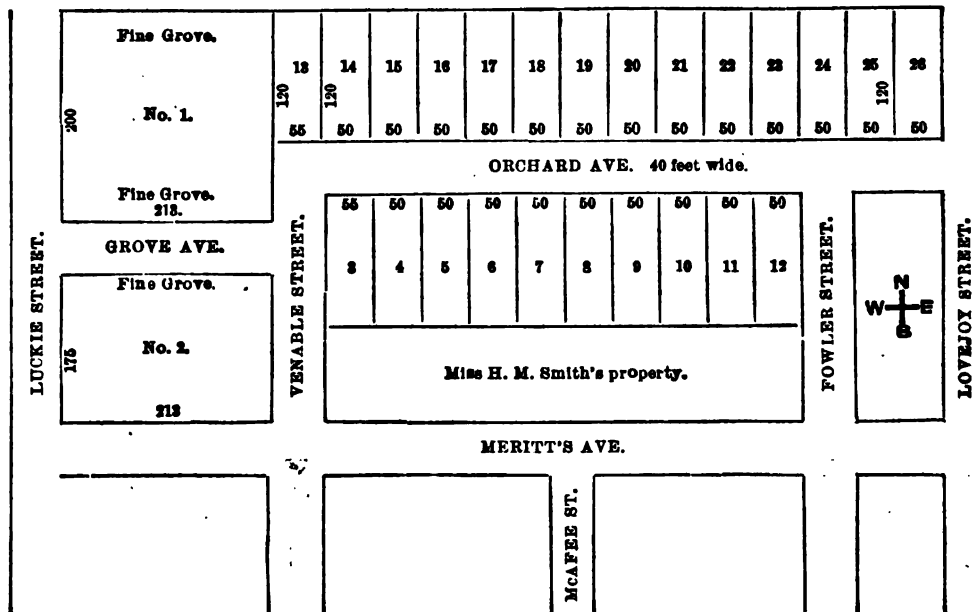
Action by P. S. B. Ford and others against A. L. Harris, trustee, and others, to remove obstructions from a street. From a judgment of nonsuit, plaintiffs bring error. Affirmed.

The following is the official report:

The petition prayed for a decree declaring Grove avenue, as indicated on a certain plat, a street, for the benefit of parties on Orchard avenue, etc., and that the obstructions placed by defendants across Grove avenue be removed. The court granted a nonsuit, and plaintiffs excepted. The evidence made the following case:

January 24, 1882, a public sale was made of a number of lots, constituting a portion of the Harris property (owned by defendants). The following plat was introduced in evidence:

GRESHAM'S PROPERTY.



Plat by Frierson & Leak of the Harris Property, sold Jan. 24, 1882.

On January 23, 1882, the defendants conveyed to Boyd a parcel of land described as "commencing at the southeast corner of Venable street and Orchard avenue, and running thence east, along the south side of Orchard avenue, 501 feet, to Fowler street; thence south, along the west side of Fowler street, 110 feet; thence west, parallel with Orchard avenue 501 feet, to Venable street,—being lots numbered from three to twelve (3 to 12), both inclusive, of the Harris property, as per plat of Frierson & Leak, January 24, 1882." The plaintiffs hold under a deed from Boyd dated June 30, 1890, conveying the same property as described in the deed from defendants to Boyd, and making the same reference to the plat. Plaintiffs also put in evidence a deed from defendants to Simmons, of the same date as their deed to Boyd, conveying a parcel of land described as "commencing at the northeast corner of Luckie street and Meritt's avenue, and running thence north, along the east side of Luckie street, 175 feet, to Grove avenue; thence east, along the south side of Grove avenue, 213 feet, to Venable street; thence south, along the west side of Venable street, 175 feet, to Meritt's avenue; thence west, along the north side of Meritt's avenue, 213 feet, to the starting point, being lot number two (2) of Harris property, as per plat of Frierson & Leak, made January 24, 1882." Boyd testified that he attended the sale of the Harris property on January 24, 1882, and at that sale bid off the lots numbered on the plat from 3 to 12, inclusive. He identified the plat introduced as one of the plats on hand at the time of the sale, and as being a copy if not the identical plat he delivered when he sold the land. He bought the land by the plat. He had no particular use for Grove avenue during the time he owned the land; did not ask for it to be opened; and in fact it has never been opened. But he understood that he bought with the privileges as set out upon the plat by which they were sold, and had no notice that any of the streets designated on the plat would not be opened when asked for or needed. He never heard of any reservation. Harris had a fence across Grove avenue, that extended around his home, including lots 1 and 2 of the plat, at time of the sale, which has remained there ever since, with Harris in actual possession. There was a bluff six or seven feet high at Venable street, that would have to be cut down before Grove avenue could be opened so as to travel through it. Gresham street into Luckie street, on the north side of the Harris property, has been opened since the sale in January, 1882, and furnishes an outlet through Fowler street and Gresham street into Luckie street for this property. The failure to open Grove avenue would depreciate the value of the property witness bought, although he himself did not need it, as he used the property for a cow pasture. Luckie street was the most public

and accessible thoroughfare from that property to the center of the city, and Grove avenue would be more convenient for access to this property from Luckie street. Other testimony was that the loss of Grove avenue to plaintiffs' property would depreciate its value very much, while the opening of said avenue would be a valuable appurtenance to their property, being worth \$1,000 to the same; that plaintiffs traded on the faith of the plat as part of the deeds; and that the plat would be abode by, and, when wanted, Grove avenue would be opened, etc.

W. J. Spears and J. A. Anderson, for plaintiff in error. Mayson & Hill, for defendant in error.

LUMPKIN, J. The material facts are stated by the reporter.

1. Upon the principle ruled in *Bayard v. Hargrove*, 45 Ga. 342, which was approved in *Harrison v. Augusta Factory*, 73 Ga. 447, we have no hesitation in concluding that, by virtue of the sale made by A. L. Harris, trustee, and Julia E. Harris, in January, 1882, a right of way over the strip of land designated in the plat as "Grove Avenue" passed to every purchaser at that sale, and that the sellers of the lots were thereby estopped either from closing up the strip or maintaining an obstruction in it existing at the time of the sale. There was probably no dedication, in the technical sense of that word, of the strip in question to the public as a street; but undoubtedly the purchasers of the lots acquired an easement in the use of the strip as a way to and from their property. Properly speaking, there can be no dedication to private uses, but only to the public use. However, if the owner of land lays out streets and alleys, and afterwards sells lots bounding upon them, while this does not constitute them public streets, unless the public shall in some way accept and adopt them as such, yet the purchasers of those lots acquire the right to have the strips designated as streets remain open for their use as a perpetual easement over the ground for ingress to and egress from their property. Washb. Easem. (4th Ed.) 203, 204. The mere fact that the purchasers did not immediately begin to exercise their right to use the strip as a way, or that they delayed doing so for a number of years, would not occasion a loss of the easement. Their right to it being perfect and complete, they could not be deprived of it except by express abandonment, or by such conduct on their part as would be tantamount to the same. We do not, of course, mean to say that a right of this kind might not become stale by long lapse of time, or by nonuser under circumstances manifesting that the parties interested had no intention ever to claim or use the right. Under the facts of this case, the successors in title of the original purchasers of the lots succeeded to their rights in the

easement, and it passed from one to the other as appurtenant to the lots. The case of *Blissell v. Railroad Co.*, 23 N. Y. 63, will throw some light on the case in hand.

2. We also think that one in possession and holding under bond for titles from a successor in title of the original purchaser also had the right to enjoy this easement, and to institute proper proceedings to establish and secure that right. His vendor would in no sense be injured thereby, but, on the contrary, would be benefited, because, in the nature of things, the opening of Grove avenue would necessarily enhance the value of the property, and thus make the security for the purchase money better. This view is consistent with the ruling in the case of *Fulton Co. v. Amorous*, 89 Ga. 614, 16 S. E. 201, especially as it appears in the present case that the plaintiff's vendor was a party plaintiff to the action, and, of course, assenting to it. The case of *Jones v. Napier*, 93 Ga. 582, 20 S. E. 41, rests upon an entirely different principle from the case at bar. The language used in the opinion filed in the *Napier* Case, pointing out the distinction in principle between that case and the Case of *Amorous*, is applicable here. While one holding land under a bond for titles may, consistently with the rights of his vendor, do anything to protect the property from waste or enhance its value, he should not be permitted to do anything which will prejudice the rights of the vendor or injuriously affect his security.

3, 4. We think the plaintiffs' declaration, as originally filed, made a case entitling the plaintiffs to a decree adjudicating their right, as against the defendants, to the easement in question. The court sustained a general demurrer to the petition, but in the order provided that the plaintiffs have leave to amend so as to proceed for damages or for specific performance. No exception was taken to this action of the court, but the plaintiffs undertook to comply with the terms of the order by amending their declaration, and praying that the defendants be decreed to specifically perform the contract by opening the avenue. The difficulty was the defendants had made no contract to "open the avenue," nor to do anything else capable of enforcement by a decree for specific performance. Therefore, the plaintiffs entirely failed by their proof to make out a case. As above stated, however, in our opinion, the petition as originally filed was good as against a general demurrer; at least, to the extent of supporting a verdict and decree establishing the right of the plaintiffs to the free and unobstructed use of Grove avenue as a way to and from their property. We, therefore, think the general demurrer should have been overruled; and although, as no exception to the action by the court was taken, no question with reference to this matter was properly presented to us for determination, yet as the case, upon the facts presented, appears to be meritorious, we have given direction that the plaintiffs

be granted leave to so amend their petition as to obtain the relief above indicated, or such other relief as may seem appropriate upon further investigation and development of the case. Judgment affirmed, with direction.

(95 Ga. 208)

RAU v. UNION PAPER-MILL CO.

(Supreme Court of Georgia. Dec. 21, 1894.)

CORPORATE PROPERTY—WHEAT CONSTITUTES.

Where individuals engaged as partners in the conduct of a given business applied to and obtained from the superior court a charter incorporating them under the same name as that previously borne by the partnership, although the petition for incorporation and the order granting the charter recited in loose and general terms, but without describing any particular property, that the capital stock of "thirteen thousand dollars in lands, machinery, water power, money, other material and property" had been fully paid in, yet, where in fact the corporation was never organized, and never actually did business as such, but the business was continued by the partnership, and the land referred to in the petition for incorporation was sold by certain of the petitioners, to whom it had belonged, prior to the application for a charter, to a bona fide purchaser, for value, who bought without notice of the fact of incorporation, and whose title was duly recorded, such land was not subject to a judgment against the corporation, obtained by a creditor upon an account for goods sold and delivered to the corporation as such after the sale of the land had been made.

(Syllabus by the Court.)

Error from superior court, Rockdale county; Richard H. Clark, Judge.

To property levied on and that of the Stewart Paper Manufacturing Company, at the suit of George Rau, the Union Paper-Mill Company interposed a claim of ownership. From an adverse judgment, plaintiff brings error. Affirmed.

J. N. Glenn, for plaintiff in error. Henry Jackson and J. B. Irwin, for defendant in error.

ATKINSON, J. An execution in favor of Rau against the Stewart Paper Manufacturing Company, based upon a judgment of date September 14, 1892, was levied upon 100 acres of lots of land No. 318, and 65 2-5 acres of lot 317 in the Sixteenth district of Rockdale county, the levy embracing all the buildings, engines, machinery, etc., located on the land, the property being known as the "Rockdale Paper-Mill Lands." The property was claimed by the Union Paper-Mill Company. There was a verdict finding the property not subject, and, plaintiff's motion for a new trial being overruled, he excepted. It appeared from the evidence that in July of 1886 Benjamin N. McKnight and Michael J. Brannon, of Rockdale county, George W. Stewart and William M. Stewart and M. J. Ivey, of Fulton county, applied to the superior court of Rockdale county for a charter, praying that they be incorporated under the name of the Stewart Paper Manufacturing Company, together with various other prayers, and that in Au-

gust of that year the charter so applied for was granted by the court. It also appeared that from the year 1894 up to the time of this application for and grant of charter, and until the year 1898 thereafter, the title to the land levied upon, and on which the paper plant was situated, was in Benjamin N. McKnight, and that on May 30th of the year last named, to wit, 1898, said McKnight executed to George W. and W. M. Stewart a deed conveying five-sixths of 165 acres, including the paper-mill property, and on May 16th of the same year said McKnight executed to M. J. Ivey a deed to the remaining or one-sixth interest in the same property. It further appears that in May, 1898, George W. and W. M. Stewart executed to Wellhouse & Sons a warranty deed to the same property and interest as was conveyed to the former by McKnight, and that, the Stewarts having executed this deed to Wellhouse & Sons for the purpose of securing a loan, the latter in turn executed to the Stewarts a bond for titles, whereby they obligated themselves to reconvey to the Stewarts upon the payment of the loan secured by said deed. Thus the matter stood until October 7, 1890, when George W. and W. M. Stewart conveyed five-sixths of the absolute title to this property to Wellhouse & Sons, at the same time surrendering to the latter the bond for titles covering the same property theretofore given by Wellhouse & Sons to the Stewarts; and on the same day the Stewarts transferred and assigned to Wellhouse & Sons a certain bond for titles which they had previously acquired from M. J. Ivey, covering the remainder, or a one-sixth interest in the property in controversy. On November 25, 1891, Mrs. Kiser (who was formerly Mrs. M. J. Ivey, Ivey being dead, and having left no children) executed to Wellhouse & Sons, in compliance with the provisions of the bond for titles from Ivey to the Stewarts, and transferred by the latter to Wellhouse & Sons, a warranty deed conveying the one-sixth interest covered by that bond. It further appeared that on February 2, 1892, Wellhouse & Sons executed to the Union Paper-Mill Company a deed conveying to it this property. All of these conveyances purport to have been made for a valuable consideration, were duly recorded, and it is upon this chain of title that the Union Paper-Mill Company bases its claim. During the time the Stewarts owned the paper mills they conducted the business under the name of the Stewart Paper Company. The application for charter by the Stewart Paper Manufacturing Company prayed, and the charter granted thereon provided, that the Stewart Paper Manufacturing Company be incorporated with a capital stock of \$13,000, with the privilege of increasing the same to \$25,000, each reciting, "which amount of thirteen thousand dollars in lands, machinery, water power, money, other material and property is fully paid in," and also providing that the chief place of business of the corporation should be at Rockdale Paper

Mills, on Yellow river, near Conyers, in the county of Rockdale, and that the aim and object of the corporation was to purchase and otherwise procure a location, land, material, necessary power of water, steam, or other kinds, fixtures, machinery, and other property and effects that may be useful or needful in the manufacture of book, news, manilla, wrapping, and all other kinds of paper. It does not appear that the incorporators named in the charter ever met, organized thereunder, or in pursuance of the powers and privileges thereby granted and conferred ever made any contracts or had dealings of any character with any person whomsoever. There was no conveyance of the property in question to the corporation in its corporate name or otherwise. It seems that the Stewarts continued to run and operate the mills owned by them in the manufacture of paper in the same manner after as before the grant of the charter, and that in running and operating their business for a portion of the time they used the name of the Stewart Paper Company, and at other times that of the Stewart Paper Manufacturing Company. During the time they were engaged in running and operating the property, the Stewarts, for material necessary in the conduct of their business, contracted a debt with the plaintiff in execution. For the nonpayment of this debt suit was brought, and the judgment recovered upon which this execution issued. Prior to the date of the deed from the Stewarts to Wellhouse & Sons, the latter caused an examination on the records in Rockdale county to be made, to ascertain whether there were any liens, incumbrances, or other conveyances of record which in any way impaired the title of the Stewarts to the property in question. There were none such, and finding the chain of title into the Stewarts regular, they purchased the estate, and paid them a full consideration therefor. The Union Paper-Mill Company was incorporated after the conveyance to Wellhouse & Sons, and it took by virtue of the conveyance from Wellhouse to it. The main point of contention upon the part of counsel for the plaintiff in error was that the court erred in charging the jury, in substance and to the effect, that the mere fact that the applicants for the charter of the Stewart Paper Manufacturing Company were the owners of the property involved in this litigation, and that they recited in their petition for charter that \$13,000 of the capital stock of the corporation had been paid in in lands, water power, machinery, etc. (as described in the body of said application), would not have the effect to vest the legal title to the property thus referred to in the application for charter in the corporation, but that, in order to divest the owners of their title, it was necessary that there should be an organization of the company, and a conveyance by the owners of the property to the corporation. This charge is excepted to as being an erroneous statement of the law. We do not think this contention of the plain-

tiff in error well founded. A formal conveyance of real property is necessary to a transmission of title in this state, unless the owner thereof so deal with it as to vest an equitable interest in another, and raise an estoppel against the assertion of title upon his part. In the first place, in order to make a grant effective, there must be such description of the premises as that the same is capable of application to a particular subject. If we were at liberty to regard this application for the grant of charter and the consequent grant of the charter thereon as sufficient to operate as a formal conveyance, there is no such identification of the thing conveyed as would enable the court to determine what particular land, what particular water power, or what particular machinery was intended to be covered thereby. These incorporators may have owned a half dozen mill sites, and the general description in this application for charter would be equally applicable to each of them; so that the grant would be void for uncertainty, treating it even as a conveyance. In the second place, a corporate existence was essential to the acquirement of real estate. No title could by possibility pass to this corporation until by organization it had attained an actual entity. As it stood upon the moment of the grant of its charter, it was a species of legal foetus,—a corporate body in embryo. Organization was essential to its endowment with the vital principle. Without this it could do no corporate act, could receive no corporate property, could incur no corporate liability, and against it no corporate judgment could be legally rendered. If individuals assumed to use its corporate name for the conduct of their own business, they might render themselves liable in suit against them as individuals, but, there being no corporation, it follows that no judgment could be rendered against a corporation. We recognize the distinction between corporations *de jure* and corporations *de facto*, and that, with reference to the latter, where the corporators have assumed to act under a corporate name, they cannot, by reason of informalities in the execution of corporate powers escape liability for corporate acts; but nothing of that kind occurs in this case. The court simply charged the jury as to the legal effect of the act of incorporation upon the title to this property in the hands of individual corporators, and we think his instructions to the jury were correct.

We do not mean to say that a case might not arise in which corporators, by the terms of their application for a charter, might not so far commit their property as assets of the corporation as that if, upon its organization, the corporation did in fact take possession and control the property, and upon the faith and credit of property thus acquired and thus controlled incurred liabilities, the courts would treat such property, as to such debts, as the property of the corporation, not upon the theory that the corporation had a legal title to

the estate, but upon the theory that the corporators themselves would be estopped to set up title in themselves as against a bona fide creditor upon the faith of their apparent dealings with their property. But this is not a contest between the corporators themselves and a person claiming to be a creditor, as appeared in *Stewart Manuf'g Co. v. Rau*, 92 Ga. 511, 17 S. E. 748. It is a contest between a creditor of the alleged corporation and a bona fide purchaser, without notice, from the corporators. That Wellhouse & Sons were bona fide purchasers of this property is not open to serious debate under the facts of this case is clear. Whether the grant of this charter carried into the corporation any property of the corporators at all is one thing, and whether it carried into the corporation the property of the corporators in such form as to legally charge a purchaser with notice is entirely a different thing. Let us assume, for the purposes of this discussion, that this charter could operate as a conveyance, and that, being a public record, a person was bound to take notice thereof. From an inspection of this record, what facts would be disclosed to an intending purchaser which would apprise him that the particular property in controversy was the property intended to be carried into the corporation by the application for charter? There is nothing in the petition or charter to identify it, either in point of value or character, as the property now in question. As a matter of fact, the undisputed evidence shows that Wellhouse & Sons made diligent inquiry into the status of this property before they purchased, and found nothing upon the record which would arouse the slightest suspicion in the mind of the most prudent and careful person suggestive of the fact that the Stewarts, from whom they purchased, had at any time parted with their title to this property. They paid full value for it, and, indeed, there is no circumstance connected with the entire transaction which casts the slightest suspicion upon the bona fides of their conduct. It is clear that, as against such a purchaser, title would not pass by operation of the estoppel invoked in this case, whatever might be its effect as against the corporators.

Exception was taken to the exclusion by the court of certain answers to interrogatories addressed to the plaintiff, who testified that he had extended this credit to the Stewart Paper Manufacturing Company upon the faith of information derived by him from a mercantile agency, to the effect that the Stewart Paper Manufacturing Company was a corporation in good standing, and worthy of credit. Whether these declarations of this mercantile agency would be admissible as against anybody we do not deem it necessary to decide, but certainly they are not admissible in a controversy of this character, where it is not shown, nor sought to be shown, that this purchaser, against whom an equitable estoppel is invoked, bought with notice,

either express or implied, of the plaintiff's debt, or the circumstances under which it was incurred. Judgment affirmed.

(95 Ga. 231)

ROUNTREE et al. v. DURDEN.

(Supreme Court of Georgia. Dec. 21, 1894.)

CONVICTS—UNAUTHORIZED HIRING OUT—APPLICATION OF PROCEEDS.

Although the county authorities have no power to hire out or otherwise employ misdemeanor convicts save in legally organized chain gangs, and upon public works, yet where the county commissioners in fact hired such convicts to a private person, who, as an individual, employed them in building bridges for the county at an agreed compensation, and a fund was realized therefrom, such fund was not subject to distribution among the officers of court under the provisions of the act of 1891, which limits the fund applicable to the payment of the fees of these officers to such compensation only as may be received from county or municipal corporations for the labor of convicts hired to them.

(Syllabus by the Court.)

Error from superior court, Emanuel county; R. L. Gamble, Judge.

Application by Frank R. Durden for a writ of mandamus against G. S. Rountree and others. The writ was granted, and petitioners bring error. Reversed.

Alfred Herrington and Glenn & Maddox, for plaintiffs in error. W. D. D. Twigg, Evans & Evans, and Jas. K. Hines, for defendant in error.

SIMMONS, C. J. The solicitor of the county court of Emanuel county applied for a mandamus against the commissioners of roads and revenues of that county requiring them to apply to the payment of his insolvent costs money received by them from the hire of convicts tried and convicted in the county court. A mandamus absolute was granted, and the commissioners excepted. The application for mandamus and the order of the judge granting the same were based upon the act of October 16, 1891, "to authorize county authorities to hire out misdemeanor convicts, and to provide for the distribution of the money arising therefrom," which act provides that, where "said convicts are delivered to any other county or municipal corporation, as now provided by law, said county authorities are hereby authorized to receive compensation for the labor of said convicts, and the money so received shall be first applied to the payment of the fees of the officers of court," etc. 1 Acts 1890-91, p. 212. The money to be applied in this manner, it will be observed, is to be derived from the hire of convicts to "any other county or municipal corporation." It appears in this case, however, that the fund in question was derived, not from the hire of convicts to another county or to a municipal corporation, but from their hire to a private person, who, as an individual, employed them in building bridges for the county at an agreed compensation. It was contended that, notwithstanding such

hiring was unauthorized by law, yet, when the county authorities received money from that source, it became subject to distribution under the provisions of the act. The obvious reply to this is that the act does not authorize the distribution of a fund derived from a source not contemplated by the act. The mere fact that the money came from the hire of convicts is of no more consequence, so far as any right to subject it to distribution under this act is concerned, than if it came from a source wholly disconnected with the hire of convicts. It follows that the court erred in granting the mandamus. Judgment reversed.

SIMMONS et al. v. AUTEN.

(Supreme Court of Georgia. Dec. 4, 1894.)

JUDGMENT BY DEFAULT—WANT OF ISSUABLE DEFENSE.

The action being upon an unconditional contract in writing, the mere marking of the name of defendants' counsel upon the bench docket presented no legal obstacle to the rendition of a judgment by the court in favor of the plaintiff; the defendants, up to and including the time when the case was called for trial, having made no offer to file an issuable defense under oath.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Mrs. Hester A. Auten against C. J. Simmons and others. Judgment for plaintiff, and defendants bring error. Affirmed.

See Simmons v. Trust Co., 21 S. E. 1005, for opinion applicable to this case.

Simmons & Corrigan, for plaintiffs in error. J. B. Goodwin and J. A. Anderson, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 267)

McREA et al. v. DUTTON.

(Supreme Court of Georgia. Jan. 14, 1894.)

TENANT IN COMMON—CONSTRUCTION OF DECREE.

Although the title to the property in South Carolina, the proceeds of which were invested in land in this state, embracing that now in controversy, was vested in the mother of the plaintiffs for life, with remainder to her children, yet as the land was in fact conveyed by deed in 1860 to a trustee for the mother by name "and her issue," and as subsequently, upon a bill in equity filed by a trustee for the mother and children, to which the latter were also parties complainant by next friend, against two persons who had fraudulently obtained possession and a claim of title to the land, which bill in effect alleged a present title and interest in the children as well as in the mother, it was decreed that "said complainants do recover of the said defendants; * * * that [the land, describing it] be, and the same is, fully vested in and belongs to [the trustee for the complainants, naming him]; that he do hold it in fee simple under and by virtue of this decree and the deed [of 1860]; * * * and that the complainants be put into immediate possession,"—the effect of the decree, in the light of all the antecedent facts, was to make the mother and the children tenants in common; and consequently she could not sell and convey in fee simple the

entire estate, but only her interest or undivided share in the same. This being so, on the trial of an action brought by the children after her death to recover the land from one holding under her vendee, it was error to direct a verdict in favor of the defendant; it not appearing from the evidence that he had a title by prescription, or otherwise, superior to their right to recover. The children, however, were not remainder-men, and their right to sue in no wise depended upon the death of the mother.

(Syllabus by the Court.)

Error from superior court, Bulloch county; R. L. Gamble, Judge.

Action in ejectment by Julia A. McRea and others against A. D. Dutton. Defendant had judgment, and plaintiffs bring error. Reversed.

Dell & Wade, G. S. Johnston, and Harrison & Peeples, for plaintiffs in error. D. R. Groover and J. A. Brannen, for defendant in error.

LUMPKIN, J. It appears from the record that in 1859 Mrs. Sophia J. McRea and her children then in life, as well as such others as might be born to her thereafter, were entitled to certain property in the state of South Carolina, the interest of the mother being a life estate, with remainder to the children. A decree was rendered by a court of competent jurisdiction in that state directing that the property be sold, and the proceeds paid to trustees in Georgia for Mrs. McRea and her children, to be reinvested for the use of the mother for life, and, at her death, for the benefit of the children. The proceeds of the South Carolina property, or a portion of the same, were in 1860 invested in lands lying in Bulloch county, Ga., embracing the tract now in controversy; the deed of conveyance being made to Neal A. McRea, "trustee for S. J. McRea and her issue." Afterwards one Samuel F. Saunders obtained a fraudulent judgment against Neal A. McRea as trustee. The land was sold under an execution issued from that judgment, and one Richard F. Saunders became the purchaser, and went into possession. In 1869 a bill was filed in Bulloch superior court against both Samuel F. and Richard F. Saunders, by one Robert M. Williams, Jr., as trustee for Mrs. McRea and her children, to which bill all the children were also made parties complainant in their own names, and were represented by a next friend. Among other things, the bill alleged fraud and conspiracy on the part of the defendants by which the complainants had been deprived of the land. It also, in effect, alleged a then present title and interest in the children, as well as in the mother, and prayed for a cancellation of the sheriff's deed to Richard F. Saunders, and for a recovery of the property. Upon this bill a decree was rendered April 3, 1875, the portion of which now material is quoted in the headnote. In 1876, Mrs. McRea sold and conveyed the land now in controversy in fee simple to one Lanier, under whom Dutton, the defendant in the present

action, holds by a regular chain of title. After the death of Mrs. McRea, her children brought an action of ejectment against Dutton, and, upon the above-stated facts, the court directed a verdict in favor of the defendant.

It is evident that the theory upon which the plaintiffs' counsel rested their right to recover was that they were remainder-men, and could not bring suit until after the death of their mother. The view entertained by the trial judge doubtless was not only that the plaintiffs were not remainder-men, but also that they had no interest whatever in the land. After thorough consideration, we are of the opinion that neither of these theories was exactly correct. We agree with the court that the plaintiffs were not remainder-men, but we think that, under the decree rendered in 1875, they were tenants in common with their mother. Whatever may have been the proper construction of the conveyance made in 1860 to Neal A. McRea as trustee for Mrs. McRea "and her issue," when considered in the light of the above-mentioned equitable proceeding in South Carolina, we are convinced that the effect of the decree rendered in Bulloch superior court was to make the mother and the children tenants in common. These children were direct parties to the bill resulting in that decree, and, fairly construed, the allegations of the bill amounted to an assertion that they and their mother were the true owners of the land at the time the bill was filed, each having a present and common interest therein. The bill did not set up that the children were remainder-men, but proceeded on the theory that they were tenants in common with their mother. It is true that these things were not alleged unequivocally and with absolute distinctness in the bill; but we think, fairly construed, its meaning and purpose in these respects were as we have stated. If, prior to the rendition of the decree, the children had no interest at all in the land, they were benefited in so far as the decree conferred an interest upon them. If, before that time, the mother had only a life estate, and the children were remainder-men, the effect of the decree was to reform and modify the deed of 1860 by changing their interest thereunder from that of remainder-men, and making them tenants in common with the mother. This was within the power of the court, and consistent with the allegations of the bill; and the decree, never having been excepted to nor vacated, remained binding upon all the parties affected thereby. All the parties at interest were properly before the court, the children being represented not only by a trustee, but also being personally parties complainant, and, as such, being represented by a next friend. We therefore think there can be no doubt that they were bound by the terms of the decree, the effect of which has been stated. The result is that the deed from Mrs. McRea to Lanier could convey no

greater interest than her undivided share in the land; and therefore he and his successors in title took by that deed no title to the undivided shares of the children. They not being remainder-men, however, their right to sue in no way depended upon the question of whether their mother was living or dead. In the absence of proof showing that the defendant Dutton had a title by prescription or otherwise superior to their right of recovering their respective shares in the land, it was wrong to direct a verdict in his favor.

In view of the theories entertained, respectively, by counsel for the plaintiffs and by the trial judge, there was no occasion for the defendant to show title in himself by prescription, or otherwise present a complete defense to the action. The case has not been properly tried, but, in the light of this opinion, its full merits will doubtless be developed at the next hearing. It appears that the youngest of the children was born about the year 1861. Whether or not the title which we think was vested in them by the decree of 1875 has been defeated by the lapse of time will necessarily depend upon such further facts as may be brought to light when the case is tried again. Judgment reversed.

(95 Ga. 215)

COOK et al. v. DEKALB COUNTY.

(Supreme Court of Georgia. Dec. 21, 1894.)

BRIDGES—FAILURE TO TAKE BOND FROM CONTRACTOR—LIABILITY FOR DEFECTS.

1. Where, prior to the passage of the act of 1888, a public bridge was constructed, under contract with the authorities of one county, across a stream dividing it from another (the authorities of the latter refusing to participate therein), it was the duty of the county authorities causing the construction of such bridge to take bond in accordance with section 691 of the Code; and, failing so to do, the county for which they acted is liable for damages resulting to a traveler occasioned by a defect in such bridge, of which these authorities had timely notice.

2. There being sufficient evidence to support a finding for the plaintiff, it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from city court of Dekalb; H. C. Jones, Judge.

Action by Mary E. Cook and another against county of Dekalb. From a judgment of nonsuit, plaintiffs bring error. Reversed.

Geo. W. Gleaton and John S. Candler, for plaintiffs in error. Candler & Thomson, for defendant in error.

ATKINSON, J. Cook and his wife brought suit against the county of Dekalb for damages for personal injuries resulting to Mrs. Cook in consequence of a fall by her from a public bridge constructed by the county of Dekalb across a stream which was the dividing line between Dekalb and Rockdale counties. It appeared that the bridge in question was constructed in 1887 by the county of Dekalb; the county authorities of Rockdale

county refusing to participate in, or contribute anything towards, the construction thereof. The county of Dekalb, by its authorities, caused this bridge to be constructed under contract, and failed to take any bond from the contractor in accordance with section 671 of the Code. Before the expiration of seven years the bridge got out of repair. Of this fact the road commissioners of the county of Dekalb had due notice, and, being so notified, permitted the bridge to remain with a hole in it, variously estimated by the witnesses to be six inches wide, two feet long, and seven inches wide, three feet long. It appears that Mrs. Cook, the party who was injured, was driving a gentle horse, attached to a buggy, across this bridge, when the horse, becoming frightened at this hole, refused to pass it, and, backing the buggy, precipitated the buggy, its occupant, and itself into the stream below, inflicting serious injuries upon Mrs. Cook. There were no banisters and no railing constructed upon this bridge to prevent such a catastrophe. Upon this testimony, the payment of her claim for damages being refused by the county commissioners of Dekalb county, the plaintiffs brought their action, and upon the trial of the case a nonsuit was awarded.

The special ground upon which the court rested its judgment for granting the nonsuit does not appear in the record, but its judgment was awarded generally upon the insufficiency of the evidence. In the argument before this court the principal contention, however, of the defendant in error, was that the court ruled correctly upon the idea that one county has no authority, under the statute law of this state, of its own motion, to construct a public bridge across a stream dividing it from another county, and that if it assume to construct such a bridge, and is in any respect negligent, the person injured is without remedy. This is the only ground upon which it could be seriously contended that the judgment of nonsuit was right, for the reason that the plaintiffs established their claim by such testimony as, if presented to the jury, might have been satisfactory to them, and, if believed to be true, would have justified a verdict in favor of the plaintiffs. We do not think the contention of the defendant is well founded. The act of 1881 entitled "An act to regulate the manner of letting out contracts to build or repair public bridges over water courses which divide one or more counties from each other," etc., is cumulative and explanatory of section 678 of the Code. This section of the Code provides generally that, when a bridge or ferry is necessary over any water course which divides one county or more counties from each other, each county must contribute equally towards the building and keeping the same in repair, or in such proportion as would be just, taking into consideration the taxable property of each; but the act of 1881, to which we have referred, enters upon

the details, and provides how and in what manner assessments shall be levied upon the respective counties for this purpose, and how plans and specifications should be prepared. Section 679 of the Code provides that if any county refuses to undergo its fair proportion of such expenses the other county or counties may construct the work, compel the other to contribute by suit, and, until such contribution takes place, may have exclusive control thereof, and charge toll thereon against all the citizens of the refusing county. Under the provisions of the latter section of the Code, the county of Dekalb was authorized to proceed with the construction of this bridge, it appearing that the county of Rockdale refused to contribute thereto. It did so. Its authorities caused the same to be constructed under a contract, and failed to take the bond required by law. Section 691 of the Code provides that, if the county authorities fail to take the bond required by section 671 of the Code, then the county shall be liable, in the place of the contractor. If injury be done to one by reason of the defective construction of such a bridge, he will be entitled to recover, as against the county whose authorities failed to take the bond referred to, provided his injuries occur within seven years from the date of the construction of the bridge. If county authorities would absolve their counties from liability, they must require of the contractor the bond required by law. Otherwise the county is liable. See *Collins v. Hudson*, 54 Ga. 25; *Mackey v. Ordinaries*, 59 Ga. 832; *Monroe Co. v. Flynt*, 80 Ga. 489, 6 S. E. 173. The plaintiffs having, therefore, otherwise proved their case, there is no legal impediment to their recovery against the county of Dekalb, and the court therefore erred in granting the nonsuit. Let the judgment of the court below be reversed. Judgment reversed.

(95 Ga. 215)

PHIPPS v. ALFORD.

(Supreme Court of Georgia. Dec. 21, 1894.)

RES JUDICATA—DEFAULT JUDGMENT—EXECUTOR—DISMISSAL OF ACTION.

1. Where an action was brought against an executor upon a demand due by his testator, and no defense was made, the judgment was properly entered against the defendant *de bonis testatoris*, and amounted to a conclusive admission of assets on the part of the executor. Execution having issued, a return of *nulla bona* having been made, and a subsequent action upon this judgment having been brought against the executor in his individual capacity, it was too late for him to plead or prove as a defense a want of assets existing at the time when the original suit was brought.

2. Where an action was brought in a justice's court, which, after the hearing of evidence, was dismissed by the court, and an appeal entered by the plaintiff, and thereafter dismissed by him, this constituted no bar to bringing a second suit upon the same cause of action. The effect of dismissing the appeal was to leave in force the judgment of dismissal rendered by the justice's court, and that judgment, under the circumstances, was equivalent to a judgment of nonsuit.

(Syllabus by the Court.)

Error from city court of Dekalb; H. C. Jones, Judge.

Action by Sarah E. Phipps against J. T. Alford. Defendant had judgment, and plaintiff brings error. Reversed.

J. A. Wimpy, for plaintiff in error. Geo. W. Gleaton, for defendant in error.

SIMMONS, C. J. Alford was sued individually for the amount of a judgment rendered against him as executor of Mrs. Pierce. It appeared from the plaintiff's petition, and from the evidence at the trial, that the defendant was duly appointed executor of Mrs. Pierce, qualified as such, and entered upon the administration of the estate; that on April 13, 1893, the petitioner sued him, as executor of said estate, to the May term, 1893, of a magistrate's court mentioned, for the recovery of \$44 and interest due by account against Mrs. Pierce, and on the same day he was legally served; that he failed to file a plea of *plene administravit*, *plene administravit praeter*, or of release to himself, and the magistrate, in June, 1893, gave judgment for the petitioner against him, as such executor, for the amount sued for, and costs, to be satisfied by levy and sale of the goods, etc., of Mrs. Pierce in the hands of Alford, as such executor, to be administered; that an execution was issued on this judgment, and search made for property on which to levy the *fi. fa.*, but the officer failed to find any property of Mrs. Pierce in the hands of the executor to be administered, and made a return to that effect; and that he subsequently demanded of Alford to point out property belonging to the deceased in his hands to be administered, sufficient to satisfy the *fi. fa.*, but Alford failed and refused to do so. The defenses set up in this case were that at the time the judgment above referred to was rendered the defendant had no property of Mrs. Pierce in his hands, and none had come into his hands since; that he had fully administered the estate on or before May 15, 1893, and had been on that day discharged as executor of the estate, without any notice of the plaintiff's claim; and that a suit "which involved the same questions as are involved in this case" was brought against the defendant in a magistrate's court September 20, 1893, and was dismissed by the court after hearing evidence, and an appeal taken by the plaintiff, which was subsequently dismissed by him, for which reason this suit should abate. The court in this case, after hearing the evidence without a jury, rendered judgment in favor of the defendant, and the plaintiff excepted.

1. The executor having failed to defend when sued in his representative character, the judgment in that case was properly entered against him *de bonis testatoris* (Code, § 3573), and was conclusive that he then had in his hands assets of the deceased to

be administered. It was therefore too late for him to plead or prove as a defense in the present case a want of assets existing at the time when the original suit was brought. *Woolfolk v. Kyle*, 48 Ga. 420; 2 Woerner, Adm'r, § 382.

2. It was no bar to this action that a suit upon the same cause of action was brought in a justice's court, and was dismissed by the court, and an appeal entered and thereafter dismissed by the plaintiff. The effect of dismissing the appeal was to leave in force the judgment of dismissal rendered by the justice's court. That judgment, under the circumstances, was equivalent to a judgment of nonsuit. *Railroad Co. v. Blevins*, 92 Ga. 522, 17 S. E. 836. And a judgment of nonsuit, as we have repeatedly held, is no bar to a subsequent suit upon the same cause of action. *Smith v. Floyd Co.*, 85 Ga. 420, 422, 11 S. E. 850, and cases cited; *Railroad Co. v. Blevins*, supra.

3. Under the evidence in this case, the court erred in rendering judgment in favor of the defendant. Judgment reversed.

(94 Ga. 809)

HICKS et al. v. SMITH et al.

(Supreme Court of Georgia. Jan. 14, 1895.)

DESCENT AND DISTRIBUTION—RIGHTS OF BASTARDS—CONSTRUCTION OF WILL.

1. Bastards have generally no inheritable blood, and, save by express statutory enactment, cannot take by descent.

2. A bastard who has been legitimated by order of the superior court, under the provisions of section 1787 of the Code, by force of that provision of the law, may take by descent from his father only.

3. Where, by the provisions of a will made by the great-grandfather of a bastard on the paternal line, an estate is vested in the father of a bastard for life, with remainder over to his children, and, he failing issue, remainder over in fee to other great-grandchildren of the testator, upon the death of the father of such bastard without issue other than such legitimated bastard, while the latter, by force of the statute, may take by descent from his father, he cannot take by purchase under the will of his great-grandfather, which devises the estate to his great-grandchildren generally; there being in the will no language expressly indicating a purpose to include within the scheme of his benevolence any bastard descendants.

(Syllabus by the Court.)

Error from superior court, Johnson county; R. L. Gamble, Judge.

Action by Thomas B. Hicks, administrator, and others, against J. E. Smith and others. From the judgment rendered, plaintiffs bring error. Affirmed.

Jas. B. Hicks, Evans & Evans, and Jas. K. Hines, for plaintiffs in error. Jackson & Leftwich and A. F. Daley, for defendants in error.

ATKINSON, J. In October, 1853, a testator died, leaving a will which was executed March 28, 1850, and a codicil thereto, executed September 27, 1853. The will and

codicil were duly probated November 7, 1853. The two items of the will necessary to a consideration of this case, and which were introduced in evidence, are as follows: "Item 11. I will and direct that my plantation known as 'Fullerville,' lying partly in Washington and partly in Laurens county, in said state, shall be divided, as soon after my death as possible, into two parts or shares, as nearly equal in the number of acres as may consist with equality in value; including in one part, or share No. 1, the portion of land lying in Washington county, with the mills and other water privileges, and in the other part, or share No. 2, the portion of land lying in Laurens county. But, should the land in either county be considerably greater in quantity than that in the other, then I do not desire that the county lines should govern in setting off the shares; my object being only to make two plantations of as nearly equal size as possible, to accomplish which the county lines may be disregarded, and the difference in the value of the two shares shall be made good to the least valuable share in the manner hereinafter directed. Item 12. I give and devise share number 1, mentioned in item eleven, to my beloved daughter Malvina V. Parsons, for her sole and separate use for and during the term of her natural life only, free and exempt from the debts, contracts, liabilities, or disposition of her present or any future husband; and, from and immediately after the death of the said Malvina V. Parsons, I give and devise the same unto her child or children living at the time of her death and their heirs forever; but, in default of any child living at the time of her death, then the said land to return to and be equally divided among my children and other legal representatives per stirpes: provided, always, that the share or shares falling to her sons, Thomas Henry Parsons and James William Parsons, according as one or both may survive her, shall remain to him or them for and during the term of their respective natural lives only, remainder to their children living at the time of their death and their heirs forever; but, in default of such children, remainder to the other lineal representatives of my said daughter; but, in default of any other lineal representatives of my said daughter at the death of the said Thomas Henry Parsons and James William Parsons, remainder over to be equally distributed among my children and their lineal representatives per stirpes." The codicil was as follows, to wit: "It is my will and desire that the devises contained in the 11th and 12th items of my said last will and testament be so changed as to read thus: I give and devise my Fullerville plantation, lying partly in Washington and partly in Laurens county, in said state, embracing all the lands attached to said premises, unto my beloved daughter Malvina V. Parsons, for her sole and separate use for and during the term of her natural life only, free and

exempt from the debts, contracts, liabilities, or disposition of her present or any future husband; and, from and after her death, the said devised property in this item of this codicil named to be subject to all the conditions, restrictions, and limitations in said 12th item in said last will and testament set forth." The executors of the testator delivered the property described to Malvina V. Parsons, and she remained in possession until her death, in 1874. She left only two children,—William H. Parsons, who died in 1887 (he being the husband of one and the father of the other of the defendants in this case); the other of said sons being Thomas A. Parsons, who died on January 7, 1894. Though there is an apparent discrepancy between the names of these two sons as expressed in the pleadings and as stated in the will, the evidence explained satisfactorily how this discrepancy occurred, and it may be taken as a fact that they are the same persons mentioned by the testator in his will. Thomas A. Parsons, one of the sons of Malvina V. Parsons, who did not marry, was the father of T. A. Parsons, one of the plaintiffs in this suit; and by an order of the superior court, dated September 30, 1892, caused T. A. Parsons, one of the present plaintiffs, to be regularly and duly legitimated. After the death of T. A. Parsons, the defendants, who were the wife and daughter, respectively, of W. H. Parsons, the brother of T. A. Parsons, deceased, entered and took possession of the premises which had been apportioned to T. A. Parsons for his life estate under the terms of the will of Henry P. Jones. An equitable petition was filed by Thomas B. Hicks, who was the administrator of T. A. Parsons, deceased, and by T. A. Parsons, the legitimated son; setting up title in the latter to the property in controversy, and claiming the right to the possession of the premises, and as well an accounting from the defendants for rents, etc., and praying for injunction and the appointment of a receiver. It appeared that the defendants were entirely solvent, but, upon the hearing, the court denied the injunction, upon the ground that the plaintiffs exhibited no such title or interest in the premises as justified the grant of an injunction at their suit. These are the substantial facts upon which the issues made in this case are presented, and upon these we are to determine whether or not the plaintiffs had any title to the property claimed.

1. We will first consider what the real status of this natural son was. At common law, the rights of a bastard were few, and they such only as he could acquire. Having no inheritable blood, by operation of the law of descent no estate could be imposed upon him; for, in order to take by descent, he must be capable of inheriting, and this he could not do, because he was not and could not be an heir. Having the capacity to labor, there was no legal impediment to the acquirement of an estate by him. Being

without inheritable blood, he was of kin to no one, could have no ancestor, could be heir to no one, and, for the same reason, he could have no heirs save those of his own body. In process of time, however, the rigor of the common law has been in most countries where its rules prevail much abated, and its asperities so softened and tempered by humane legislative enactment that bastards have many rights and are now accorded privileges which under the common law were denied them. To this spirit of liberality, which at the present time seems to pervade the whole scheme of legislation with respect to these unfortunates who are in no sense responsible for their existence, may be attributed the statutes which are now of force in this state, and by which the condition of the bastard is vastly improved. The general assembly early saw the propriety of allowing a bastard to inherit from its mother, and bastard children of the same mother, without reference to paternity, to inherit each from the other. The law of escheats forfeited to the state the estates of such persons who, dying intestate, left no heirs. It was held by some of the courts that, for want of inheritable blood in her descendants, the bastard children of a mother dying intestate were incapable of taking her estate; and, by force of the statute, the same was forfeited to the state, to the exclusion of those who, upon the commonest principles of humanity, should and would have been the recipients of her bounty. For remedy of this palpable injustice, in 1816, the legislature passed an act the provisions of which are contained in section 1800 of the Code, and which relieves bastards of some of the disabilities imposed by the common law. So the act of 1850 was passed to allow bastard children of widows to inherit equally with those who were legitimate. The status of the bastard as fixed by the common law, except as changed by statute, remains under our system of laws. The rules of the common law generally are recognized by our Code, and with respect to all matters in which it has not been changed by legislative enactment, or in process of time by judicial decision, to meet the varying conditions in the affairs of men which have arisen in the onward march of progressive civilization, remain unchanged. Bearing in mind his original status, the changes made by previous laws, and mindful of the further fact that in some cases a reputed father might, as far as possible, desire to make reparation for the wrong he had done the unfortunate and innocent offspring of his lustful desire, the legislature, from time to time, passed individual enabling acts, and this practice was continued until the adoption of the general law upon that subject approved March 6, 1856, prescribing the manner by which persons born illegitimate might be rendered legitimate, the provisions of which act are incorporated in section 1787 of the Code. The

purpose of this act, as expressed in its title, was to "prescribe the manner in which persons born illegitimate should be made legitimate." In the legislative mind was this purpose. It had the power to confer upon such a child in the act of legitimation all of the attributes, including inheritable blood, of a perfect son born in lawful wedlock. It had the power to purge his blood of all impurity, and, despite the strictest rule which ever prevailed under the ancient feudal system, make him eligible to the succession. The whole subject, as to how far and to what extent it would confer inheritable blood, was within the scope of legislative power. One word without qualification was sufficient to give him this status, and that one word, without more, "legitimate." To have said in the act that, upon compliance with its terms, the court shall pass an order declaring said child "legitimate," according to an unbroken current of authority, this language, without more, would unquestionably have conferred upon him the power to inherit from his father. According to most of the adjudicated cases, it would have injected into his veins inheritable blood in its most comprehensive sense, and have authorized him, through his reputed father, to take by descent from ancestors on the paternal line. Then, why make any addition to this simple statement that the child be made "legitimate"? Why add the further significant words "and capable of inheriting from his father"? We have already seen that this language could not and did not enlarge the capacity of the child to take if he was "legitimate." Then, that one word expressed the quality of being able to take by inheritance, certainly from his father, probably in its broadest sense. If, then, these words could not enlarge the scope of the term "legitimate," what could have been the purpose of the legislature in adding them? Could they operate as a limitation upon its effect in its more extended sense? It must be borne in mind that, in the interpretation of a statute, it must be so construed as that all the language employed by the legislature may be given some meaning. Courts will always presume that the legislature uses language appropriate to the expression of the legislative purpose, and therefore do not feel at liberty to disregard any portion of the language employed by it in the expression of its design, unless the same be without meaning, or bear a most absurd or unreasonable significance. When we consider, then, that the introduction of these words could neither enlarge, give scope to, nor emphasize in any way the word "legitimate," we naturally conclude that the legislature, in discussing the matter, reached the conclusion that the word "legitimate," standing alone, was too broad. It might well have concluded that while it was in consonance with a sound public policy to enable a contrite parent, out of his own estate, by this process of legitimation, to provide for

his natural son, and, by recognition of the relation, in addition relieve him of the imputation cast upon him by reason of his birth, yet, to enable the father, by this simple judicial contrivance, to confer upon his bastard son inheritable blood generally, might operate greatly to the prejudice of others who stood with the reputed father in the same relation to a common ancestor. The legislature might have well considered that such an ancestor would have no interest in making a bastard descendant equally with his other legitimate descendants a recipient of his bounty. It might well have concluded to limit the effect of this proceeding to enabling the illegitimate to inherit from the father, without likewise enabling him, by inheritance through the father, to take by descent from the ancestors of the latter an estate which did not vest in his lifetime. The father had the right to dispose of his property as he saw proper, and the general assembly could see no good reason in morals or law why as to his own estate the father could not by his own voluntary act place his bastard children in the direct line of legal succession. Thus applied, all of the words of the statute may be rationally employed in its interpretation. So interpreted, it becomes a highly beneficial statute, producing no evil consequences, entailing no hardships, working no injustice, and conferring upon the subject of its benefactions whatever the parent would have the legal or moral right to give.

The views herein expressed are in perfect harmony with, and are supported and sustained by, adjudications of this court made upon special legitimating statutes passed before the adoption of the general law upon the subject which is embraced in the section of the Code hereinbefore referred to. In the leading case of *Shelton v. Wright*, 25 Ga. 636, this court states broadly that such statutes are to be strictly construed, and, so construing the particular statute then under consideration, it holds that a statute which fully legitimated and made the illegitimate the heir at law of her reputed father, and made her capable in law of inheriting the property of her reputed father as though born in lawful wedlock, would confer upon the person legitimated by its provisions the power to take by inheritance the property of the reputed father. By the very terms of this act, not only was she legitimated, so as to enable her to take from her father, but she was fully legitimated; in other words, rendered for all purposes legitimate, and competent to take any property coming from her father. This court held that the words "fully legitimated" were not qualified by the subsequent expression "and competent to take the property of the father as though born in lawful wedlock," and were not thereby restricted in their application to an inheritance from him direct, so as to exclude an inheritance from a legitimate child

of the father as to property coming from him. But we apprehend a different question would have arisen, even though the child were legitimated as the child of the father, if the inheritance were of property descending upon the maternal line of the legitimate children, or otherwise than through him. The legislature may well leave a man free to dispose of his own property, either by will or act of legitimation. This decision goes no further than to declare that with respect to such property an heir may be created by act of the legislature. But, where others are jointly interested in an inheritance as remainder-men or otherwise, in so far as the interest of such person can be affected thereby the law recognizes no such method of creating an heir. From the section of the Code in question, and from the act of legitimation from which that section is codified, the word "fully" is omitted. As we have seen, we may fairly presume that this omission was intentional. While the tendency of the court has been recently towards the adoption of rather more liberal rules for interpretation of statute of legitimation than those which formerly prevailed, we conclude that the wisest and most conservative construction to place upon this statute is that which gives full scope and expression to all powers of a reputed father over his own estate, and at the same time protects others who may be interested with him as heirs of a common ancestor against the possibility of having coheirs created out of the order of nature. We therefore hold that in proceeding under section 1787 of the Code the judgment therein authorized does not have the effect to render "legitimate" a bastard child according to the full significance of that term, but only the effect to render him so far legitimate as will enable him to inherit from his father.

2. We will now consider whether the plaintiff in this case took as a purchaser under the will of Henry Jones, by virtue of the devise contained in the items thereof which hereinbefore appear. By the terms of this will, the estate devised was limited to the reputed father and his children, and, he dying without children, remainder over in fee to the children of his brother. In arriving at the true interpretation of these words,—at the true construction to be placed upon this bequest,—it is necessary to determine what was the intention of this testator; and to that end it is necessary to some extent to inquire as to the legal significance of the terms employed by him in the expression of that intent. The will itself being free from ambiguity, its meaning must be arrived at by reference to its own terms, and without resort to extrinsic facts or circumstances. In reaching a result, then, it will not be unprofitable to bear in mind a few general propositions, the correctness of which will not be seriously questioned: (1) The law indulges no presumptions against the right

of the heir standing in the direct line of legal succession. (2) Without the use of language clearly manifesting such a purpose, a testator will not be presumed to intend to extend his bounty to other than those who are authorized to take by descent. The word "children," as a general rule, means legitimate children, and will not be extended by implication so as to embrace children other than legitimate, unless such construction be necessary to carry into effect the manifest purpose of a testator. What is the legal status of this plaintiff? Whether he sues as the heir at law of his reputed father, or by virtue of a supposed right as a purchaser under his great grandfather's will, he cannot recover, because the estate to his father was limited by the express terms of the will to enjoyment by him during his natural life. At his death the remainder interest in fee was vested in his children, and, he having none, in the children of his brother. Does this plaintiff come within the class of persons who could take under this provision of the will? Was he, in legal contemplation, the child of Thomas A. Parsons? Was he such a child as the testator can be legally presumed to have had in contemplation at the time of the execution of the will? We have seen that though he might have been of the blood of Thomas A. Parsons, and while he was, at the instance of his reputed father, made legitimate by an appropriate order of the court, yet that the legal effect of such judicial legitimation was only to so far confer upon him a status as a legitimate child as to enable him to inherit from his father. For all other purposes he was still a bastard. He could take by force of the statute as the heir of his father, but he could not thus take as a purchaser under the will of his great-grandfather. There is nothing in the will justifying the inference that it was the intent of the great-grandfather to include him as a legatee thereunder. His rights are referable to strict law. No presumptions will be indulged in his favor, and we will presume that the testator intended to use the word "children" with reference to its strict legal significance, rather than as in its conventional sense it is occasionally employed. To undertake to presume at this late day that it was the purpose of this testator to provide by his will for all his descendants, legitimate or illegitimate, and that he intended, as he employs the term "children," to make it apply indiscriminately to all descendants, without reference to antecedents or the circumstances of birth, not only does violence to his expressed desire, legally manifested by the terms of his will, but it may not wholly consist with his idea of the propriety of indiscriminately mixing up descendants. His ideas upon the propriety of begetting illegimates, and, after they were begotten, to what extent the father's obligation to provide for them would justify their adoption, might have greatly

differed from those of his grandson. He might have been perfectly willing that this grandson, in the high and honorable state of lawful wedlock, without reference to the walks of life from whence his wife might come, should transmit his name, and with it his estate, to his posterity; while, on the other hand, he might not have been willing that, stepping aside from this honorable estate, this grandson should bring reproach upon his name by conferring it upon one whose only title to estate or name resulted, not from the order of nature operating in accordance with the ordinance of God, but by virtue of the statute in such case made and provided. At any rate, whatever may have been the intention of the testator with respect to such descendants, he used no such language as expressly or by fair implication can justify the inference that he intended to use the word "children" in other than the sense in which, according to its strict legal significance, it is authorized to be employed. He used no language which would embrace within its meaning the plaintiff, or designate him as an intended recipient of his bounty. He therefore took no estate under the will in question, has no interest in the property in controversy, and the court properly, upon that ground, denied the prayer of his petition.

THOMAS, Inspector, v. ROWE.¹

(Supreme Court of Appeals of Virginia. April 25, 1895.)

APPEAL—JURISDICTION—INJUNCTION—WHEN LIES
—PLEADING—FISHERIES—COLLECTION OF FINES
—CONSTITUTIONAL LAW.

1. One who has restrained an oyster inspector from collecting fees and fines under Code 1887, § 2134, as amended by Act March 5, 1894, on the ground that the act is unconstitutional, cannot dispute the jurisdiction of the supreme court of appeals, to which an appeal may be taken in all cases involving the constitutionality of a statute.

2. An allegation in a bill for an injunction that the act complained of is being committed under an unconstitutional statute will not, of itself, confer jurisdiction on a court of equity to grant the relief, where the other allegations do not make a case for such relief.

3. Code 1887, § 2134, as amended by Acts 1894, p. 778, requiring oyster inspectors to collect "all fines, taxes and all sums due, or would be due," on oyster ground rented, or used and not rented, and conferring "the same powers to collect the same which a county treasurer has for the collection of taxes," and also giving said inspectors power to remove enough oysters to pay the same, is not unconstitutional, as allowing the inspector to impose fines, as the fine is imposed by the statute itself.

4. Under said act the inspector may collect back rents, and is not confined to the sale of oysters, but may pursue all remedies given a county treasurer for collecting taxes.

5. Where an answer to a bill for an injunction negatives all its equities, and is sworn to, it is entitled to the weight of an affidavit, under Code 1887, § 3281; and on a motion to dissolve

the injunction, heard on bill and answer, the injunction should be dissolved.

Appeal from circuit court, Gloucester county; T. R. B. Wright, Judge.

Bill by J. M. Rowe to restrain Joel Thomas, oyster inspector, from collecting rents for oyster beds. Decree for plaintiff. Defendant appeals. Reversed.

R. Taylor Scott, Atty. Gen., for appellant.
J. N. Stubbs, for appellee.

CARDWELL, J. Appellee, J. M. Rowe, obtained from the judge of the circuit court of Gloucester county, May 19, 1894, an injunction to restrain Joel Thomas, oyster inspector for district No. 10, Gloucester county, from selling at public auction certain property of Rowe levied on by Thomas, inspector, to satisfy claims in his hands for oyster-ground rent, surveying, assigning, etc., advertised May 18, 1894, for sale, as to three canoes, stock of oysters, on May 22, 1894, and as to four cows, yoke of oxen, and three heifers, on June court day. The bill filed by Rowe states "that on the 24th of April, 1894, he was in possession of, holding, and using certain oyster-planting ground in the county of Gloucester; that it had not been assigned to him, or surveyed at his request, or rent paid, under the act of the general assembly of Virginia approved March 5, 1894; that on the 24th day of April, 1894, Joel Thomas, inspector for district No. 10, Gloucester county, served notice on complainant, as the law provides; that on May 18, 1894, Thomas, inspector, posted notice of the sale of his property, as before stated; that the levy was made, as claimed by inspector, for back rent; that complainant owed no back rent, having never rented; that there could be no renting till the rent is paid in advance,"—vouching Acts Assem. 1893-94, § 2, approved March 5, 1894. And the bill then charges that Inspector Thomas had no authority to collect back rent, even if any be due, and denies the right of the inspector to levy for rent on complainant's property,—that, if he could levy at all, he could only levy on property on the leased premises, just as a distress warrant or an attachment could be levied for such,—and insists that the only remedy for the inspector was under section 2134, as amended by the act of assembly approved March 5, 1894, providing for the removal of oysters from the leased premises, and sale thereof; that section 7 of the act is plainly unconstitutional, as to the inspector imposing fines. The prayer of the bill is for an injunction to restrain Thomas, the inspector, from making sale of complainant's property; that he be required to survey, assign, and receive the rent on said oyster ground; that the law governing the matter of complaint be construed by the court; and that full and final relief be given.

Thomas, the inspector, and only defendant, demurred to this bill, as being insufficient in

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

law, and filed his answer thereto, which states that he went to complainant in June, 1892, and asked him if he wanted the oyster-planting ground he had been occupying, and Rowe replied that he did; that Rowe then went with respondent, and marked off the ground as he wished it surveyed, and was present when all except one parcel was surveyed; that Rowe's oyster ground consists of several parcels, and that he had before designated how he wished that parcel surveyed, which, though surveyed in his absence, was surveyed in accordance with his wishes; that, after this survey, Rowe refused to pay the rent, or the fees of the inspector and surveyor; that Rowe did apply for the oyster-planting ground in question, and to have it surveyed, and for two years has been using and occupying it with oysters planted thereon, and persistently refuses to pay one cent of the rent or fees; and that respondent, failing to collect of Rowe the amount due to the state, and fees, did levy on Rowe's property, and advertise the same, to satisfy the claims in his hands as inspector. The answer is responsive, and negatives the equities of the bill, and is sworn to by Thomas.

Upon a hearing of the cause on the bill and its exhibits, and the demurrer and answer of Thomas, inspector, the circuit court overruled the demurrer, and, without stating in the decree the grounds upon which it was decreed, perpetuated the injunction; and an appeal was allowed Thomas, inspector, to this court.

The questions to be disposed of are:

1. The jurisdiction of this court. It is insisted by appellee's counsel that there is no constitutional question involved in the case, and as the amount in controversy is not \$1,500 this court is without jurisdiction, and must dismiss the cause. The bill filed by Rowe in the court below charges, as we have seen, that the act of the assembly under which Thomas, inspector, was acting in endeavoring to collect revenues to which the commonwealth was entitled as rent for oyster grounds, the property of the commonwealth, and the costs, etc., incident to their collection, under the act of March 5, 1894, was unconstitutional, whereby the validity of the statute is called in question; and he cannot, therefore, question the jurisdiction of this court on the ground that there is no constitutional question involved. Const. Va. art. 8, § 2; *Com. v. Chaffin*, 87 Va. 545, 547, 12 S. E. 972.

2. Did the circuit court of Gloucester err in overruling Thomas', inspector's, demurrer, and perpetuating the injunction? An allegation in a bill for injunction that the legislative act under which the wrong complained of is being committed is unconstitutional will not, of itself, confer jurisdiction upon a court of equity to grant the relief prayed for; and, where the other allegations do not make a case for equitable relief, a demurrer to such a bill should be sus-

tained. The allegations of the complaint in the court below attack the act of March 5, 1894, as unconstitutional, and specify that section 7 is plainly unconstitutional, because it authorizes the inspector to impose fines; and then the bill utterly fails, upon its other allegations, to make a case for equitable relief. Section 2134 of the Code, as amended by Acts 1893-94, p. 778, provides that: "He [the inspector] shall collect all fines, taxes and all sums due as rent upon oyster planting grounds imposed by this chapter within the limit to which he is assigned, also the tax on planted oysters, and to enable him to collect the same, together with his fees according to the preceding section, he shall have the same powers which a county treasurer or other collector of the state's revenue has for the collection of taxes; and when the lessee remains in default in the payment of his annual rent for such planting ground, or any part thereof, for the period of sixty days, after the same becomes due and payable, the inspector shall also have the power to remove at [lessee's expense] a sufficient quantity of oysters from the leased ground to satisfy the fines, taxes and rents upon the planting ground and shall proceed to sell the same. * * * And in case any person is in possession and use of planting ground not so leased according to law, the same remedy is hereby given said inspector for the collection at once of said fines, taxes, and all sums due or would be due, had the said ground, so occupied been rented." It is not denied (in fact, it is admitted by Rowe, in his bill) that he was in possession of, holding, and using the planting grounds in question; and nothing seems clearer, from the act of March 5, 1894, than that Thomas, inspector, was authorized (indeed, required) to collect of Rowe "all fines, taxes and all sums due or would be due, had the said ground, so occupied been rented," and that he was clothed with "the same powers to collect the same which a county treasurer or other collector of the state's revenue has for the collection of taxes." And the remedy given the inspector by section 7 of the act, which appellee's counsel insists is his only remedy, is cumulative only, and may be used or enforced at the inspector's discretion. This act nowhere authorizes the inspector to impose fines, but only provides that if any person holding any oyster ground, who has not had it assigned and paid the rent, upon notice of 30 days, and who falls or refuses to rent as the law directs, he shall be fined one dollar per month per acre (collectible by the inspector as other oyster revenues are collected) for each month he continues to hold or occupy the same, or refuses to remove the stakes after being notified by the inspector so to do, and the inspector shall rent out the ground to the first applicant. So that, if this fine or penalty is imposed, it is by opera-

tion of the law, and not by the imposition of the inspector, and due to the failure of the occupant of oyster-planting ground to comply with the same,—just as the penalty of 5 per cent. is added to the bill of every taxpayer in the commonwealth who fails to pay the tax due by him on or before the 1st day of December of the year in which it is due. And, moreover, it nowhere appears in this record that Thomas, inspector, was seeking to collect fines of Rowe. His notice of sale says it is to satisfy claims in his hands for oyster-ground rent, surveying, assigning, etc. If Thomas, the inspector, transcended his authority,—sold Rowe's property without authority of law, or without legal notice,—he would be a trespasser, and answerable to Rowe in an action at law for such damages as the latter sustained by reason of such unlawful act. We are wholly unable to see the force of appellee's contention that there could be no such thing, under the act of March 5, 1894, as back rent. The act, to our minds, does not sustain such a contention. Nor is the contention that the inspector cannot levy on personal property for rent, and that he is confined to removing planted oysters, under section 2134, as amended by the act of March 5, 1894, sustained. If such a contention can be maintained, why does the act confer upon the inspector, as we have seen, the same powers which are given by law to county treasurers, or other collectors of state revenues? There is nothing in the act, that we are able to see, that confines the inspector, in the collection of the fines, taxes, or rents due from an occupant and user of oyster-planting ground, to the property found on the ground occupied or leased. The revenues derived from this source go into the general revenues of the state (*Com. v. Brown* [decided by this court at the January term, last] 21 S. E. 357), and are collectible as other revenues are collected by county treasurers and other collectors, with the additional remedy in the inspector given by amended section 2134 of the act in question.

We are of opinion that the circuit court erred both in overruling the demurrer to the bill filed by Rowe, and in not dismissing the cause, when heard on the bill and the answer of Thomas, inspector. The answer being responsive to the bill, negating all of its equities, and being sworn to, was entitled to the weight of an affidavit. Code Va. § 3281. And upon a motion to dissolve the injunction, heard, as it was, on the bill and the answer, the injunction should have been dissolved. 1 Bart. Ch. Prac. 414, 426; *North v. Perrow*, 4 Rand. (Va.) 1; *Hogan v. Duke*, 20 Grat. 244; 2 High. Inj. (3d Ed.) § 1472; *Moore v. Barclay*, 23 Ala. 739; *Rogers v. Bradford*, 29 Ala. 474. The decree of the circuit court will therefore be reversed, and this court will enter such decree as the circuit court should have entered, sustaining the demurrer and dismissing the bill.

(91 Va. 369)

LANGHORNE v. RICHMOND RY. CO.

et al.¹

(Supreme Court of Appeals of Virginia. April 18, 1895.)

PRACTICE—SERVICE OF PAPERS—RAILROAD COMPANIES—CONSOLIDATION—PARTIES.

1. The right to crave oyer of papers mentioned in a pleading only applies to a deed on the direct operation of which the party pleading relies, and not to other writings mentioned.

2. Where two railroad companies are consolidated under authority, the presumption of law is, until the contrary appears, that the united company is subject to all the liabilities of those out of which it is created, and may be sued thereon under its new name as if no change had been made in the organization of the original corporations.

3. Where two corporations are legally consolidated, an action at law lies against the new company for any debts or torts of the old companies.

4. Plaintiff sued the R. Railway Co. and the R. Railway & Electric Co. for an injury done him by the former, alleging that the two companies had been consolidated under authority in the latter company. The declaration stated a cause of action against both companies, but the facts pleaded showed that the injury was inflicted by the former company alone. *Held*, that the former company was liable for the injury, and the latter company was also liable by reason of the consolidation, but that both could not be sued in the same action; that there was a misjoinder of causes of action and of parties.

Error to circuit court of city of Richmond; B. R. Wellford, Jr., Judge.

On rehearing. Reversed.

For former decision, see 19 S. E. 122.

James Lyons and W. P. De Saussure, for plaintiff in error. Wyndham R. Meredith and Christian & Christian, for defendants in error.

BUCHANAN, J. This case was decided by this court, at its March term, 1894, and the judgment of the trial court reversed. A rehearing was granted, and in this way the case is again before this court.

The plaintiff in error brought an action of trespass on the case in the circuit court of the city of Richmond against the Richmond Railway Company (known also as the Richmond City Railway Company) and the Richmond Railway & Electric Company, for an injury done him by the first-named company.

One of the defendants (the record does not show which) appeared, craved oyer of the writings in the declaration mentioned, and demurred to the whole declaration.

The declaration contains but one count, and that is for an injury alleged to have been done the plaintiff by the Richmond Railway Company. The declaration alleges substantially, after giving a history of the organization of the first-named company, and of three deeds of trust that it had given upon its property, works, and franchises to secure its creditors, that there had been a sale under the second and third deeds of trust, subject to the lien of the first, and that

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

certain parties, who were the owners and officers of the corporation, became the purchasers at such sale of its works and property, and continued to carry on the business of said corporation, subject to the first lien or deed of trust, adopting the name of the Richmond City Railway Company, by which last name said corporation has since been known and called; that on or about the 2d day of January, 1882, said Parker Campbell, president of the said Richmond Railway Company, and styling himself president of the Richmond City Railway Company, filed a petition with the common council of the city of Richmond praying for the extension of the charter of the said Richmond Railway Company; that said petition was granted, and on the 17th of May, 1882, said common council of the city of Richmond passed an ordinance extending the charter of the Richmond Railway Company, and continuing to it its powers and privileges until the 31st of December, 1900; that by an act of the general assembly of Virginia passed 17th day of March, 1884, the said Richmond City Railway Company was "recognized" as the same corporation chartered by and under the act of assembly of 20th of March, 1860, and the ordinance thereunder, and contract with the city of Richmond of the 17th May, 1860, and subsequent amendments thereto, under the name of the Richmond Railway Company; that, under and by virtue of statutes of Virginia for such case made and provided, the said defendant the Richmond City Railway Company, by deed dated October, 1890, and recorded in the clerk's office of the chancery court the 20th November, 1890, conveyed to the Richmond Railway & Electric Company all its works, property, and franchises, and, by such sale and the statutes aforesaid, became consolidated with the said Richmond Railway & Electric Company, subject to the following provision, in the said conveyance contained, to wit: "The foregoing conveyance is made subject to the payment by the Richmond Railway and Electric Company of all the liabilities of the party of the first part which may not have been discharged prior to this conveyance."

Preliminary to, and as a part of his demurrer, the defendant craved oyer of all the writings mentioned in the declaration. These writings consisted of deeds of trust, petitions to and ordinances of the common council of the city of Richmond, a deed from the trustees in two of the deeds of trust to the purchasers at a sale made under them, and a deed from the Richmond City Railway Company to the Richmond Railway & Electric Company. None of these writings ought to have been, or could properly be, considered upon the demurrer. The plaintiff did not claim under them. They were mentioned in the declaration by way of inducement or introduction to other matters that it was necessary to allege, and not for the purpose of showing right or title in the plaintiff.

The right to crave oyer of papers mentioned in a pleading applies, as a general rule, only to deeds and letters of probate and administration, not to other writings, and only applies to a deed when the party pleading relies upon the direct and intrinsic operation of the deed. 4 Minor, Inst. (Last Ed.) 1280, 1281; Steph. Pl. 436; 5 Rob. Prac. 132. In *Byars v. Thompson*, 12 Leigh, 550, 561, 562, which was an action of debt brought on an arbitration bond, the defendants craved oyer of the bond and the award, and demurred; but the court, President Tucker delivering the opinion, said: "Preliminary to and as part of his demurrer, the defendant prayed oyer of the submission, to which he had a right, and which accordingly was read to him. He also prayed oyer of the award, to which he had no right; and, that being also read to him, he objects, as fatal, to the variance between the true date of the submission and the date recited in the award. In the opinion of this court, however, the plaintiff having in his declaration averred that the award was made in pursuance of the submission, that matter was matter of fact for the jury, who might find upon evidence that the date on the face of the award was mistaken."

Whether the Richmond Railway Company and the Richmond City Railway Company was the same corporation or not, or whether there had been a consolidation of the Richmond City Railway Company with the Richmond Railway & Electric Company, as alleged in the declaration, would depend upon the evidence introduced upon these questions, and could not properly be the subject of a demurrer to the declaration; and, in passing on the demurrer, the writings of which oyer was craved will not be considered.

The grounds of demurrer relied on are that there is a misjoinder of causes of action, of the form of action, and of parties. The declaration states a good cause of action against the Richmond Railway Company for the injury complained of. It alleges that the Richmond City Railway Company is one and the same corporation as the Richmond Railway Company. It also alleges the authority of the Richmond City Railway Company to consolidate with the Richmond Railway & Electric Company, and that a consolidation has been made by which the last-named company acquired all the works, property, and franchises of the Richmond City Railway Company, and assumed all its liabilities. Such a consolidation as is alleged in the declaration not only renders the property and works of the old company, which passed to the company with which it is consolidated, subject to the liabilities of the old company, but also makes the new or surviving company responsible for them. Where two railroad companies unite or become consolidated under the authority of law, the presumption is, until the contrary

appears, that the united or consolidated company has all the powers and privileges and is subject to all the restrictions and liabilities of those out of which it is created. *Tomlinson v. Branch*, 15 Wall. 460; *Tennessee v. Whitworth*, 117 U. S. 139-147, 6 Sup. Ct. 649. The corporation which is created by such consolidation, or the surviving corporation, where another or others are merged into it or consolidated with it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name or under the name of the surviving company for their debts as if no change had been made in the name or in the organization of the original corporations. *Jones*, Ry. Sec. § 415; 1 *Thomp. Corp.* §§ 372, 373, 395; 1 *Beach, Priv. Corp.* §§ 343, 344; 2 *Mor. Priv. Corp.* § 955; *Tayl. Priv. Corp.* § 666; 4 *Am. & Eng. Enc. Law*, 272n.

There has been some question whether the consolidated company could be sued in an action at law for the liabilities of the companies composing it, or whether the proceeding must be in equity; but the better view seems to be that, when a consolidation has been authorized and made, it confers all the rights, property, and franchises of the old company upon the new or consolidated company, and subjects it to all the liabilities of the old companies; and an action at law may be brought against the new or consolidated company for the debts or torts of the old companies. The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been injured to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he desires to do so, in the first instance, to the corporation which by the terms of the consolidation is made liable to him.

The privity, some cases say, necessary to support this action, is created by the statute authorizing the consolidation and the purchase and conveyance under it. Other authorities place the right to bring such action on the ground that the effect of the consolidation is, as to the liabilities of the old company, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation. 1 *Thomp. Corp.* §§ 372, 395; 1 *Beach, Priv. Corp.* § 344; 2 *Mor. Priv. Corp.* § 955; *Jones*, Ry. Sec. §§ 418, 419; *Tayl. Priv. Corp.* § 666; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; *Railroad Co. v. Skidmore*, 69 Ill. 566; *Arbuckle v. Railroad Co.*, 81 Ill. 429; *Railroad Co. v. Boring*, 51 Ga. 582; *Thompson v. Abbott*, 61 Mo. 176; *Railroad Co. v. Shirley*, 54 Tex. 125; *Railroad Co. v. Fryer*, 56 Tex. 609; *Warren v. Railroad Co.*, 49 Ala. 582; *Field, Corp.* § 395; *State v. Baltimore & L. R. Co. (Md.)* 26 Atl. 865; *Berry v. Railroad Co.*, 52 Kan. 774, 36 Pac. 724.

Since, by authority of law and the act of the parties, the consolidated corporations are molded into one with none of their rights impaired, and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old to compel payment of liabilities. It avoids circuitry of action. It allows the party with whom the contract was made or to whom the injury was done to proceed directly against the corporation which, by virtue of the consolidation proceedings, is made liable for it.

In this case, as the plaintiff had instituted his action to recover damages from the consolidated corporation for the injury alleged to have been done him by the corporation consolidated with it, it was necessary for him to allege generally the authority of the old companies to consolidate, and the fact that they had consolidated, and under what name, in order to show the liability of the new or consolidated corporation for the injury sued for. 1 *Thomp. Corp.* § 406.

The declaration states a good cause of action, not only against the Richmond Railway Company, known also as the Richmond City Railway Company, but also against the Richmond Railway & Electric Company. To this there can be no objection, as it was necessary to state a good cause of action against both the Richmond City Railway Company and the Richmond Railway & Electric Company; otherwise there could be no recovery against the last-named company, since its liability depends upon the liability of the Richmond City Railway Company. But the defect in the declaration is in joining them as defendants. They are not jointly liable. One is liable for committing the alleged injury; the other is liable by reason of the consolidation proceedings. The plaintiff has the right to sue either for the injury alleged to have been done, but has no right to sue both in the same action at law. If an action at law be brought against two or more persons, it must appear from the declaration that the contract or tort upon which it is brought is a joint contract or a joint tort. 2 *Tuck*, 208, 214, 226. It was held in *Sanders v. Clason*, 3 Minn. 379 (Gil. 352), that "a cause of action against a defendant for the value of goods sold and delivered and a cause of action against a third person on the promise to such defendant to pay said debt to the plaintiff are improperly joined, and the complaint is bad on demurrer."

In this case it was necessary to state a good cause of action against the Richmond City Railway Company in order to state a good case against the Richmond Railway & Electric Company. If the plaintiff had only instituted his action against the last-named company, there would have been no misjoinder of causes of action; but as he made both corporations parties to the action, and the declaration states a good cause of action

against each, there is a misjoinder of causes of action and of parties.

On these grounds, it was proper for the trial court to sustain the demurrer to the declaration, and its judgment must be affirmed.

(91 Va. 42)

THROCKMORTON v. THROCKMORTON.¹
(Supreme Court of Appeals of Virginia. Jan. 24, 1895.)

RESULTING TRUST—HUSBAND AND WIFE—GIFTS.

1. In an action by a divorced wife against her former husband to establish a trust in land held by him, it appeared that when the parties were married defendant had no property; that defendant rented a farm of his father, and that this farm was afterwards conveyed to defendant; that plaintiff had joined with defendant in the execution of trust deeds to secure loans, describing the land as defendant's; that in former litigation between them plaintiff had spoken of the land as defendant's, and asked to be allowed a part thereof; that while the parties lived together plaintiff allowed defendant to receive a large amount of money that she had inherited, but there was no direct evidence that this money went into the land in question. *Held* insufficient to entitle plaintiff to a decree.

2. Where a wife, living with her husband, allows him to receive her money without an agreement to repay the same, the presumption is that it is a gift, and not a loan, and he is under no legal obligation to restore it to her.

Appeal from circuit court, Loudoun county; James Keith, Judge.

Action by Annie E. Throckmorton against Mason Throckmorton and others. Defendants had judgment, and plaintiff appeals. Affirmed.

John M. Orr, for appellant. Edward Nicholas and Alexander & Tibbs, for appellees.

RIELY, J. This suit was brought in the circuit court of Loudoun county in December, 1890, by the appellant, Annie E. Throckmorton, against her husband, Mason Throckmorton, from whom she had been recently divorced, and certain of his creditors, holding deeds of trust on his land, to establish a resulting trust in her favor in his real and personal property. She based such right on the claim that the proceeds of sale of the lands inherited by her from her parents, and moneys to which she was entitled, had been received by her husband, and invested in the real and personal property possessed by him. Upon the hearing of the cause she was denied the relief sought, and her bill dismissed. It may be considered as settled law that a resulting trust may be established by parol evidence, or even by circumstances, but the facts in all cases must be proved with great clearness and certainty. Loose and equivocal facts will not be allowed to control the evidence of deeds. The evidence must be full, clear, and explicit. *Perry, Trusts, § 137; Pom. Eq. Jur. § 1040; Dyer v. Dyer, 1 White*

& T. Lead. Cas. Eq. pt. 1, p. 315; Phelps v. Seely, 22 Grat. 573; and Miller v. Blose's Ex'r, 30 Grat. 744. Guided by this rule, we will consider the evidence and circumstances relied on by the appellant to establish her claim. She was married to Mason Throckmorton in November, 1874, and at that time owned in fee an undivided one-third part of a tract of land in Loudoun county, of 300 acres, which she had inherited from her father, Abner G. Humphrey. On the partition of this land, she received 133 acres, which was sold and conveyed in several parcels by her and her husband between the years 1878 and 1881, and the proceeds of sale, which aggregated \$4,098.71, were received by her husband. Her mother, Mary C. Humphrey, died in 1876, possessed of land and personaity, in which the share of the appellant amounted to \$3,292.51, and this was likewise received by her husband. Her grandfather, Joseph Lodge, died in June, 1877, and she received at different times, under the legacy bequeathed by him to her mother, \$2,291.48, which was also received by her husband. Her moneys so received by her husband amounted altogether to the sum of \$9,682.70, and came into his hands at different dates between the years 1878 and 1885. Her husband, at the time of her marriage, had no estate of any kind. For the first two years after their marriage they lived in his father's house. He then rented his father's farm for the next two years. At the expiration of that time his father conveyed it to him. He continued to live upon it and cultivate it thereafter, and, according to the evidence, was a successful farmer. When this suit was brought he owned 389 acres of land in Loudoun county, assessed at \$11,675, and personal property assessed at \$2,355, making in all \$14,030. On this land was a deed of trust, executed by Mason Throckmorton and his wife, Annie E. Throckmorton, on September 8, 1886, to secure a debt of \$4,000 to Mary A. Mead for money lent to him, and another deed of trust made by him on September 11, 1890, to secure a bond for \$1,000 to Nathan T. Brown, and also a bond for \$850 to H. H. Russell, guardian of Ella Rogers, for moneys lent to him. From the report of Commissioner William N. Wise, made under decree in the cause, it appears that Mason Throckmorton owed unsecured debts amounting to \$12,201.17, thus making his indebtedness on December 15, 1890, \$18,051.17, which exceeded the assessed value of his whole estate by several thousand dollars. This heavy indebtedness arose in great part from the expensive litigation which attended the suits for divorce between his wife and himself. The appellant alleged in her bill that she consented to the sale of the land she inherited from her father upon the promise by her husband that he would use the proceeds of sale in the purchase of the farm of 319 acres and some lots which belonged to his father, and now constitute the principal

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

part of the real estate owned by her husband, and his assurance that the property should be hers; that the other moneys which belonged to her and were received by him were invested in the residue of the 389 acres and the personal property possessed by him; that he had no other means with which to purchase the same, except the moneys and property belonging to her, and the income, interest, and profits thereof, all of which she charged was her separate, legal estate under the married woman's act of April 4, 1877; and that he had never accounted to her for the property or moneys. She produced no evidence to sustain the allegations of her bill in respect to these matters beyond the receipt and possession by her husband of her property and moneys, and he only admitted, in his answer to her bill, that some of her moneys, mingled with his own, might have been used in paying for some of the personal property; while, on the contrary, it was shown that the father of Mason Throckmorton conveyed to him the farm of 319 acres and the lots referred to on January 27, 1879, for the consideration of \$1,000 and his agreement to pay certain debts of his father, aggregating between \$3,000 and \$10,000, which were secured on the land by deed of trust. The realty so conveyed to him by his father was proved to be worth some five or six thousand dollars more than the debts. These debts had been assigned to Eliza J. Throckmorton, the mother of Mason Throckmorton, in part of her share of the estate of her father, Mason Chamblin, and were her property. Mason Throckmorton did not pay these debts, and when he desired to obtain the loan of \$4,000 from Mary A. Mead she required the deed of trust securing them to be released so as to give her the first lien on the land. This was accordingly done. Mason Throckmorton then executed his bond to his mother for the amount of her said debts, and subsequently confessed judgment on the bond in her favor. So that the charge in the bill that the money of the appellant was used in buying the said farm was clearly refuted. There was also a failure to show that any of the estate of the appellant was used in paying for the Adler land, aggregating 70 acres, and which comprises the residue of the real estate owned by Mason Throckmorton. It appears from the evidence that he paid to her from time to time considerable sums of money, though the amount thereof is not shown, and that he bought from the estate of Robert James, deceased, a tract of land of 40 acres, for which he paid \$1,600, and had it conveyed to the appellant by deed dated June 12, 1879, of which she knew nothing until it was done. This land she still owns, and her right to it is not questioned. Thus there was a total failure to prove that any of the appellant's estate was used in paying for any land conveyed to her husband, or to trace the investment of any particular part of her estate in his personal prop-

erty. Her case rests simply on the presumption from circumstances—the receipt and possession of her property and money by her husband—that it was so used. Presumption is not proof. The evidence falls far short of the certainty and clearness required in a case of this kind, and her claim to a resulting trust in the real and personal property possessed by her husband must fail.

In the view that we take of this case, we do not deem it necessary to decide the relative rights of the husband and wife to the property and moneys inherited and acquired by her, but, conceding for the sake of argument that it was all her legal, separate estate, and was used in paying for the property in which it is sought to establish a resulting trust, her claim to it must still fail.

In the first place, in any event her right would be subordinate to the deeds of trust in favor of Mary A. Mead and Nathan T. Brown and H. H. Russell, guardian. The record title to the land is in Mason Throckmorton, and there is nothing to show, or to suggest even, any right or claim to it in Annie E. Throckmorton. Nor is there any evidence of any kind in the record of the case, or allegation even in the bill, that the trustees or beneficiaries in the deeds of trust had notice of any right in or claim by her to the land. And they deny all notice. They stand before the court as bona fide purchasers for value without notice (*Evans v. Greenhow*, 15 Grat. 153, and *Shurtz v. Johnson*, 28 Grat. 657), and belong to a class of persons who are favorites of a court of equity (*Story*, Eq. Jur. § 410; *Carter v. Allan*, 21 Grat. 241; and *Bank v. Blanchard* [Va.] 17 S. E. 742). Again, the record shows that Annie E. Throckmorton united with her husband in the sale of her lands, and permitted him to receive the proceeds of the sale. She likewise permitted him to receive and appropriate the bonds that were turned over as a part of the estate of her mother, and also of her grandfather, and to receive and use the moneys to which she was entitled from their estates. This was done with her full knowledge and acquiescence. No complaint was made by her against it, nor any claim asserted by her to the moneys or the property in which she alleges that they were invested by her husband, until the institution of this suit. She neither took nor required of him any obligation for their repayment, nor raised any account against him. She exacted no promise from him to repay or return them. She knew of the acquirement of property by her husband in his own name, and enabled him on the faith and credit of it to contract a large indebtedness. There is nothing in the evidence, in view of their relations as husband and wife, to create the relation of debtor and creditor. Under these circumstances the law does not imply a promise of repayment, as would be the case if they were strangers, but presumes that the receipt and use of her moneys and her

property or its proceeds was a gift of them by her to her husband, and not a loan. *Beecher v. Wilson*, 84 Va. 813, 6 S. E. 209; *Temple v. Williams*, 4 Ired. Eq. 39; *McLure v. Lancaster*, 58 Am. Rep. 259; *Bennett v. Bennett*, 37 W. Va. 396, 16 S. E. 638; *Bank v. Norwood*, 50 Ark. 42, 6 S. W. 323; *Edelen v. Edelen*, 11 Md. 415; *Osburn v. Throckmorton* (Va.) 18 S. E. 285. In *Tyson v. Tyson*, 54 Md. 35-38, the court said: "If the husband received and applied the fund, whether money, goods, or chattels, or collected choses in action with the wife's privacy and consent, and without an agreement or promise to repay or restore it, no legal obligation rests on the husband to restore it; no right of action inures to her, and to that extent her rights are extinct." The facts disclosed by the record, so far from impairing this presumption of law, strongly support it. The property and moneys of the appellant were all received and used by her husband when their domestic relations were cordial and affectionate, and they lived together in peace and harmony. She knew that he had taken the conveyance of the farm and lots to himself in his own name, and united with him in the deed of trust to secure the loan from Mary A. Mead. The deed of trust described the land as his; that it was conveyed to him by his father; and when she executed it it was explained to her, and she was fairly examined in regard to it, as the law required. In the suit instituted in 1887 by her to obtain a divorce from her husband she made no claim to the property as hers by right of her money having been invested in it. The statement in her original bill was: "That when she married her said husband she had some ten or twelve thousand dollars' worth of property, which went into his hands: that for the first years of her marriage they lived happily together, and he was kind and considerate, and that he is now seised and possessed of a handsome estate in Loudoun county, worth at least \$25,000." And in her amended bill in said suit she reiterates "that at the time of and subsequent to her marriage she was possessed in her own right of property of the value of \$10,000, which passed into her said husband's hands, and was appropriated for his own purposes." This suit was decided by this court at its March term, 1890, and the divorce refused. 16 S. E. 289. Her husband afterwards brought suit against her for a divorce on the ground of desertion, and in her answer to his bill, after enumerating and describing the property she had inherited and acquired, and its value, and alleging that he had invested it in his present estate, she says: "If the court sees fit to grant the divorce prayed for, she respectfully insists that in the exchange for the extinction of her dower in 300 or 400 acres of complainant's land, and of her other rights as wife, she be granted and secured the same right she would have had if the land she so inherited

were yet unsold; that is, that she be allowed the principal of the said proceeds, \$5,098, free from the marital rights of complainant." While she refers to and describes in her answer all the property she had inherited or acquired, and alleges that it was invested in the estate then held by her husband,—the very estate in which she now seeks to establish a resulting trust,—she distinctly describes it as his, and simply asks that a certain sum be allowed her in lieu of her contingent right of dower in his land, and of her other rights as wife. She asserts no right or claim to it in either suit by reason of the investment of her property or moneys in its purchase. She makes no complaint that he had taken the title to the realty in his own name instead of hers; asserts no promise on his part to do so, or that she parted with any of her property on any such condition; and makes no suggestion even of a resulting trust in her favor. But there is the implied, if not the express, admission that the estate was his. She seeks to excuse herself from failing to bring forward heretofore the claim she now asserts on the ground that she was ignorant of the married woman's act passed April 4, 1877, and that it made her own all the property inherited or acquired by her, and excluded the marital rights of her husband. This is nothing less than the simple declaration that she was ignorant of the law of the land. Her excuse is based on a mistake of law, and not of fact, and cannot avail her. The distinction between mistakes of law and fact as a foundation for equitable relief is well established. A court of equity may grant relief where the mistake is one of fact, but it would be liable to the greatest abuse to permit one to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law affecting his title. The wisdom of the rule which forbids it is founded in sound wisdom and policy. *Zollman v. Moore*, 21 Grat. 313, and *Wimblish v. Com.*, 75 Va. 839. The married woman's act does not restrict, but unfetters, the property of a married woman, and removes obstructions to her right to dispose of it as she may please. It does not prevent her from giving her property to her husband if she chooses to do so, "nor abrogate the presumption that, under the circumstances such as exist in this case, she has done so."

It was earnestly urged by the counsel for the appellees that the rights of the appellant to the property now in controversy were involved in the suit brought by her husband to obtain a divorce from her, and that they are concluded and barred on the principle of *res adjudicata*. The court in that case granted the divorce, and gave a decree for costs against the plaintiff, her husband, but made no order in regard to the rights of property of the parties. The decree is wholly silent on that subject. We have reached on the

merits the same conclusion that would follow if the defense of *res adjudicata* was held valid, and as it is not, therefore, necessary to decide upon its validity, we desire to be considered as expressing no opinion in regard to it. We find no error in the decree complained of, and it must therefore be affirmed.

KEITH, P., not sitting.

(91 Va. 284)

RISON et al. v. MOON.¹

(Supreme Court of Appeals of Virginia. April 25, 1895.)

MECHANICS' LIENS — ENFORCEMENT — EQUITY —
STATEMENT OF ACCOUNT—ARBITRATION—
WITHDRAWAL FROM AGREEMENT.

1. Where a suit to establish a mechanic's lien is brought in a court of equity, the court, having taken jurisdiction, should proceed to determine all the questions between the parties.

2. An account filed with a bill to establish a mechanic's lien is not so defective as to defeat the lien because the lienor fails to allow certain credits, of which he did not have exact information, and no injury is caused by such omission.

3. Either party may withdraw from an agreement to arbitrate made after a cause of action has arisen, and before the award has been rendered; such an agreement being no bar to suit at law or in equity, and no foundation for a decree of specific performance, the only remedy being an action for damages growing out of the breach of submission.

Appeal from circuit court, Fluvanna county.

Bill by J. L. Moon against John W. Rison, trustee, and others, to enforce a mechanic's lien. From the decree rendered, defendants appeal. Affirmed.

W. B. Pettit, for appellants. Thos. S. Martin, for appellee.

CARDWELL, J. July 7, 1886, E. Bateman, agent for his wife, M. L. Bateman, through H. J. Wright, entered into a contract in writing with John W. Rison, trustee and agent for his wife, Sarah A. Rison, whereby Bateman undertook and agreed, under a penalty of \$100, to furnish and put into the Rivanna Mills, in Fluvanna county, the property of Sarah A. Rison, certain machinery and other equipments, minutely stated in the contract, and "to do all the work necessary to make 50 barrels of flour in 24 hours, the quality of which shall be up to the standard of any burr mill in the state of Virginia, guarantying a barrel of extra flour from four and one-third bushels of wheat that will weigh sixty pounds to the bushel," the work to be completed within 30 days from the date of the contract, and for which Bateman was to receive the gross sum of \$1,200—\$400 in 90 days, \$400 in 6 months, and \$400 in 12 months, from the completion of the contract; Rison to board Wright and the hands while working at the Rivanna Mills, without charge. This contract

was subsequently, by indorsement thereon, approved by E. Bateman and M. L. Bateman, his wife, and Sarah A. Rison, with slight modifications as to the date of the first payment of the contract price, and as to the time within which certain work on water wheel and connections with sawmill were to be completed; making the time as to the first payment 60 days, instead of 90, from completion of the contract, and 60 days from date of contract, instead of 30, within which to make the connections to sawmill, etc., and negotiable notes to be given for the two last payments of the contract price. August 12th following the date of the contract, only a part of the machinery had been put in the mill, and little or no work had been done by Bateman, whereupon Rison complained by letter to Bateman of the delay, and notified him of his (Rison's) intention to claim damages of \$20 for each day from the date upon which the contract should have been completed, until completed, and about the 16th of August locked up the mill, and refused to let Bateman resume work, or take the machinery out of the mill that he had already put in. But, upon some understanding had between the parties, Bateman resumed work; the contract, as modified, remaining unchanged, except as to some of the machinery, which, at the request of Rison, was changed; he agreeing to buy such as he wished to substitute for that specified in the contract, its cost to be deducted from the original gross contract price. The work continued until about November 5th, following, when all the machinery had been put in, and the work completed, except as to a portion of it,—the cost of completing the work then unfinished being, as shown by the testimony, from \$25 to \$30; and Rison then took charge of the mill, began to work it, and assumed to do the uncompleted work himself, which he afterwards did, together with other work and additions not covered or contemplated by the contract. December 3, 1886, W. J. Keller, who was a subcontractor on this work, and on the 31st of January, 1887, E. Bateman, the general contractor, filed their accounts of the work done and materials furnished, sworn to, and with a statement and description of the Rivanna Mills property, upon which they claimed a mechanic's lien in pursuance of the statute, and caused notice thereof, in writing, to be at once served upon Rison, as trustee, and upon his wife, Sarah A. Rison. These accounts were duly recorded in the clerk's office of Fluvanna county court, as required by the statute,—the former for \$206.80, and the latter for \$1,200.

January 25, 1887, an agreement in writing was entered into between Bateman and Rison to refer the matters in controversy between them to arbitration, the arbitrators being afterwards chosen; but, before an award was made, Bateman withdrew from the agreement, and the arbitration failed. The liens taken out by Keller and Bateman were then assigned to J. L. Moon, appellee, whereupon

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Moon, as assignee, filed his bill in the circuit court of Fluvanna county to enforce them,—making Rison and wife, E. Bateman and wife, and W. J. Keller, parties defendant,—to which bill answers were filed by all the defendants except Keller; John W. Rison demurring and answering for himself and wife, and the latter also demurring, and adopting the answer of her husband and trustee as her own. And on November 21, 1888, the circuit court of Fluvanna referred the cause to one of its commissioners, who was directed to take and report "the following accounts, on the testimony then in the cause, or which might be taken on behalf of either party: First, an account showing what amount, if any, is due to the plaintiff; second, what amount, if any, the defendants John W. Rison and wife are entitled to as against E. Bateman and wife, or as against any claim established by the plaintiff as assignee of said E. Bateman and wife or of W. J. Keller, by reason of any delay or failure on the part of said E. Bateman and wife in the execution of the work stipulated for in the contract filed with their bill. Third, an account showing the annual and fee-simple value of the property in the proceedings mentioned, with all liens thereon, and their priorities, if any." A number of witnesses were examined on behalf of both the plaintiff and defendants Rison and wife before and after this decree of reference; and on the 9th of April, 1890, A. E. King, the commissioner to whom the cause was referred, filed his report, sustaining the liens of Keller and Bateman on the Rivanna Mills, and reporting that there was due to Moon, as assignee, by Rison and wife, \$572.54, one-third of which was due at 60 days from the 5th of November, 1886, one-third at 6 months from said date, and the remaining third at 12 months from said date; each sum to bear interest from the date it was due; total due, including interest to April 10, 1890, \$671. In Account A, filed with this report, the commissioner allowed the full contract price, and deducted therefrom the cost of certain machinery purchased and paid for by Rison, the cost of the work omitted by Bateman, and the forfeiture under the contract of \$100, and also some small sums paid by Rison to workmen on the mill; leaving the balance due, as stated, \$572.54, with interest; the sum of \$100, credited to Rison, being allowed as covering all damages sustained by Rison by the delay in the completion of the work, no other or additional damages having been proved.

To this report a number of exceptions were filed by Rison and wife and by the plaintiff, and on the 23d day of May, 1890, the cause having been submitted to the judge of Fluvanna circuit court for decision and decree in vacation, the judge made a decree overruling the demurrers to the bill and the exceptions to Commissioner King's report, and approved and confirmed the report, and further decreed that unless John W. Rison, trus-

tee, and Sarah A. Rison, his wife, or one of them, paid, within 40 days from the date of the decree, to Jacob L. Moon, the money, with interest, as shown to be due him by Account A, filed with Commissioner King's report, and the costs of Moon incurred in the prosecution of this suit, the sheriff of Fluvanna county should proceed, after notice prescribed by the decree, to rent out the Rivanna Mills for the purpose of paying the amount due by Rison and wife.

The assignments of error are five in number, the second of which is waived, and the remaining four will be considered in their order.

The first assignment of error is that the plaintiff could not recover in this suit because the bill does not allege a complete performance of the contract by Bateman. This suit was brought properly in a court of equity to enforce the mechanics' liens taken out by Keller and Bateman, and assigned to Moon; and the court, having taken jurisdiction of the case, should have done just what it appears it has done,—proceeded to the determination of all the questions between the parties to the suit according to their rights and the equities of the case. Hence this assignment of error cannot be maintained.

The third assignment of error is that Keller was a mere workman, for daily wages, and not, in any sense, a subcontractor, and that Bateman's lien acquired under the statute should not have been maintained, because the account filed therewith was not a true account. It is unnecessary to consider the Keller lien, as his claim had been paid off by Bateman, through Moon, assignee, and Bateman's claim covered the entire amount of the original contract price. It is true that the statute commonly known as the "Mechanic's Lien Law," at the time that Bateman took out his lien, required that the account filed therewith should be "a true account"; and, while it appears that the account filed by Bateman states truly the amount of the contract price, it omits to credit Rison with the cost of the machinery that he had purchased to substitute for some of the machinery specified in the contract, and some other items that were afterwards allowed by the commissioner in stating the account between Bateman and Rison. But it does not appear in the record that Bateman knew at the filing of this account just what the credits were, or the amounts thereof, that Rison was entitled to. Hence it would seem that the account made out and filed by him was as true an account as he could, under the circumstances, have made; and, moreover, it does not appear that this failure by Bateman to put the proper credits on the account has worked any injury to Rison. In the case of *Taylor v. Netherwood* (decided by this court in January last) 20 S. E. 888, where the account filed by Netherwood only set out the specific amount, in gross, for

which Netherwood contracted to do the work and furnish the material necessary therefor, it was held that the account filed by him was sufficient. The statute under which Netherwood sued out his lien required that the account should not be "willfully false"; and the statute formerly, as we have seen, required that the account should be "a true account,"—very little difference, if any, in the requirement as to what the account should be. Where the account is substantially correct, and especially where any inaccuracies or omissions do not work injury to the owner of the property, we think it is sufficient; and this seems to be sustained by the weight of authority. *Taylor v. Netherwood*, and the cases there cited.

The fourth assignment of error is that no action could be maintained on Bateman's claim until the arbitration and award stipulated for were had and made. It is well settled that either party may withdraw from an agreement to arbitrate, made after a cause of action has arisen, and before the award has been rendered, and that such an agreement is no bar to a suit at law or in equity, and no foundation for a decree of specific performance. *Corbin v. Adams*, 76 Va. 58; *Morse*, Arb. 79, 90; *Tobey v. County of Bristol*, 3 Story, 822, Fed. Cas. No. 14,065. The only remedy for the party aggrieved is by an action for damages growing out of the breach of submission. *Morse*, Arb. 239. It is contended, however, by appellants, that one of the conditions upon which Bateman was allowed to resume work on the contract August 16, 1886, was that the matters of difference between them should be submitted, upon the completion of the work, to arbitration; but this is not sustained by the evidence. Indeed, it is inconsistent with the position taken by Rison in his answer, wherein he only contends that the agreement to arbitrate was brought about January 25, 1887,—the date of the agreement,—by a proposal from Bateman to have all matters in dispute between them submitted to arbitration.

The fifth and last assignment of error is, in effect, that the circuit court should not have sustained Commissioner King's report, because the damages allowed Rison as a set-off to Bateman's claim were inadequate. The decree referring the cause to the commissioner, as we have seen, authorized him to inquire into every matter of fact necessary to establish what damages Rison was entitled to as an offset to plaintiff's claim, and to settle the accounts between them according to the equities of the case, and quite a number of witnesses were examined. The plaintiff, as Bateman's assignee, was entitled to recover the gross price agreed upon in the contract, subject to a deduction of the cost of machinery, or other sums paid by Rison for Bateman, the sum which it would take to complete the contract and to compensate Rison for any damages sustained by

him by reason of the delay in the completion of the contract. 5 Rob. Prac. 273; *Van Buren v. Digges*, 11 How. 475; 13 Am. & Eng. Enc. Law, 867. And the damages were not confined to the penalty or forfeiture stipulated for in the contract, but were to be measured by the evidence. The contention is that Rison was entitled, not only to the \$100 penalty specified in the contract, but to additional damages, even including the cost of additions and repairs put on the mill two years thereafter. This contention cannot be sustained. The commissioner fairly and rightly stated the account between the parties, allowing Rison the cost of completing the work which should have been done by Bateman, and \$100 as covering the damages sustained by Rison by the delay of Bateman in completing the contract. The first item is clearly shown by the evidence; and the commissioner states that he allowed the \$100 as covering all damages to which Rison was entitled for delay, because there were no other damages proved. We think the evidence fully sustains his findings, and the circuit court committed no error in sustaining the report. For the foregoing reasons, we are of opinion that the decree of the circuit court complained of is clearly right, and it is therefore affirmed.

(91 Va. 438)

GEORGE CAMPBELL CO. v. ANGUS et al.¹
(Supreme Court of Appeals of Virginia. May 2, 1895.)

ASSUMPSIT — PLEADING — BILL OF PARTICULARS — EVIDENCE — ASSESSMENT OF DAMAGES — APPEAL.

1. Where plaintiff in an action of assumpsit does not file with his declaration an account stating the several items of his claim, as required by Code 1887, § 3248, the defect cannot be taken advantage of by demurrer, but only by moving to require plaintiff to file an amended account, and, if he fail to do so, to move to exclude evidence of matters insufficiently stated.

2. Where transactions in a suit are in sterling money, the pleading should set forth the indebtedness in sterling money, and leave its value in domestic money to be ascertained by the jury under Code 1887, § 2816, providing for such contingencies, or to state the indebtedness in foreign money of the value of so much domestic money.

3. Where no question is raised as to the genuineness of drafts on their introduction in evidence, such an objection will not be considered on appeal.

4. Though no foundation is laid for the introduction of copies of letters by requesting the production of the originals, such error will not cause a reversal where the letters are not necessary for the case of him who introduces them.

5. Where a defendant appears and pleads, an order of inquiry as to damages under Code 1887, §§ 3284-3286, 3288, is not necessary.

6. In ordinary dealings a factor must obey his principal's orders as to prices and sales, but, if he advances on the goods to the principal, and demands payment of said advances, then, if said advances are not returned, he has a right to sell, and reimburse himself.

7. Where a defendant pleads the general issue, it is not error to reject special pleas of matter which may be proved under the former plea.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Error to circuit court, Powhatan county.

Action by George Angus & Co. against the George Campbell Company. Plaintiffs had judgment, and defendant brings error. Affirmed.

Wm. M. Flanagan, for plaintiff in error.
Willis B. Smith, for defendants in error.

RIELY, J. This is an action of assumpsit, and the declaration contains only the common counts. In every action of assumpsit the plaintiff is required to file with his declaration an account stating distinctly the several items of his claim, unless it be plainly described in the declaration. Section 3248, Code. The defendant demurred to the declaration solely on the ground of alleged defects in the bill of particulars. He claimed that it was vague and indefinite; and also that it was inconsistent with the declaration, in that it set forth transactions in sterling money, whereas the declaration alleged an indebtedness in and a promise to pay in the money of account of this state. Defects in a bill of particulars cannot be taken advantage of on a demurrer to the declaration. They are not within its scope, and it does not lie for such purpose. 1 Bart. Law Prac. 337; Abell v. Insurance Co., 18 W. Va. 400; and Sheppard v. Insurance Co., 21 W. Va. 368. Where a sufficient bill of particulars is not filed, the proper practice is to apply to the court to require the plaintiff to file an amended and sufficient account of his claim; and, if he fail to do so, to move the court to exclude evidence of any matter not sufficiently described as to give him notice of its nature and character. Tidd, Prac. 596-600; Bart. Law Prac. 337, 338; Moore v. Mauro, 4 Rand. (Va.) 488; Purdy v. Warden, 18 Wend. 671; and Starkweather v. Kittle, 17 Wend. 20. The court, therefore, properly overruled the demurrer. We have, notwithstanding, examined the amended bill of particulars filed by the plaintiffs after the first demurrer was sustained by the court, and find that the several items of the plaintiffs' demand are stated in such manner as to leave no doubt of the causes of action to be, and which were, relied upon on the trial. Matters of evidence are not required to be stated in a bill of particulars. Garfield v. Paris, 96 U. S. 557. And we further find that, although each item is for a transaction in foreign money, yet the value of such money is computed and expressed in domestic money. The defendant was without any reasonable ground of objection to the amended bill of particulars.

The first bill of exceptions was founded on the objection of the defendant to the introduction as evidence of certain papers and depositions "tending to show transactions between the parties in sterling money," when the indebtedness alleged in the declaration was in money of account of the state. About this I had some difficulty at first, and thought that the declaration, in order to admit such evidence, should have set forth the indebted-

ness in sterling money, and left its value in domestic money to be ascertained by the jury under the provisions of the statute (section 2816, Code), or should have stated the indebtedness to be in foreign money of the value of so much domestic currency; and I still think this the more correct method (3 Rob. Prac. 498, 499; 2 Chit. Pl. 85, 86; Brown v. Jones, 10 Gill & J. 334). But upon reflecting on the office of a bill of particulars,—that it is to give a fuller and more particular specification of the matter contained in the declaration, and to be read in connection with it,—I have come to the conclusion that the bill of particulars supplies the defect of the declaration, if any, and that the objection of the defendant ought not to prevail. In the amended bill of particulars, as previously stated, the several items of the demand of the plaintiffs are not merely set forth in sterling money, but its value is calculated and expressed in federal money, and the aggregate in such money corresponds precisely with the amount alleged in the declaration. This being the case, it is the same in substance and in effect as if the indebtedness had been alleged in the declaration in foreign money of the value of so much domestic currency, which would have rendered admissible the evidence objected to.

It was also urged in the oral argument that the drafts and acceptances mentioned in the bill of particulars should not have been admitted as evidence, because their genuineness was not proved. An inspection of the bill of exceptions shows that this was not made a ground of objection to their introduction on the trial in the lower court, and it cannot be raised and considered here now. The specific objection on this ground made to the admission of the letter of the defendant of August 8, 1891, confirms this view. The propriety of its admission will be adverted to further on.

Objection was made to the admission of copies of certain letters, which had been written by the plaintiffs to the defendant, on the ground that no notice had been given to produce the originals, and no foundation laid for the introduction of the copies. This was irregular and improper, but an examination of the letters shows that they were not at all necessary to the maintenance of the plaintiffs' case, and could not have prejudiced the defendant. So far from being prejudicial, they were in its favor. They contain, in the main, the accounts of sales of bark consigned by the defendant to the plaintiffs, out of which this controversy arose, and show the credits to which the defendant is entitled. If all of these letters had been excluded, and also the letter of August, 1891, referred to above, the strength of the remaining testimony of the plaintiffs would not have been thereby impaired, which was ample to sustain the verdict of the jury and the judgment of the court. Insurance Co. v. Trear, 29 Grat. 255; and Preston v. Harvey, 2 Hen. & M. 55.

It was also assigned as error that the jury, on the trial of the issue made by the pleadings, assessed damages when no writ of inquiry of damages had been awarded. The defendant pleaded the general issue at the first rules, and, this being the case, it would be a sufficient answer to this assignment of error to refer merely to the provisions of the Code of Virginia on this subject. Sections 3284-3286, 3288. An order of inquiry of damages, where it is necessary, is confined to cases where the defendant has not appeared and pleaded. Where an issue is made by the pleadings, and it is tried by a jury, then the jury, at the same time that they try the issue, assess the damages; so that in such case no writ of inquiry is necessary. This is the usual and immemorial practice. Steph. Pl. 127; 4 Minor, Inst. (3d Ed.) pt. 1, p. 955; 1 Bart. Law Prac. 564; James R. & K. Co. v. Lee, 16 Grat. 424; and Rees v. Bank, 5 Rand. (Va.) 328. It will be seen from an examination of the cases relied on by counsel for the plaintiff in error that they were all cases in which no plea had been filed, and the judgment was by default. They are not, therefore, pertinent to the case at bar.

On the trial of the case, the court, on the motion of the plaintiffs, gave the jury the following instruction: "The court instructs the jury that in ordinary dealings a factor must obey his principal's orders as to prices and sales, but if he advances on the goods to the principal, and demands payment of said advances, then, if his advances are not returned, he has a right to sell and reimburse himself; that he has then a special property in the goods, and a right to sell follows therefrom,"—to which instruction the defendant excepted, and this constitutes its third bill of exceptions. The instruction correctly expounds the law applicable to the case, and the court did not err in giving it. *Brown v. McGran*, 14 Pet. 479; and *Feild v. Farrington*, 10 Wall. 149.

It is also assigned as error that the verdict of the jury exceeds the damages claimed in the declaration. The indebtedness claimed in each count of the declaration is \$1,347.36 as of December 21, 1891, and the damages laid at \$2,000. The verdict of the jury was for \$1,344.08, with interest from December 12, 1891. This claim of error is without foundation.

Exception was taken to the ruling of the court in rejecting the special plea set out in the sixth bill of exceptions. The court, in rejecting the plea, stated that it did so because the defendant could prove under the plea of non assumpsit, which it had already pleaded at a former term, all that it could prove under this special plea. The special plea sets forth, in substance, acts of misconduct by the plaintiffs in the performance of their duty as the factors of the defendant in the sale of its goods and in the retention out of the proceeds of sale of fraudulent, unreasonable, and unlawful charges in

the matter of expenses. Evidence of such matters was clearly admissible under the general issue. 4 Minor, Inst. pt. 1, pp. 773, 774; 1 Bart. Law Prac. 500, 501; Steph. Pl. 180, 181; and 2 Greenl. Ev. §§ 135, 136, and notes thereto. It is apparent from the character of the evidence introduced by the defendant that it availed itself of the right to do so, and without objection from the plaintiffs. The special plea was properly rejected.

The remaining assignment of error is to the refusal of the court to set aside the verdict, and award the defendant a new trial. It would prolong this opinion, already too extended in view of the nature of certain of the errors assigned, to recite and discuss the evidence. It is sufficient to say that we have carefully examined it, and that, in our opinion, it fully sustains the verdict of the jury. We find no error in the judgment of the circuit court of Powhatan county for which it should be reversed, and the same is affirmed.

DASHIELL v. MERCHANTS' & PLANTERS' SAV. BANK.

(Supreme Court of Appeals of Virginia. May 2, 1895.)

FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.

D. executed a note secured by trust deed, which at maturity was taken up by defendant, his brother, and defendant afterwards proceeded to sell the property under the trust deed to satisfy the note. Plaintiff claimed to succeed to D.'s interest in the land, through a conveyance from him made after maturity of the note, and alleged that D., or defendant, as his agent, paid the note; that D. had possession thereof, but defendant wrongfully obtained the same, and claimed to be the owner thereof. Plaintiff's one witness testified that D., at the time defendant took up his note, gave defendant checks to the amount of the note, and that defendant afterwards obtained possession of D.'s papers wrongfully. Defendant admitted receiving the checks from D., but testified that they were to be applied on D.'s past indebtedness to him, and that he was to take up the note, and hold the same, together with the right of lien, and that he had continuous possession of the note from the time he took it up. Defendant was partially corroborated by another witness. The note was not marked "Paid." *Held*, that possession of the note being prima facie proof of ownership, and the burden of proof being on plaintiff to show that the note had been fraudulently obtained by defendant, the evidence was insufficient to sustain a decree for plaintiff.

Appeal from chancery court of Richmond; James C. Lamb, Chancellor.

Action by the Merchants' and Planters' Savings Bank against J. Parker Dashiell and another for possession of land, and to enjoin the sale thereof under a trust deed. From a decree for plaintiff, defendant Dashiell appeals. Reversed.

Allen Potts and Leake & Carter, for appellant. G. Carlton Jackson, for appellee.

CARDWELL, J. By a deed dated May 27, 1890, and recorded in Chesterfield county

clerk's office, J. H. Montague, H. A. Tabb, and W. L. Royall, trustees, conveyed to R. B. Taylor, trustee, a tract of 25¼ acres of land lying in Chesterfield county, adjoining the city of Manchester, in trust, to secure, among a number of other notes, the payment of a note for \$662.50 drawn by W. S. Dashiell to his own order, and by him indorsed in blank, bearing even date with the trust deed, and payable 12 months after its date at the State Bank of Virginia, Richmond, Va. At the maturity of this note, on May 27, 1891, it was taken up by J. Parker Dashiell, appellant, with the check of Thomas Potts & Co., of which firm he was a member, and held by him until about the 18th of February, 1892, when he, as the holder of the note for value, as he claimed, required R. B. Taylor, the trustee in the deed securing the same, to proceed to advertise and sell the property in accordance with the provisions of the trust, whereupon the Merchants' & Planters' Savings Bank of Richmond, Va., filed its bill of complaint in the chancery court of Richmond against J. Parker Dashiell and R. B. Taylor, trustee, and obtained an injunction to restrain the trustee from advertising and selling the tract of land conveyed to him by the deed from Montague and others till the further order of the court, setting forth in its bill that W. S. Dashiell had, by deed dated on or about the 27th day of July, 1891, in consideration of \$1,800, conveyed to the bank all of his right, title, and interest in this tract of land, upon which the note in question, along with a number of others, was secured, and charging that at the maturity of this note, on the 27th of May, 1891, it was paid and satisfied by W. S. Dashiell, or by his agent, J. Parker Dashiell, who is his brother, and came into the possession of W. S. Dashiell, but that J. Parker Dashiell had wrongfully and tortiously obtained possession of the note, and was claiming and pretending to be the holder and owner of it. The answer of J. Parker Dashiell, duly filed, denies specifically every charge or allegation made by the complainant in its bill, and sets forth how he came into possession of the note, and that it had been in his possession ever since he took it up from the bank, and never in the possession of W. S. Dashiell, and claiming that respondent's possession of the note was by purchase for a valuable consideration, and that he in no manner obtained it wrongfully and tortiously. The answer of R. B. Taylor, trustee, was also filed, in which he admits the genuineness of the note, and that it is secured by the deed of trust from Montague and others, in which he is named as trustee, but denies, so far as he is concerned, all charges of fraud in complainant's bill contained.

The complainant in the court below, to support the allegations of its bill, examined but one witness, C. D. M. Cobb,—a former partner of W. S. Dashiell, engaged in the real-estate business in the city of Richmond

under the style or the firm name of Dashiell & Cobb,—and his testimony is to the effect that the check book of the firm of Dashiell & Cobb, as well as the checks returned to the firm as paid at bank, shows that a check was drawn May 27, 1891, on the Citizens' Bank of Richmond, to the order of J. P. Dashiell, for \$400; another on the same bank, May 29, 1891, to the order of "Cash," for \$262.50; that both checks were signed by the firm name, in the handwriting of W. S. Dashiell, and both indorsed, "For deposit in the Merchants' National Bank, Richmond, Va., account of Thomas Potts & Co." (Merchants' National Bank, Richmond, Va.); that said checks were charged on the books of this firm to W. S. Dashiell; that W. S. Dashiell kept his private papers in two tin boxes, which were delivered to Mr. Thomas Potts upon an order of J. Parker Dashiell, brother of W. S. Dashiell, and that, besides the two tin boxes, W. S. Dashiell had a private drawer in the safe of the firm, in which he kept some papers, and which drawer, at the request of J. Parker Dashiell, was opened in witness' presence after W. S. Dashiell left the city, in November, 1891; and that J. Parker Dashiell took charge of and carried away contents of the drawer. But witness was unable to state what papers were in the boxes or the drawer, with the exception of one note, which he noticed as they hurriedly went over the papers, and this was a note for \$1,000, with the name of E. A. Coleman to it. J. Parker Dashiell, testifying in his own behalf, stated that during the spring of 1891 he requested his brother, W. S. Dashiell, many times, to give him security for money he had advanced to him and paid for him, amounting to about \$675; that a day or two before he paid the note in question, on May 27, 1891, in the State Bank, his brother said to him: "You pay this note and hold it. It is a lien on real estate I purchased in Chesterfield, and will be first-class security for that amount of the debt, certainly; and I will make you a payment of not less than the amount of the note on account of what I owe you,"—the witness agreeing to continue making monthly payments due by his brother, W. S. Dashiell, to the National Building Association; that on May 27, 1891, he took up the note in question from the State Bank, with the check of Thomas Potts & Co., and that some hours after he had taken it up, but on the same day, his brother, W. S. Dashiell, brought to witness' office, and handed to him, the two checks, the one for \$400, dated May 27, 1891, and the other for \$262.50, dated May 29, 1891, and distinctly stated that these checks were not to pay the note for \$662.50 that witness had taken up from bank, but were a payment on account, as he had before promised witness. J. Parker Dashiell further testified that on taking up this note from the bank he put it among his private papers in the vault of his firm; that it has never, since its

maturity, been in the possession of W. S. Dashiell, nor had he even seen it. And this statement is corroborated by Thomas Potts, who testified that in looking over the bank checks of his firm, about June 1, 1891, he came across a check for the amount of this note, and asked J. Parker Dashiell about it, and was told by him that he used it to pay a note of W. S. Dashiell he could not pay, and took the note out of the vault, and offered it to him (Potts) as collateral for anything that he (J. Parker Dashiell) might owe the firm, but the note was put back in the vault, witness declining to take it. Witness Potts further testified that about a month before November 7, 1891, J. Parker Dashiell still had possession of this note.

Upon a hearing of the cause on the bill and the answers and the depositions of the witnesses referred to, the court below, on December 1, 1892, decreed that the note in question, for \$682.50, has been fully paid off and discharged at the cost of said W. S. Dashiell, and that the plaintiff is entitled to possession of same, and further adjudged, ordered, and decreed that the clerk of the court withdraw said note from the papers in the cause, and deliver the same to the plaintiff, and that the injunction awarded the plaintiff on the 18th day of February, 1892, be made perpetual, and that J. Parker Dashiell, defendant, pay to the plaintiff the costs of its suit. From this decree an appeal was allowed J. Parker Dashiell to this court.

After a most careful examination of the record, we are unable to concur in the view taken of the case by the learned judge of the court below. The possession of the note in question, not marked "Paid," was *prima facie* proof of its ownership in the holder, J. Parker Dashiell, appellant; and the burden was unquestionably upon the complainant in the lower court to prove that the holder of the note was wrongfully and tortiously in possession of it, as charged in the bill; and the only testimony taken in support of the allegations of the bill is that of witness C. D. M. Cobb, which, at the most, raises but a bare suspicion that the note in question was in the possession of W. S. Dashiell after its maturity, and wrongfully obtained by J. Parker Dashiell from among the papers delivered by Cobb to him after W. S. Dashiell had left the city of Richmond; but, even if such an inference could be rightfully drawn from Cobb's testimony and other circumstances, it would not be sufficient to sustain the allegations of the bill. Fraud is never presumed, but must always be proved, when charged, by clear and satisfactory evidence, — a rule of law too well established to require the citation of authority. The efforts of the complainant in the court below to sustain the allegations of its bill, have been fully met by a full, frank, and, as we think, reasonable, statement on oath by appellant of all his transactions with his brother, W.

S. Dashiell, in which he acquired title to the note in question; and he is materially corroborated by the testimony of Thomas Potts, a disinterested witness.

It is contended, however, that the failure of J. Parker Dashiell to credit W. S. Dashiell with the two checks given by him May 27, 1891, in the account on which he obtained judgment in the circuit court of Richmond November 30, 1891, against W. S. Dashiell, for the sum of \$1,338.70, is sufficient, together with the other testimony in the case, to justify the decree complained of, but we are unable to see the force of this contention. While, according to the ordinary rules used in stating accounts, these checks should have been credited to W. S. Dashiell, the failure to do so does not, we think, affect at all the right of J. Parker Dashiell to the note in question; and it also appears that the larger portion of the account sued on is made up of payments made by J. Parker Dashiell for account of W. S. Dashiell after the note was taken up, May 27, 1891, and if the note is realized, as J. Parker Dashiell states, the amount will have to be credited on his judgment. For the reasons stated, we are of opinion that there is error in the decree complained of, and the same must be reversed; and this court will enter such decree as the court below should have entered, dissolving the injunction and dismissing complainant's bill, with costs to appellant.

(81 Va. 446)

WITZ et al. v. FITE et al.

(Supreme Court of Appeals of Virginia. May 2, 1895.)

MERGER—PAROL EVIDENCE—PAYMENT OF NOTE.

1. A note is not merged in a judgment note given to the payee as additional security for the original note.

2. Where a judgment note is given for the same debt as a previous promissory note, and does not show that it was given as collateral, the party claiming it as collateral may show such fact by parol evidence.

3. A plea that a judgment note was executed in satisfaction of a note given for the same debt is defective in not alleging that it was accepted in satisfaction of such note.

Error to circuit court, Orange county.

Action by Witz, Biedler & Co. against M. M. and S. L. Fite and Julia A. Levins on two promissory notes. Judgment for defendants. Plaintiffs bring error. Reversed.

Rixey & Barbour, for plaintiffs in error.
G. D. Gray, for defendants in error.

BUCHANAN, J. This is a writ of error to a judgment of the circuit court for Orange county rendered in an action of debt brought upon two promissory notes executed by M. M. Fite, S. L. Fite, and Julia A. Levins, the defendants in error, to Witz, Biedler & Co., the plaintiffs in error. The defendants filed two special pleas in writing. The defense set up in plea No. 1 is that 1 M. Fite and

S. L. Fite, two of the three makers of the notes sued on, after such notes became due and payable, executed two writings under seal, payable to the plaintiffs, for the identical debts mentioned in the declaration, which were accepted by the plaintiffs, and that by reason of such acceptance the notes sued on were fully satisfied, discharged and extinguished.

Plea No. 2 sets up substantially the same defense, except that the writings under seal were executed before the notes sued on became due.

The plaintiffs objected to the filing of the pleas, but the court overruled their objections, and allowed the pleas to be filed. To this action of the court the plaintiffs excepted. This constitutes their first bill of exceptions.

After the objections of the plaintiffs to the pleas were overruled, they offered a special replication to each of the pleas, in which they averred that the writings under seal referred to in the defendants' pleas contained, in addition to the promises to pay the sums therein specified, powers of attorney giving the plaintiffs or their attorneys authority to confess judgments therein in any court of record in the state of Pennsylvania, of which state the two obligors in said writings obligatory were inhabitants, and that the writings obligatory were delivered, received, and accepted as collateral security alone to the notes sued on, and not in satisfaction or as a merger of the said notes, and with the knowledge, assent, and advice of the defendants, and at the special instance and request of Julia A. Levins, the other defendant, who was a resident of the state of Virginia, and desired the plaintiffs to take the said judgment notes for her protection, the said M. M. Fite and S. L. Fite being at that time largely indebted. The defendants demurred to the replications. The court sustained the demurrers. To this action of the court the plaintiffs excepted, and took their second bill of exceptions.

The question raised by the pleadings filed and offered to be filed in the cause is whether a simple contract debt is merged into a higher security given for the same debt to the same creditor by a portion of the same debtors, although it was agreed by the parties, when given, that the higher security should be taken only as a further or collateral security, and not in satisfaction of the simple contract debt.

The counsel of the defendants insist that the question of merger cannot be controlled by the intention or agreement of the parties, but results by operation of law from their acts, without regard to intention.

In general, a simple contract is extinguished by a specialty security for the same debt, if the remedy upon the latter is coextensive with that which the creditor has on the former.

This question has been much discussed in

England and in this country, but the weight of authority is in favor of the doctrine that if the higher security shows upon its face that it was executed for the same debt as the simple contract, and shows further that it was not taken in satisfaction of the simple contract but in addition to or collateral to it, there is no merger. If the higher security shows upon its face that it was executed for the same debt as the simple contract, and nothing more appears, the presumption is—at least, of fact—that it was in satisfaction of the simple contract, and that the latter is merged into it. 2 Chit. Cont. (11th Am. Ed.) pp. 1160, 1161; 15 Am. & Eng. Enc. Law, 357; 1 Smith, Lead. Cas. (8th Am. Ed.) pt. 1, p. 663; 3 Minor, Inst. (Class Ed.) 142; Commissioner of Stamps v. Hope [1891] App. Cas. 476, 483; Butler v. Miller, 1 Denio, 407; Wallace v. Fairman, 4 Watts, 378, 380; 5 Lawson, Rights, Rem. & Prac. § 2580; Graves v. Allen, 66 Tex. 589, 2 S. W. 192.

But in this case the higher securities which are copied into the replications offered do not show that they were executed for the same debts as the notes sued on, nor do they show that they were accepted by the plaintiffs as additional or collateral securities to the notes. Evidence other than the higher securities will therefore have to be resorted to, to show for what purpose they were executed. The defendants admit this, and insist that they can show that the higher securities were executed for the same debt as the notes sued on, but claim that, since the higher securities do not show on their face that they were taken as additional or collateral securities, the implication of law is so strong that the notes were merged into them that no proof of the intention or agreement of the parties to the contrary is admissible.

Whatever may be the rule as to the introduction of parol evidence where the higher security shows upon its face that it was given for the same debt as the simple contract, and does not show that it was given as collateral to it, it would seem clear that if the party relying upon the merger or extinguishment of the simple contract, as a defense to an action upon it, is compelled to resort to evidence other than that furnished by the higher security in order to show the purpose for which it was executed and accepted, then the party claiming that it was given as collateral security, and not in satisfaction of the simple contract, should have the right to introduce parol evidence also to sustain his contention. Authorities have been cited and found showing that, where the higher security shows upon its face that it was executed and accepted as collateral security to the lower, then the doctrine of merger does not apply. These authorities show that where it does so appear upon the face of the higher security there is no merger, but they do not therefore prove that where it

does not so appear there is a merger. If there be authorities which hold that parol evidence cannot be introduced to show that the higher security was executed and accepted as collateral or additional security, when it does not so appear upon its face, and does not show that it was executed for the same debt, the labors and researches of counsel and the court have failed to find them. On the other hand, there are authorities showing that in such a case parol evidence is admissible to show the purpose for which the higher security was executed and accepted. To this there can be no valid objection. It violates no rule of law. It enables the parties to have their controversy settled upon its merits, and not by technicalities which may shut out the truth and work injustice.

It is said in 2 Chit. Cont. (11th Am. Ed.) pp. 1160, 1161, that the giving of a specialty for a simple contract debt or security will not "operate as a merger, even in favor of a surety, if it appear upon the face of the specialty, or from the nature of the transaction, that it was intended only as an additional or collateral security."

In 5 Lawson, Rights, Rem. & Prac. § 2580, it is said that "if the face of the security, or other evidence, shows that the higher security was taken only as a further or collateral security, there is no merger or extinguishment."

In Van Vleet v. Jones, 20 N. J. Law, 340, the court, in discussing the question, said: "What did the parties mean by the transaction? Did they intend that the old security should remain open, and the new one merely collateral to it? Did they intend to extinguish the former? This intention is, of course, to be collected from the face of the instrument itself, where it so appears, and, if it does not so appear, then from the next best evidence; the only difference being that in the former case the security itself proves the exception to the rule, and also the intention of the parties, whilst in the latter the party alleging the exception must prove it. And in this no evil can arise. There is no parol contradiction of a written instrument, but only an explanation as to the object for which it was given. A contrary doctrine would prohibit parol proof of the payment of a collateral security by the payment of the original claim, unless it appeared upon the face of the collateral that it was such."

In the case of Gardner v. Hust, 2 Rich. Law, 601, 608, the higher security did not show upon its face that it was for the same debt as the lower security. It was urged in that case that the legal presumption that there was a merger could not be rebutted by parol evidence, but the court held that it could, and, in reply to the argument that it could not, said: "That may be so where the fact that both securities were for the same debt appeared from the higher security, or by comparing the two together; but, if the fact is proved by parol, there can be

no objection that the terms upon which the higher security was received are also proved by parol. Wallace v. Fairman, 4 Watts, 378, 380.

Tested by these rules, the pleas offered and allowed to be filed over the plaintiffs' objection were insufficient. All that is stated in them may be true, and still they do not set up a good defense. They ought to have averred, not only that the writings obligatory mentioned therein were executed by the obligors for the same debts as the notes sued on, but that they were accepted by the plaintiffs in satisfaction and discharge of such notes. The circuit court erred in not sustaining the plaintiffs' objection to the pleas.

If the facts stated in the replications are true, there was no merger of the notes sued on, and the plaintiffs had the right to maintain their action upon them. The court therefore erred in sustaining the demurrer to the replications.

For these errors the judgment of the circuit court must be reversed, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

PATCH et al. v. MORRISETT et al.¹

(Supreme Court of Appeals of Virginia. May 2, 1895.)

TRUST DEED FOR PURCHASE MONEY — INJUNCTION TO RESTRAIN SALE — DEFECTS IN TITLE — CONDITIONS OF SALE.

1. The existence of a lien for a small paving tax is not such a cloud on the title as to warrant the enjoining of a sale under a deed of trust given for the price thereof, as the trustee can be compelled to pay the tax out of the purchase money.

2. A sale of land under a trust deed, for the price of the land conveyed thereby, will not be enjoined because upon a part of the same tract, other than that conveyed by the trust deed, a family burying ground was reserved by a previous grantee, there being sufficient land remaining in the seller (the beneficiary in the trust deed) to afford ingress to the burying ground and egress therefrom without touching the land conveyed by the trust deed.

3. Where a deed of trust provides that if, at the time of sale thereof, any of the notes secured thereby shall not be due, the purchase money necessary to pay the same shall be made payable when such notes mature, the trustee cannot sell for cash to pay a note not due at the time of sale.

4. Though grantors in a deed of trust depol the trust property by removing buildings situate thereon, they do not thereby forfeit their right to have the property sold upon a credit provided for in the trust deed.

Appeal from circuit court, Chesterfield county.

Bill by George Patch and others against T. J. Morrisett and others to enjoin a sale under a deed of trust. From a decree for defendants, plaintiffs appeal. Reversed.

D. S. Pulliam and Wm. I. Clopton, for appellants. Chas. S. Page, for appellees.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

KEITH, J. George Patch and others filed a bill in the circuit court of the county of Chesterfield in August, 1892, setting out that in March, 1890, they conveyed to George E. Gary, trustee, a parcel of land in the city of Manchester, to secure four notes, payable in one, two, three, and four years after date, representing the purchase money of a lot of ground purchased by them of T. J. and Harriet V. Morrisett. The deed of trust provides for the payment of the notes as they may become due, the trustee being empowered, when required so to do by the holder of the notes, to sell the property conveyed for cash, as to so much as may be necessary to defray the expenses of executing the trust, and to discharge the amount of money payable upon the notes; and it further provides that "if, at the time of such sale, any of the notes shall not have become due and payable, such part or parts of said purchase money as will be sufficient to pay off and discharge such remaining notes shall be made payable at such time or times as the said remaining notes will become payable, and as to the residue, if any, after paying the said notes at such time as the grantors [who are the complainants in the bill] should direct." The bill avers that the trustee had advertised the property for sale, in violation of the terms and conditions in accordance with which he was required by the deed to sell, and files with the bill, as an exhibit, the terms of sale as advertised by the trustee, as follows: "Cash as to expenses of sales, taxes, if any be due, and to pay off a note of \$770, and interest on same from March 26th, 1892, till paid. Note due March 26th, 1893, for \$811.25; and another note due March 26th, 1894, for \$852.50. The residue on such terms as will be announced at sale." The sale was advertised to take place on the premises on the 19th day of July, 1892, at 6:30 p. m., when it appears that but one of the unpaid notes was due, all of which the bill avers to be a direct violation of the terms of the deed of trust. The complainant avers, further, that, when they bought the land, they were informed that the sum of \$55 was due to the city of Manchester for paying tax; and that, under the law and ordinance of the city of Manchester, the tax is a lien on the land. They further aver that the land in question is a part of the lands of which James Briggs died seised and possessed, and which was "conveyed to T. J. Morrisett and Harriet V. Morrisett by a deed of partition with E. T. Bass and Mary E. Bass, his wife"; that the land, of which this is a part, was acquired by Briggs by two deeds,—one from William Harman, dated 17th May, 1851, and the other from Cecelia A. Granger, dated the 15th March, 1850; and that the deed from Granger contains the following reservation, to wit: "Saving and reserving the family burying ground, of thirty-two feet square, with the privilege of ingress and egress to the same." For these

reasons the complainants say that the trustee ought not to sell the land in question, and pray for an injunction, which was awarded. Upon notice, however, given a short time thereafter, the judge of the circuit court of Chesterfield dissolved the injunction, and the plaintiffs applied to this court for an appeal, which was allowed.

We do not think that the paying tax due to the city of Manchester constitutes any cloud upon the title. There is no reason to suppose that if it was an existing incumbrance upon the property, for which the appellees were liable, the trustees would not have made a proper application of the purchase money. They could, without doubt, have been compelled to do so, and it is scarcely possible that so small a charge could seriously have affected the sale of the property; nor do we think that the reservation of the burial lot constitutes any substantial objection to the title. There is strong reason to believe that it had been abandoned; but, apart from this, we think the law applicable to the case is correctly stated in the answer of T. J. Morrisett and wife. The lot purchased by the plaintiffs was only a part of the real estate owned by the appellees. The burying ground is not upon that part sold by them to the appellants, but appears from the evidence to be upon the portion retained by the appellees. There has been as yet no demarcation of the precise route by which the right of ingress and egress over the lands of T. J. Morrisett and Harriet V. Morrisett to the reservation in question is to be enjoyed; but there can be no doubt that, in accordance with general principles governing such cases, those entitled to the easement over the lands in question would be required to exercise that right in subordination to the rights of others, and this incumbrance, which existed upon the property of the Morrisetts prior to their alienation of a part of the estate charged with it, would, in favor of the alienee for value, be restricted to that portion of the land with which they have not yet parted, provided such restriction did not interfere with the reasonable use and enjoyment of the easement by those for whose benefit it was created. There is no suggestion that the burying ground is not as accessible through and over that portion of the land which T. J. Morrisett and wife have not aliened as over that portion of it which they have sold to the appellants. A court of equity, therefore, under such circumstances, would require those in whose favor the easement exists so to exercise it as to impose the burden upon Morrisett and wife, and to exonerate the appellants. We do not think, therefore, that this reservation constituted any ground for the interposition of the court.

We are, however, reluctantly forced to the conclusion that, in the terms of sale advertised by the trustee, he exceeded the powers conferred upon him by the deed of trust,

which alone is the source of his authority to act. It plainly appears from the advertisement that he undertook to sell for a sum not due, which was obviously in excess of his powers. For this reason, we think the decree of the circuit court dissolving the injunction was erroneous.

The decree recites that the appellants, after procuring the injunction, entered upon the property, and removed therefrom a valuable brick building, and that "therefore they should be left to what remedy they may have had at law," and for this reason the injunction awarded was dissolved. In thus spoliating property as to the possession and enjoyment of which they had invoked the protection of the court, the complainants committed a flagrant and unjustifiable act. It was a contempt of the court, for which, if guilty, they might and should have been punished by the imposition of such pains and penalties as the law denounces against that offense. We cannot, however, concur with the circuit court in thinking that the complainants had thereby forfeited all claim to relief against the improper exercise by their trustee of the powers with which he had been clothed. It seems to us that the duty of the trustee was wholly unaffected by the misconduct attributed to the appellants, and that, having transcended his power, it still remained the duty of the court to exercise the jurisdiction conferred upon it, and to confine the trustee to the due observance of the provision of the instrument from which he derived his authority.

We are therefore of opinion that the decree of the circuit court of Chesterfield dissolving the injunction should be reversed; and, this court proceeding to enter such decree as the circuit court of Chesterfield ought to have entered, it will be further ordered and decreed that the injunction granted on July 16, 1892, by the judge of the circuit court of Chesterfield be perpetuated, but without prejudice to the rights of those entitled to the benefit of the deed of trust executed by the appellants to George E. Gary, trustee, to require the trustee therein named, or any substituted trustee, to advertise the property for sale, or to proceed otherwise, as they may be advised, to enforce the said deed; and that the appellants recover their costs in this court and in the circuit court of Chesterfield county.

(91 Va. 421)

CLARKE et al. v. OLIVER et al.¹

(Supreme Court of Appeals of Virginia. April 25, 1895.)

LIABILITY OF TRUSTEES—MISAPPROPRIATION OF FUND—EQUITY.

1. Where money was contributed to establish an industrial school for colored youths, the contributors cannot require trustees to account, as

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

for a misappropriation of the trust fund, merely because the trustee subsequently appropriated a part of the fund for a church.

2. A court of equity will not, under its general powers to administer trusts, enforce a mere legal demand for work and labor done on property standing in the name of trustees.

Appeal from circuit court, Henrico county; B. R. Wellford, Jr., Judge.

Bill by one Clarke and others against John Oliver and others for an accounting. Defendants had decree, and plaintiffs appeal. Affirmed.

W. W. Henry and J. Saml. Parrish, for appellants. Stiles & Holladay and Edmund Waddill, Jr., for appellees.

KEITH, P. In the spring of 1875 certain colored people purchased of Charles G. Davis a lot of ground in the city of Richmond, on the north line of Moore street, with brick buildings thereon; and on the 22d of August, 1876, this property was conveyed to John Oliver, Coleman C. Smith, and others, who had been in the meantime appointed trustees of the Moore Street Missionary Baptist Church, by an order of the circuit court of Richmond city, entered on the 24th of November, 1875, to hold the property subject to the payment of the unpaid purchase money, for the benefit of the Moore Street Missionary Baptist Church, according to the laws of the state of Virginia governing the holding of church property. The unpaid purchase money amounted to the sum of \$4,523.52, which was evidenced by five negotiable notes secured by a deed of trust. About the same time it appears that a movement was set on foot by certain colored people in the city of Richmond to raise a fund for the establishment of an industrial school, to be known as the "Moore Street Industrial Society," the design of which was to promote the instruction of colored youth in practical and useful trades, and to that end to raise money for the purchase of suitable buildings and equipment. In order to secure the money for this industrial school, many of the influential residents of Richmond were induced to subscribe to a fund for that purpose, and by others letters were written and testimonials given, which were placed in the hands of agents, who went to Pennsylvania and elsewhere soliciting assistance for this most worthy purpose from the charitably disposed. One John Oliver appears to have been the chief agent through whom these appeals were made. He was active and successful in procuring subscriptions, and in the month of March, 1882, the deed given to secure the unpaid purchase money resting upon the Moore Street Missionary Baptist Church property was released, the sum secured thereby having been paid off and discharged. In the meantime a controversy had arisen as to the title to this property. The Moore Street Missionary Baptist Church had negotiated the purchase of the lot upon which the church

and other buildings stand, and had taken the deed from Davis, their vendor, to trustees for its benefit, and had by strenuous efforts assisted in some degree in relieving it of the lien for the balance of the unpaid purchase money. Be this as it may, however, certain it is that the Moore Street Missionary Baptist Church was in possession, with the absolute legal title, subject only to the deed of trust before mentioned in favor of Davis for the unpaid purchase money, and, when that incumbrance was discharged, the apparent title of the Moore Street Missionary Baptist Church, through its trustees, was perfect and complete. Those, however, who had been instrumental in promoting the organization of the industrial school determined to assert a claim to this property by reason of the fact, which is beyond dispute, that by far the greater part, if not the whole, of the purchase money had been paid out of the money raised by contributions voluntarily made by persons whose aid had been solicited for the erection and endowment of an industrial school, and not for the establishment of a Baptist Church. This controversy between these two organizations, the Moore Street Missionary Baptist Church and those representing the industrial school, resulted in a compromise, and in April, 1880, a deed was executed by the trustees of the church and of the Moore Street Industrial School, by which the greater part of this property was conveyed for the benefit of the school, and with a covenant that, if that portion of it which remained for the benefit of the church should at any time cease to be used for religious purposes and for worship by the said Moore Street Missionary Baptist Church, it should belong to and be used by the Moore Street Industrial School. This arrangement, which it was hoped would compose the difficulties between the church and the school, did not have that effect, and six years after its execution a bill was filed on behalf of a number of plaintiffs, suing for themselves and others, contributors to the fund for the establishment of an industrial school, setting out the terms and conditions upon which they had subscribed, declaring that it was for the establishment of a school to enable colored youth in the southern portion of the United States to acquire useful and practical trades, and to become skilled laborers, and generally to elevate their condition. They averred that they were not solicited for subscriptions for any other purpose, and that they did not subscribe or contribute any money to any person for the establishment of the Moore Street Missionary Baptist Church or any church whatever; that they paid their money to John Oliver, as agent, to establish the said school, and not to build or to aid or to establish a church. They then set out substantially the facts that have been narrated, and claim that there has been a diversion of the fund from

the uses and purposes for which it was designed, and that this application of the money given by them for the industrial school for the purchase of property for the Moore Street Missionary Baptist Church, without their knowledge and consent, was a gross perversion and misapplication of their money, unwarranted by law, and was inequitable and unjust. To this bill there was a demurrer, and the first question presented for our decision is, does the bill state a case entitling the plaintiffs to the relief prayed for?

The contributors to this fund parted with their interest in it, and when it was paid their control over it ceased. They are not described as persons belonging to the class intended to be benefited by the application of the fund. The money was devoted to a charitable use. As we have said, the whole interest of the donors was divested. There remained in them no scintilla of right. How, then, can they be heard in a court of equity with respect to the disposition of it? There is no such thing as a resulting trust with respect to a charity. Where a fund has been devoted to a charity, which, if the charity fails, will go to others, those persons having hostile interests may, of course, assert any claim they may have in the subject, and show that the charitable use has for any cause failed and become inoperative and void; but, where the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him, have any standing in a court of equity as to its disposition and control. The law is so laid down in the case of *Ludlam v. Higbee*, 11 N. J. Eq. 342, where it is said "that the contributors to a fund creating a trust for mere charitable purposes cannot call the trustees of that fund to an account for a misapplication of the fund or any other breach of the trust. There must be something peculiar in the transaction, beyond the mere fact of contribution, to give a contributor to a charitable fund a foothold in court to enable him to question the disposition of the fund."

It is said that a person who goes into a court of equity for such a purpose must have some interest in the trust. He must be a trustee, or cestui que trust, or have some reversionary interest in the trust fund. In the case just cited, the subscriptions were to a fund for the purpose of building a church at Cape May for the benefit of visitors of all denominations of Christians, and the demurrer in that case was overruled, because the plaintiffs showed themselves to be of the class which constituted the objects of the trust, and therefore had a right to seek redress at the hands of the court. To the same effect see *Perry, Trusts*, § 733, where it is declared "that the contributors to the fund cannot maintain a bill to correct an abuse of the fund by the trustees, unless they are also the cestuis que trust." In a

suit to enforce a trust, if it appears that the plaintiffs have no direct interest in the enforcement of the trust, their bill will be dismissed. See *Association v. Beekman*, 21 Barb. 563; *Perry, Trusts*, § 873; *Story, Eq. Jur.* § 1191.

The case of *Chambers v. Society*, 1 B. Mon. 215, is much relied upon both by the plaintiffs and defendants in support of their respective positions. In that case one Pawling, by his will, bequeathed a sum for the benefit of the Baptist Educational Society. Chambers subscribed a small amount to the same charity, and a part of the Pawling fund was loaned to him by the trustees. For both of these sums judgments at law were recovered against him, and he filed his bill in chancery against the trustees and others enjoining the collection of these judgments, in which he charges various acts of misfeasance and abuse of their corporate powers, but mainly in the misapplication of the fund to other objects and purposes than those designated by the founder and donor. He contended that he was a party to the contract of subscription to the fund; that he had been induced to enter into it by false representations or a suppression of the truth in matters material to its correct understanding; and he therefore asked for a dissolution of the contract, and a perpetuation of the injunction against the payment of the money subscribed. Surely that case is not in any degree analogous to the case at bar. If one of the plaintiffs here were being sued by the Missionary Baptist Church to compel the payment of a judgment obtained at law upon his contract of subscription, the allegations contained in the bill in this case would clearly entitle him to the same relief that was given Chambers in the suit brought by him against the Baptist Educational Society. It would be a fraud upon Clarke and others to allow the Moore Street Missionary Baptist Church to recover of them money which had been subscribed to a wholly different donee, for wholly different purposes. It is true that the supreme court of Kentucky in the course of its opinion indulges in observations unnecessary to the decision which tend to maintain the position of the plaintiffs here. The intimation is that a party to a contract of donation, or the representative of such party, may maintain such a bill, for it says "that no private individual can proceed against an eleemosynary corporation unless he be a party to the contract of donation, or a representative of one who is, or is interested in the same, or in the use to which the fund is donated." As far as this opinion recognizes the right of a party, merely by virtue of his having been a subscriber to the fund, to maintain a bill to control its disposition, we cannot concur in it, though we think the decree in that case was eminently proper. An information or bill may be exhibited by the attorney general, as was done in the case of *Gallego's*

Ex'rs v. Attorney General, 3 Leigh, 487; or a bill may be filed by the trustees, or one of them, asking the aid of a court of equity, or by any beneficiary of the trust calling upon a court to compel its due execution; but the question here is not as to the inherent power of a court of equity to compel the due execution of a trust, charitable or otherwise; its power to that end is ample. The true question is, by whom may the exercise of those powers be invoked? In our opinion, where contributors have subscribed to a fund for a charitable purpose, and have paid it over to the hand by which it is to be received and applied, their interest and control over it ceases and determines, and whatever jurisdiction is thereafter entertained by the courts with respect to the disposition and control of this fund must be called into active exercise either by the attorney general acting upon behalf of the public, or the trustees charged with its custody and administration, or by some person having a beneficial interest in the object of the trust. We are therefore of opinion that the demurrer of the trustees of the Moore Street Missionary Baptist Church should have been sustained, and the bill dismissed, and that the decree appealed from should be affirmed.

Along with the record in this suit is presented the proceedings upon a bill filed by John W. Williams, into which came Henry Exall by petition, the object of the bill being to recover the sum of \$1,587.20, alleged to be due John W. Williams, plaintiff, for certain repairs placed upon the church, and the sum of \$100, with interest from October 31, 1878, and costs due Henry Exall, upon a judgment recovered by Exall, and by him assigned to John Oliver, for the benefit of the Moore Street Industrial School. To the bill the trustees of the Moore Street Missionary Baptist Church were made parties defendant, and the prayer is for an account of the debt due to Williams, and of the real and personal estate owned by the church, and for further and general relief. It is not pretended that there was any lien of any kind for the claim of Williams. The bill seems to proceed upon the idea that, because the work was done upon property standing in the name of trustees, a court of equity, under its general power to administer a trust, should compel its payment. This proposition cannot be maintained. The plaintiff here is seeking to enforce a purely legal demand for work and labor done and materials furnished in the repair of a church. That the property is church property, and that the legal title to it is in trustees, in no manner affects the rights and remedies of those seeking to charge it. In the absence of a statute, it cannot be subjected in equity any more than at law until a lien has been acquired; that is to say, a right to charge the property specifically with the demand of the plaintiff. The case of *Linn v. Carson*, 32 Grat. 170, is relied upon by the appellants to sustain their

contention. That case rests upon its own peculiar facts and circumstances, and we do not consider that it is authority by which we should be controlled in passing upon the controversy now before us. We are of opinion, therefore, that the decree of the circuit court dismissing the bill brought by Williams, who, as we have seen, had no lien of any kind against the property which he sought to charge, but who came into a court of equity to enforce a simple contract, was clearly right, and that it also must be affirmed.

(44 S. C. 195)

MCCREERY v. DAVIS.

(Supreme Court of South Carolina. April 20, 1895.)

MARRIAGE—DIVORCE—CONFLICT OF LAWS—FOREIGN JUDGMENT—JURISDICTION.

1. Marriage is a civil contract, and not a res or status.

2. The common-law doctrine of divorce obtains in South Carolina.

3. A citizen of South Carolina was married in New York to a citizen of that state, and immediately thereafter the parties continued to reside in South Carolina, till the wife left her husband, and resided in Illinois. Judgment of divorce was there obtained, in accordance with laws of Illinois, but without personal service on or appearance of husband, on a ground not recognized as cause for divorce in New York or South Carolina. *Held*, that the Illinois judgment was void in South Carolina.

4. Article 4, § 1, of the United States constitution, providing that full faith and credit shall be given in each state to the judicial proceedings of every other state, and the act of congress (1 Stat. 122) providing that records and proceedings thereof, properly authenticated, shall have such faith and credit given them in every court in the United States as they have in the state whence they may be taken, does not prevent an inquiry into the jurisdiction of the court rendering such judgment.

5. A status accorded in one state has no extraterritorial operation, and is not thereby established in another.

6. Under a statute providing that marriages contracted while either party has a former husband or wife living shall be void, except the marriage of a divorced person, the divorce referred to must be valid.

7. Dower can be defeated only under section 1903 of the Revised Statutes, providing that where a wife elopes, and is not thereafter reconciled with her husband, she shall forfeit dower, and cannot be defeated by estoppel.

8. Dower is based upon the valuable consideration of marriage.

Appeal from common pleas circuit court of Richland county.

Action for specific performance brought by Charles W. McCreery against J. Henry Davis. Defendant had judgment, and plaintiff appeals therefrom, upon the following grounds and exceptions: "(1) Because his honor held that: 'According to the uniform decisions of the courts of this state, marriage has been adjudged to be a civil contract.' (2) Because his honor held that: 'Assuming that marriage is a civil status, that can be modified or changed by the law of the domicile, it does not follow that the judgment of divorce changing the matrimonial status of

Mrs. Rhoda McCreery in Illinois can have the effect of dissolving the matrimonial status or relations of her husband as a citizen of South Carolina. It cannot have such effect if, as universally conceded, each state has the sovereign right to fix and regulate the domestic status of its own citizens. The judgment of divorce granted Mrs. Rhoda McCreery in Illinois cannot affect the matrimonial status of her husband, Charles W. McCreery, as a citizen of this state, under section 1 of article 4 of the constitution of the United States, giving faith and credit to foreign judgments in this state. This provision of the constitution of the United States was never intended to afford one state the means of fixing or changing the marital status of the citizens of another state, in hostility to the laws and public policy of the latter state with reference to marriage. To give such effect to this constitutional provision would be to authorize one state to legislate for, and to control the domestic policy to govern in, another state. If divorces could be granted for any cause in this state, public policy might demand a recognition in this state of the judgment of divorce granted in Illinois. No country will, however, consent to recognize a foreign judgment which is contrary to its views of public policy and morality. If one state has the unquestioned right to adopt and enforce its own domestic policy with reference to marriage and divorce, the same right must be accorded to every other state. If Charles W. McCreery's marriage is to be regarded as contracted in South Carolina, his present marital status or condition must be determined by the decisions of our own courts with reference to marriage. This court will not undertake to overrule the well-settled law of this state relating to the marriage contract, in order to change the matrimonial status of Charles W. McCreery in this state to suit the changed status of his wife under the laws of Illinois.' (3) Because his honor held that: 'Regarding the marriage of Charles W. McCreery as having been contracted in South Carolina, I conclude, as matter of law, that the judgment of divorce granted in the state of Illinois at the instance of Mrs. Rhoda McCreery did not dissolve the matrimonial status of her husband, Charles W. McCreery, in this state. If the judgment of divorce granted in Illinois could have the effect of dissolving the matrimonial relations of Charles W. McCreery in this state, it could not divest the inchoate right of dower of his wife, Mrs. Rhoda McCreery, in the first lot of land referred to in the agreement between plaintiff and defendant, of which Charles W. McCreery was seised in fee prior to the date of said judgment of divorce. The statute of Illinois also reserves the wife's right of dower.' (4) Because his honor held that: 'If the marriage of Charles W. McCreery is to be regarded as having been contracted in the state of New York, the judgment of di-

voiced granted in Illinois, under the New York decisions, could not have the effect of dissolving the matrimonial relations of Charles W. McCreery.' (5) Because his honor held that: 'Considering the marriage of Charles W. McCreery as contracted either in this state or in New York, I conclude, as matter of law, that the judgment of divorce granted in Cook county, in the state of Illinois, upon the application of plaintiff's wife, Mrs. Rhoda McCreery, does not dissolve the matrimonial relations of her husband, the plaintiff, Charles W. McCreery, as a citizen of this state.' (6) Because his honor erred in passing upon the marital status of Charles W. McCreery, whereas it was only necessary to the decision of this case to pass upon the marital status of Rhoda McCreery. (7) Because his honor should have held that under the constitution of the United States, and the acts of congress passed in pursuance thereof, the judgment of divorce granted by the courts of Illinois is valid and binding in the courts of this state. (8) Because, it having been admitted that the proceedings for divorce were regular, and the judgment therein valid, and in accordance with the laws of the state of Illinois, it was error to hold that the said judgment was ineffectual to dissolve the marriage contract in this state. (9) Because his honor held that: 'The plaintiff is not entitled to compel specific performance of the agreement by the defendant, J. Henry Davis, and that plaintiff's complaint be dismissed, with costs.' (10) Because his honor held that: 'The doctrine of estoppel, as to Mrs. Rhoda McCreery, need not be considered, as she is not a party to this action.'" Affirmed.

Lyles & Muller, for appellant. Alston & Patton, for respondent.

POPE, J. On the 3d day of January, 1893, the plaintiff and defendant entered into a written agreement whereby the plaintiff, for a valuable consideration, agreed to sell and convey to the defendant, free of incumbrance or defect of title of any character, two certain lots of land situate in the county of Richland, in the state of South Carolina. When the plaintiff tendered his deeds of conveyance of said two lots of land to the defendant, the defendant refused to accept said deeds, claiming that the same were not free from incumbrance or defect of title, in this respect, namely, that there was no renunciation indorsed on said deed of the dower of Rhoda Baldwin McCreery, the wife of the plaintiff; and the said defendant still refused, said deeds after he had exhibited to him a certified copy of a judgment of the circuit court of Cook county, in the state of Illinois, in an action wherein the said Rhoda Baldwin McCreery was plaintiff and the said Charles W. McCreery was defendant, rendered at the May term, 1891, of said court, and whereby the bonds of matrimony theretofore existing between the said Rhoda and Charles were dissolved. On the 3d

of February, 1893, the plaintiff, Charles W. McCreery, commenced his action, by summons and complaint, against the defendant, J. Henry Davis, in the court of common pleas for Richland county, in the state of South Carolina, for a judgment requiring the said J. Henry Davis to specifically perform his contract, and that when the plaintiff, Charles W. McCreery, should deliver his deed, with full warranty, for said two lots of land, to the defendant, J. Henry Davis, he should accept the same, and pay the purchase money therefor to Charles W. McCreery. The defendant, in his answer, admitted the facts set up in the complaint, "except that he denies that the title offered him by the said plaintiff is free from defects or incumbrances; and he alleges that the said deeds of conveyance offered him by said plaintiff are defective, in this: that the said plaintiff is, and at the time mentioned in said complaint was, a married man, and that his wife was, and is now, alive, and that said deeds of conveyance bear no renunciation of dower by his said wife." The cause, being thus at issue, came on to be heard by his honor, Judge Witherspoon, at the spring (1893) term of the court of common pleas for Richland county, in the state of South Carolina, on the pleadings, and on the following written agreement as to the admitted facts:

"(1) That on or about the 4th day of February, 1885, the plaintiff, then and ever since a citizen of the city of Columbia, state of South Carolina, was lawfully married, in the city of Brooklyn, in the state of New York, to one Rhoda Baldwin, then a citizen of Brooklyn, and state of New York. That very shortly thereafter the plaintiff, with his wife, returned to the said city of Columbia, state of South Carolina,—his said place of residence,—where they lived together as husband and wife until on or about the 7th day of June, 1887, at which date his said wife left his house and home, and moved to the city of Chicago, Cook county, state of Illinois. That on the 14th day of March, 1891, the said Rhoda McCreery, plaintiff's wife, filed in the circuit court of said Cook county, state of Illinois (a court of record, and general jurisdiction), her bill of complaint against the plaintiff, for a divorce a vinculo matrimonii from him, in which complaint she alleges that she was an actual resident of the county of Cook, and had been for more than 20 months, then last past, a resident of the state of Illinois; that on the 4th day of February, 1885, she was lawfully married to the said Charles W. McCreery, and from that time until about the 7th day of June, 1887, she lived with the said Charles W. McCreery, as his wife, at which time she was compelled to leave him on account of his extreme and repeated cruelty to her,—and further alleging and setting forth in detail his acts of cruelty towards her; extreme and repeated cruelty being one of the causes for which divorces are granted in the statute law of said state of Illinois. That thereupon there

issued out of said court, and under the seal thereof, the people's writ of summons, directed to the sheriff of said Cook county to execute. That said summons, and due notice of the filing thereof and of the complaint, were served upon the plaintiff by publication, in strict accordance with the laws of the state of Illinois, but this plaintiff did not appear, answer, or demur to said complaint. That thereafter, to wit, at the May term, 1891, thereof, there was filed in said circuit court of Cook county a decree affirmatively finding the facts alleged in the complaint of the said Rhoda McCreery, and ordering, adjudging, and decreeing that the bonds of matrimony theretofore existing between the said Rhoda McCreery and this plaintiff be dissolved, a copy of which decree is hereto attached, as Exhibit B, and made a part of this agreement. (2) That plaintiff was seised in fee of the premises first described in said agreement prior to the date of the said decree of divorce, and that he acquired title to the premises second described in said agreement subsequent to the date of said decree of divorce. (3) That by the statute law of the state of Illinois (1 Starr & C. Ann. St. p. 904, par. 14) it is provided: 'If any husband or wife is divorced for the misconduct of the other, except when the marriage was void from the beginning, he or she shall not thereby lose dower nor the benefit of any such jointure; but if such divorce shall be for his or her own fault or misconduct, such dower or jointure, and any estate granted by the laws of this state in the real or personal estate of the other, shall be forfeited.' That in volume 1, at page 896, par. 1, of said Starr & Curtis' Annotated Statutes, it is provided 'that the estate of courtesy is hereby abolished, and the surviving husband or wife shall be endowed of the third part of all the lands whereof the deceased husband or wife was seised of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form.' (4) That by this act of the legislature of the state of New York, passed in 1828, now section 1756 of the Code of Procedure of said state, it is provided: 'In either of the following cases, a husband or wife may maintain an action against the other party to the marriage, to procure a judgment divorcing the parties, and dissolving the marriage, by reason of the defendant's adultery: (1) Where both parties were residents of this state where the offence was committed. (2) Where the parties were married in this state. (3) Where the plaintiff was a resident of this state when the offence was committed, and is a resident thereof when the action is commenced. (4) Where the offence was committed within the state, and the injured party when the action is commenced is a resident of the state.' (5) It is admitted that the deed tendered by the plaintiff did not have a renunciation of dower by Mrs. Rhoda McCreery, wife of grantor.

"Exhibit B. 'State of Illinois, Cook Coun-

ty—ss.: Circuit Court of Cook County, May Term, A. D. 1891. Rhoda McCreery vs. Charles W. McCreery. Bill. This day came again the said complainant, by John C. Hendricks and Charles Bary, Esq., as solicitors, and it appearing to the court that said defendant has had due notice of the pendency of this suit by publication and mailing notice according to the statute in such case made and provided; that the default of said defendant was taken, and the complainant's bill of complaint herein taken as confessed by said defendant; and the court having heard the testimony in open court in support of said bill of complaint (a certificate of which evidence is filed herein), and now being fully advised in the premises, doth find that the complainant is an actual resident of Cook county, and has been a resident of the state of Illinois for over one whole year prior to the filing of the bill in this case, and that the defendant has been guilty of extreme and repeated cruelty towards the complainant, as charged in the complainant's bill of complaint. On motion of said solicitors for the complainant, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, and the statute in such case made and provided, doth order, adjudge, and decree, that the bonds of matrimony heretofore existing between the complainant, Rhoda McCreery, and the defendant, Charles W. McCreery, be, and the same are hereby, dissolved; and the same are dissolved accordingly."

Thereafter, to wit, on the 31st day of May, 1893, his honor, Judge Witherspoon, decreed: "Considering the marriage of Charles W. McCreery as contracted either in this state or in New York, I conclude, as matter of law, that the judgment of divorce granted in Cook county, in the state of Illinois, upon the application of plaintiff's wife, Mrs. Rhoda McCreery, does not dissolve the matrimonial relation of her husband, the plaintiff, Charles W. McCreery, as a citizen of this state. I further conclude, as matter of law, that the plaintiff is not entitled to compel specific performance of the agreement by the defendant, J. Henry Davis, and that plaintiff's complaint must be dismissed, with costs. The doctrine of estoppel need not be considered, as she is not a party to this action. It is ordered and adjudged that the plaintiff's complaint be dismissed, with costs."

Thereupon the plaintiff appealed to this court, upon 10 grounds, which are designed to present, in its different phases, the question of the duty of our courts (we mean the courts of this state) to recognize as valid the judgment of the circuit court for Cook county, in the state of Illinois, whereby Rhoda McCreery and Charles W. McCreery were declared no longer man and wife. We will not reproduce in this opinion these grounds of appeal, but direct that they be included in the report of this case.

So far as marriage, and the estate of the wife in the lands of which her husband was seised in fee during coverture, which is called "dower," are concerned, as fixed under the laws of this commonwealth, they are what were fixed for each under the common law of the mother country. The doctrines of the common law pertaining to marriage and dower are too well understood to need any extended reference. The union of one man with one woman for life, in matrimony, is a mystery. In nature, man and woman, each for himself and herself, are endowed with those qualities that attract and attach each to the other. They were made for each other. In marriage (we speak it reverently) they gratify the propensities which are unlawful otherwise to gratify. They procreate by this union the species, and thereby perpetuate the race. Their mysterious union is the source of unalloyed pleasure, in the uplifting and development of the natures of both parties composing it. Its very design is its continuance until dissolved by death. It is a unit in social life. A combination of such units makes up society. Government itself is but the creation of society, whereby life, liberty, and property are protected. The form of such government is the choice of the units composing it, and all laws are but the expression of rules which the many units, as composing society, may prescribe for their control. No individual human creature can attain excellence in life, in thought, in action, without an ideal before his or her eyes at which they make an effort to attain. Without this ideal the individual may be said to drift. Society being made up of these individual human creatures, and government being their creature, these ideals become incorporated in the framework of their government. One of the ideals before the minds of the members of society is progressive development. Granted that it is never fully attained; still progress towards the goal fixed by the ideal is, in the nature of things, improvement. Now, all admit that the true ideal in marriage is such a perfect union that it leads to the indestructibility of the relation of man and wife; for, in its very inception, such is the declared purpose of the parties to it, and of the society in which it occurs. Such is in exact accordance with the moral law, "And they twain shall be one flesh." England held this view for centuries, and while she held it the 13 colonies in America were planted, each adopting this view of the mother country. Of these 13 colonies, South Carolina was one, and, with the exception of the interval between the years 1872 and 1878, she has constantly retained this view. If others have drifted, she cannot be so charged to have done. The appellant here contends that marriage is not a civil contract, but a status,—a condition; that marriage is a res that accompanies the husband and wife, or either of them, wherever they, or either of

them, may be domiciled. Is marriage a status,—not a contract? Is it true that although formed by a contract by one man and one woman, whereby they, each, for life, become husband and wife, when the union is complete the man has the status of husband, and the woman the status of wife, separate and apart from the civil contract? Is it true that this status, in each, may be said to exist when separate and apart? Is it true that this status in both, or either one, of them is a res? Is it true that either one of them, by becoming domiciled in a state different from that in which the other is then domiciled, thereby gives a jurisdiction to the court of the state of the new domicile of the status of such husband or wife there domiciled, by which the res is under the control of the courts of the new domicile, through which the res may be destroyed therein? Is it so, that under the constitution of the United States, and its subsequent legislation to enforce it, whereby the acts and judgments of one state must be given by every other state the same force and effect had in the state where the act was passed or the judgment rendered, a judgment of the state of Illinois rendered in an action of Rhoda, the wife, against Charles, the husband, for an absolute divorce, granting said divorce, to which action he did not appear, answer, or demur (he being then domiciled in South Carolina), must be recognized by the courts of South Carolina as valid in South Carolina, notwithstanding the state of South Carolina grants no divorces, and especially for the cause of *saevitia*, on which ground this alleged divorce was granted? Or, on the other hand, is it true that the doctrine that "once married always married, until one of the parties dies," obtains so firmly in this state that, if the court of any state grants a divorce to either Charles or Rhoda McCreery for any cause save that of adultery, such judgment will not be respected here? We use the qualifying words, "of adultery," because divorces are recognized by the state of New York, where this marriage was solemnized, for this cause alone. We have been delighted with the tone, the ability, and the fidelity with which each side to the controversy has presented its views. That we have been interested, is true. That we have been left in some doubt, at times, is true. But that the conclusion we have reached is now entirely satisfactory to us, is equally true.

These parties, Charles W. and Rhoda McCreery, were married in the state of New York, but immediately thereafter removed to, and were domiciled in, South Carolina,—the home of the said Charles W. McCreery. We are inclined to think that this contract of marriage wore a twofold aspect or character; partaking of certain characteristics under the laws of New York, and partaking, again, of certain characteristics under the laws of the state of South Carolina, where it

was to be performed. Story, Conf. Laws, § 299; 2 Kent, Comm. 460. But, concerning this phase of this matter, we do not feel that it will be profitable to devote any time to its discussion; for the divorce in this case, if it be a divorce, was for a cause not recognized in the state of New York, or that of South Carolina. Confessedly, the contract was entered into, therefore, where *sævitia*, was not recognized as a ground for divorce. If Mr. Bishop or Mr. Black or Mr. Freeman be correct in their respective views that marriage creates a relation between husband and wife which clothes each one of them with a status, and that this status, in each one of them, is entitled to be treated as a *res*, then it will be a matter of no moment where this marriage was celebrated,—whether in New York or in South Carolina, or, for that matter, in any other country. This view is presented most ably by Mr. Bishop in his work on Marriage, Divorce, and Separation, to which we will have occasion hereafter to refer; and such is his will power and his rugged strength in stating his propositions, together with the masterly arrangement observed in presenting them, that it is with difficulty one escapes his conclusions. We cannot but be impressed, however, with the view that he has taken too much for granted when he announces that, although marriage is entered into by the parties to it under a contract, yet that as soon as the contract is executed, at once, there is breathed into the relation an import far higher than a contractual relation; in fine, that a status becomes thereby assigned to the parties, over and above and beyond that of any contract. He cites in support of his theory the facts that all contracts may be annulled by the parties who create them, except marriage, under which neither party to it, nor both parties to it, can, of themselves, terminate it, and that the law alone can extinguish the contract of marriage. He masses, so to speak, the difficulties in viewing it as a contract, as follows: "Marriage, as distinguished from the agreement to marry, and from the act of becoming married, is the civil status of one man and one woman legally united for life with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony." "We know that the foregoing definition of 'marriage' is correct, because it accurately describes what the courts constantly decide. That marriage executed is not a contract, we know, because the parties cannot mutually destroy it; because the act of God, incapacitating one to discharge its duties, will not release it; because there is no accepted performance which will end it; because a minor of marriageable age can no more recede from it than an adult; because it is not dissolved by a failure of the original consideration; because no suit for damages

will lie for the nonfulfillment of its duties; because its duties are not derived from its terms, but from the law, because legislation may annul itself at pleasure; and because none of its other elements are those of contract, but all are of status." Now, this author admits that Bigelow, in *Little v. Little*, 13 Gray, 264, correctly stated the proposition that "all authorities concur in the conclusion that marriage has its origin and foundation in a purely civil contract." This is an, or rather the, initial point. How do these authors reach the conclusion which Dr. Bishop announces? "And though the new relation [that is, the status] retains some similitudes reminding us of its origin, the contract does in truth no longer exist, but the parties are governed by the law of husband and wife." Is it not an assumption coined in order to give a plausible basis to the solution of an otherwise untenable position? Is it not by this means that they hope to give currency to an otherwise baffled policy, namely, to so construct a plan that thereby they may successfully invoke that portion of the federal constitution relating to the effect to be given by all the states to the acts and judgments of one state, and thus force all other states to give effect to judgments for absolute divorces? If marriage were still esteemed a civil contract, they could not hope to escape the defect of jurisdiction hereafter to be discussed. But by coining this new term, "status," and ascribing the efficacy of "*res*" to it, under certain principles hereafter to be referred to, it is deemed by them that the difficulty has been overcome. We will investigate these later matters hereafter. Just now we are interested in this discovery made by Dr. Bishop in the year 1852, which seems to have become very popular with all those persons who favor divorce laws. We still press the inquiry, how have these people changed what was confessedly a civil contract into a status or *res* apart from such civil contract? Investigation will show that it is by an assumption of such a result. When pressed for an answer, they say it cannot be changed by the parties, and therefore it is not a contract. What principle of law is more familiar than what there is in the law pertaining to a certain contract at the time it is made becomes a part of such contract, as much so as if specifically named in the contract when made? It is a part of every contract of marriage that it is indissoluble by the parties themselves. Such being so, how need it be said that such a fact will show that the contract of marriage is not a civil contract, but a status? Reflection will show that this must be so, from the very nature of the union of man and woman in this contract of marriage, and why the law should wisely say to an infant of marriageable age, who has become a party to it, "You are as much bound as an adult." Nor does the fact that the act of God, in-

capacitating one party to the marriage to discharge its duties, will not release the other from the marriage; for such was the law when the contract was entered into. It did not need this status to show such result. Nor does the fact that no accepted performance will annul it; for how can there be an accepted performance of a contract that is not fully performed until one of the parties thereto shall die? Nor does the fact that no action will lie in behalf of one of the parties against the other for a nonfulfillment of its duties. Such is of the very essence of the law existing when it is entered into. Nor will the alleged fact that its duties are not derived from its terms. On this point we suppose the author means that when the marriage is solemnized or contracted an exact inventory is not made up, or a list of the duties incident to marriage repeated in the presence of the parties. The wise God who created us furnished us those incentives to the union in our very physical organization when he made us male and female. No necessity existed to repeat what each already knew. Besides, in the eyes of the law, their duties existed as incidents to this union, and were incorporated in the contract when it was formed. Again, they say it is not a civil contract because the legislative power may annul the marriage at will. Governmental force has annulled many solemn contracts, and such a fact has never been held to sustain the position that contracts were not contracts on that account. It needs no extended reference to history to learn of the exercise of this governmental force. The horror of mankind at the conduct of Henry VIII. as to divorces from his wives is an apt illustration of this governmental force. And, lastly (now listen!), because none of its other elements are those of contract, but all are of status. In other words, the author would have us believe it is not a contract because he says it is not a contract; it is a status because he says it is a status! And this is a proof that an executed civil contract is no longer an executed civil contract, but instead has become a status. Just here it might be well to call attention to the fact that, in the author's definition of "marriage," it nowhere appears that he has considered what the Creator of the Universe announced as the cause of woman's creation: "And the Lord God said, It is not good that the man should be alone: I will make him a helpmeet for him." Gen. ii. 18. Any idea of marriage which leaves out of view the companionship of the husband and wife ignores one of the chief beauties of the union, and one of its most attractive features. It may be assumed, however, that it was so much more important to coin this "status" and originate this "res," in connection with marriage, that many things necessary to the true conception of marriage might be well over-

looked by Dr. Bishop and his allies. Before referring to the author more directly, in regard to the pernicious effect of his new doctrines, it is but just to say that in his work so largely relied upon by the appellant here, and whose title has already been stated, and from which such heavy quotations have been made, he intimates that divorces should be confined to the cases of adultery, desertion, and *saevitia*. While this is true, he distinctly lays down doctrines that are at variance with Holy Writ, and seems to take pleasure in the reflection that he first coined the terms "status" and "res," as applied to marriage and divorce. Now, candor compels us to say that the good doctor occupies very dangerous ground; that, instead of deriving consolation from these reflections, he might really view them with consternation and terror! If his views so announced are calculated to lead his kind to disregard the Sacred Law, then, indeed, he is in peril. There is no need to announce, for it must be patent to every one who thinks that one of the direct results of this pandering to divorce is sure to prove one of the most potent agencies to the poisoning of the public mind, by not only suggesting evil, but by suggesting a plausible excuse for it. When the ends of the creation of man and woman, as Nature has made them, are perverted, and man, who was created the stronger, and therefore the protector of woman, and woman, who was created the weaker, and therefore the protected, are made equals, with no inducement to reverence man by woman as her temporal lord, and no incentive to man to tenderly protect and cherish woman, as the weaker sex, then the bonds of society are weakened, indeed, and the restraints that a different course would tend to increase are lost to society.

But one of the chief difficulties in this case is this: Grant that marriage in South Carolina is a civil contract, indissoluble by any act of the parties, and, under her laws, indissoluble in her courts for any purpose. Yet if Mrs. McCreery has received an absolute divorce from her marriage by the judgment of a court of general jurisdiction in the state of Illinois, under the constitution of the United States (article 4, § 1), and the act of congress to carry the same into effect, the judgment of the Illinois court, when pleaded or offered in evidence in the courts of South Carolina, the latter state must receive the same with like force and effect that it obtains in the state of Illinois, where rendered; and, if this be so, Mrs. McCreery is entitled to no dower in the lands owned by Charles W. McCreery in South Carolina, and therefore the plaintiff is entitled to his decree for specific performance of the contract between himself and the defendant. This section of the constitution reads as follows: "Full faith and credit shall be given in each state to the public acts, records and

Judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and judicial proceedings shall be proved, and the effect thereof." And the act of congress (1 Stat. 122) provides: "The said records and proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or may be taken." It will be at once seen that the framers of our federal constitution have, by this section, provided that while, under the law of nations, from principles of comity, the judgments of foreign countries should be respected as such in every other country, when produced, provided such foreign judgments accord with her domestic policy, etc., that it should be the duty of every state in this Union of states to give full force and effect to the judgments of any other state, when duly authenticated. Hence, if this doctrine is sound law, holders of judgments obtained in a different state have the right to produce such judgments in the courts of this state, and it is our duty to respect them, and give them the same force and effect they have in the state where rendered, as required by the constitution of the general government. We would properly and naturally look to the adjudications in the supreme court of the United States for the interpretation of this legislation, and in doing so we find a goodly number of cases bearing upon this matter. Among these cases are *Rose v. Himely*, 4 Cranch, 269; *Mills v. Duryea*, 7 Cranch, 484; *Hampton v. McConnell*, 3 Whart. 234; *McElmoyle v. Cohen*, 13 Pet. 312; *Landes v. Brant*, 10 How. 348; *Webster v. Reid*, 11 How. 437; *D'Arcy v. Ketchum*, 11 How. 165; *Harris v. Hardeman*, 14 How. 334; *Christmas v. Russell*, 5 Wall. 290; *U. S. v. Arredondo*, 6 Pet. 691; *Wilcox v. Jackson*, 13 Pet. 511; *Thompson v. Whiteman*, 18 Wall. 457; *Hanley v. Donoghue*, 116 U. S. 4, 6 Sup. Ct. 242; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269. And there are other cases. We cannot undertake to quote from all these cases. Two will suffice. In *Thompson v. Whiteman*, supra, Mr. Justice Bradley, who delivered the judgment of the court, in effect held that: "Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown either as to the subject matter or the person, or, proceedings in

rem, as to the thing." Syllabus of the case. It was also held "that the want of jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." And in *Hanley v. Donoghue*, supra, it was said: "Judgments recovered in one state of the Union, when proved in the courts of another [state], differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable on the merits, nor impeachable for fraud in obtaining them, if rendered by a court *having competent jurisdiction of the cause and of the parties.*" (Italics ours.)

Very naturally, we ask, did the court of the state of Illinois have jurisdiction of Charles W. McCreery when it rendered the judgment of divorce? It is conceded that at no time, either when such action was commenced, or while it was pending, or when decided, was Charles W. McCreery within the limits of the state of Illinois. He did not appear in such action, nor answer, nor demur. His domicile has never been in the state of Illinois, but, on the contrary, at all times in the state of South Carolina. "Jurisdiction" was aptly defined in *U. S. v. Arredondo*, 6 Pet. 691, to be the authority of the court to take cognizance of the cause or controversy at bar. The authenticated judicial record is that of an action wherein Rhoda McCreery is styled "plaintiff," and Charles W. McCreery is styled "defendant," and the judgment therein purports to dissolve the marriage of the said Rhoda and Charles. We assume that it will be admitted on all hands that, if it should be contended that such judgment was one in personam, it is an absolute nullity; for, as before stated, Charles W. McCreery was not within the jurisdiction of the court, and the only plan by which the courts of Illinois, under her statutes sought to have him within its jurisdiction, was by the publication of a notice in one of its newspapers, addressed to said Charles W. McCreery, of the pendency of the action commenced by his wife. The principle that, if the action was in personam, it is a nullity, is enforced in the United States supreme court in the case of *Pennoyer v. Neff*, 95 U. S. 714. In that case one Mitchell held a debt against Neff, and, while Neff was beyond the limits of the state of Oregon, said Mitchell brought suit against Neff to recover his debt. To that suit, notice of the pendency of the same, and requiring Neff to appear and plead, was duly published in a newspaper, as required by the statute of the state of Oregon in such cases made and provided; but Neff neither made appearance, nor did he plead. Judgment was rendered against Neff, and the sheriff sold a tract of land owned by Neff in said state. *Pennoyer*

became the purchaser at said sale, and brought his action against Neff to recover the land. In this action by Pennoyer, Neff denied the validity of Mitchell's judgment under which the land was sold, because he was not in the state, and service was alone by publication. The supreme court of the United States decided that the court of Oregon was without jurisdiction to render such judgment, and dismissed Pennoyer's action. The supreme court of South Carolina, in the action of Tillinghast v. Lumber Co., Moore v. Machine Co. (S. C.) 18 S. E. 120, adopted the same view, and held that jurisdiction, as to a defendant out of this state, could not be acquired by publication, so as to make judgment in personam. And the subsequent cases of Toms v. Railroad Co. (S. C.) 19 S. E. 142, and Gibson v. Everett (S. C.) 19 S. E. 286, have enforced such doctrine.

But now comes the difficult question, which is raised in this way: Mrs. McCreery having resided in the state of Illinois for more than 20 months before she instituted her action for divorce against Charles W. McCreery, and, under the statute law of Illinois, service upon an absent defendant may be made by publication of the summons in some newspaper in that state, to be fixed by the court, it is contended, first, that it is always in the power of a state, through her courts, to establish the status of her own citizens, and that this was done in the case of Mrs. McCreery. Now, if marriage, by operation of law, creates the status of wife in Mrs. McCreery when she removes her domicile to that state, and such status is a res, then, under Pennoyer v. Neff, Tillinghast v. Lumber Co., Moore v. Machine Co., Toms v. Railroad Co., and especially Gibson v. Everett, supra, there would be a res in the state of Illinois, upon which the courts of the state of Illinois might fasten, by attachment or similar process, which would enable them to pass upon the right to relieve Mrs. McCreery from her marital relation to Charles W. McCreery, as her husband, notwithstanding his absence, and service by publication alone. If marriage is a civil contract, whereby the domicile of the husband is the domicile of the wife, and whereby the contract between them was to be located in that domicile, it is difficult to see how the absence in another state of either party to such contract from the state where was located the domicile of the marriage could be said to carry such contract to another state, even if we were to concede that an idea, a mental apprehension, or metaphysical existence could be transmuted so as to become capable of attaching to it some process of a court, whereby it might be said to be under the exclusive jurisdiction of such court. If Mrs. McCreery could carry that res in the state of Illinois, then Mr. McCreery had the same res in the state of South Carolina at the same time. In other words, the same thing could be in two distinct places at one and the same time, which res the

courts of Illinois would have the power to control as if it were a physical entity, and which res the courts of South Carolina would have the power, at the same moment of time, to control as if it were a physical entity. Such a conclusion would be absurd. The justice who delivered the opinion in the case of Pennoyer v. Neff, supra, by way of illustration merely, purely as a dictum,—for that case had no earthly connection with marriage,—did say in that opinion: "To prevent any misapprehension of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens to a nonresident, *which would be binding within this state* [italics ours], though made without service of process, or personal notice to the nonresident. The jurisdiction which every state possesses, to determine the civil status and capacity of all of its inhabitants, involves authority to prescribe the conditions on which proceedings which affect them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the *marriage relation between its own citizens shall be created, and the causes for which it may be dissolved*. [italics ours.] One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is granted. The complaining party would therefore fail, if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such cases, and proceedings be there instituted without personal service of process, or personal notice to the offending party, the injured citizen would be without redress." Now, if the remarks, as dictum alone, of Mr. Justice Field, were intended to be restricted by him to cases where the marriage contract was executed while the domicile of both parties was in that state, and where the laws of such state authorized the granting of divorces, we suppose it correctly sets forth the law that should govern in such a case. But if it is intended to announce that such a conclusion would be proper in a case where a marriage contract was made in a state where both were domiciled, and in a state where divorce is not allowed, and where one of the parties to such contract of marriage should remove to a state where divorces are allowed, and there institute an action for divorce, causing the other party to the marriage contract to be served by publication alone, to which said latter party paid no attention, and a judgment for divorce was granted, we submit that such judgment is erroneous, so far as the same relates to the absent defendant, by the decisions of the supreme court of the United States. The defendant has the right to interpose as a defense to such wrong that he has been denied

due process of law; to interpose for his protection from such judgment the fourteenth amendment to the constitution of the United States, which provides, "No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It was concerning this very protection under this fourteenth amendment that Mr. Justice Field, in the case of *Pennoy v. Neff*, supra, said: "Since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments [where no personal service was made, or appearance entered, or pleading made] may be directly questioned, and their enforcement in the states restricted, on the ground *that proceedings in a court of justice to determine the personal rights and obligation of parties over whom the court has no jurisdiction do not constitute due process of law.*" (Italics ours.)

Charles W. McCreery, and Rhoda, his wife, whether it be said their contract should be governed by the laws of the state of New York, where the marriage was solemnized, or whether of the state of South Carolina, which was the husband's domicile, and where he is still domiciled, and where the marriage was to be performed, never agreed that their rights, duties, and liabilities as husband or wife should be determined by the state of Illinois, or that the determination of these rights, duties, and liabilities might be had in an action for divorce for *saevitia*, where service upon either of them might be made by publication; and when, therefore, a judgment of this last-named state was rendered in an action to which Charles W. McCreery was no real party, such judgment was a nullity as to him. In the opinion of Mr. Justice Field, he further said on this point: "Whatever difficulty may be experienced in giving to these terms ['due process of law'] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt as to their meaning, when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceeding any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." Can there be any doubt but the judgment of the court of the state of Illinois does directly impinge upon the personal rights and liabilities, under the contract of marriage, of Charles W. McCreery with Rhoda McCreery? By that contract her personal presence with him was his right. It was his privilege, under his contract of marriage, to receive at her hands

those ministrations incident to the marriage state. To allow this Illinois judgment to be effective as a divorce, as to Charles W. McCreery, cannot be law. In *Hull v. Hull*, 2 Strob. Eq. 174, it was held that Gideon J. Hull having married his wife while both were domiciled in the state of Connecticut, under whose laws it was competent for either party to obtain a divorce for desertion, and in such a suit service might be made by publication, and he having deserted his wife, and thereafter she having procured a divorce from him, a *vinculo matrimonii*, in an action wherein he was served by publication, such divorce was valid. This judgment was rendered because the marriage contract between them was said to have been made with all the provisions of the laws of Connecticut pertaining to marriage, including divorce, which had become part and parcel of such contract of marriage. And this was done and adjudged notwithstanding the state of South Carolina did not allow divorces.

Again, we say we refuse to recognize this judgment of the court of the state of Illinois as valid in our state, because there was no such thing as a status or res in the conception or in the records of these parties when the marriage was made by them. But even if we were to concede, for the sake of argument, that marriage created a status or res, as contended for by the appellant here, we do not concede that the courts of this state are bound to give it such effect here. The utmost that could be asked at our hands would be the recognition of the doctrine that, within the limits of the state of Illinois, Mrs. McCreery was not the wife there of Charles W. McCreery. Dr. Bishop has likened the status of husband and wife to that of parent and child, guardian and ward. A close examination of the decisions of the states will show that the status accorded in our state to the child is not that necessarily accorded in other states even where such status is established by the judgment of the courts of one state, which is duly authenticated and introduced in the courts of a different state. The industry of respondent's attorney Mr. H. Cowper Patton has brought to our attention these cases: (1) *Barnum v. Barnum*, 42 Md. 251. Here John B. Barnum was the child of parents living in the state of Arkansas, but who were not married at his birth. Subsequently the legislature of the state of Arkansas was induced to pass an act legitimatizing said John B. Barnum, as the child of his parents. Subsequently there was property in the state of Maryland that, under her laws, would pass to the legal issue of John B. Barnum's father. Thereupon John B. Barnum brought his action in the courts of the state of Maryland to recover this property. It was there conceded that the property could be recovered by him if he was entitled to maintain the status of a child of his father. The statute of Arkansas was relied upon for that purpose, but the court held that he was

not thereby made the child of his father in Maryland. The language of the decision on this point was as follows: "This act could have no extraterritorial operation whatever, except as to any rights that may have been acquired under it in the state of Arkansas. As to such it ought to be respected everywhere. Story, Conf. Law, 101, 102. But as to capacity to acquire property beyond the state passing the act, by virtue of the particular status given the party, that the legislature could not confer. Even if the act had professed to legitimate John B. Barnum, without reference to a previous marriage, it could have no operation here, and no rights involved in this case could be affected by it. This would seem to be clear both in reason and authority." (2) The case of *Smith v. Derr's Adm'rs*, 34 Pa. St. 126. Here the brother of the deceased testator, Daniel Derr, who lived in the state of Tennessee, was the father of an illegitimate daughter, Nancy. On his petition, Nancy was duly legitimated by a decree of the circuit court of Giles county, in said state, (Tennessee), where she then and still resided. And the question presented in the case just cited was whether she had any interest in the estate of the deceased testator, who lived and died in the state of Pennsylvania. The court said: "Nancy is the illegitimate niece of the testator, born in Tennessee, and legitimated there, on the petition of her father, by a proceeding in court. This forgives the vice of her birth in Tennessee, but not here. * * * A capacity in Tennessee does not prove capacity here. So far as one law is concerned, legitimation by the subsequent marriage of the parties abroad, by act of a foreign legislature, or by judicial decree abroad, are all fruitless. If they are allowed to constitute inheritable capacity, then adoption might have the same effect. Then we should be without any law of inheritance in favor of relationship in other states, except such as our neighbors should be pleased to give us."

As to the matter of guardian and ward, it is proper to say there is a status assigned to each under the law where such relation is established. But, when the guardian attempts to assert his status as such in a state different from that wherein his appointment was made, the latter state refuses to recognize it. The decision of the United States supreme court in the case of *Hoyt v. Sprague*, 103 U. S. 631, is in point here. In that case Mr. Justice Bradley, as the organ of the court, said: "One of the ordinary rules of comity exercised by some European states is to acknowledge the authority and power of foreign guardians; that is, guardians of minors and others appointed under the laws of their domicile in other states. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate, it is entirely disallowed, and is rarely admitted in regard to personal property. Justice Story, speaking

of a decision which favored the extraterritorial power in reference to personal property, says: 'It has certainly not received any sanction in America, in the states acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators.' " And let it be noticed that in the state of Rhode Island, where the res was located in the case just referred to, and where a court, by its judgment, had acted on that res, it was decided that such judgment had no extraterritorial operation. If, then, acts of the legislature and judgment of courts of states, pertaining to status of parent or child, guardian or ward, will not be entitled, when the said acts or judgments have been duly authenticated and presented in the courts of different states, to give such persons the same status as that obtained in the state where rendered, why should a different rule prevail touching the status of a husband or wife?

As far as the supreme court of the United States has ever gone in the matter of divorce is to assume that, for the purpose of obtaining a divorce, a wife may acquire a domicile apart from that of the husband; that divorce, when granted, does not impair the obligation of a contract; that it is in the power of a legislature in a state different from that of the domicile of the married parties to grant a divorce which is operative in the state where granted; that it is the exercise of a legitimate power when the state legislature grants a divorce, either by the legislature acting directly, or by conferring a power to do so upon the courts of that state, provided the constitution of such state does not deny such power; that a divorce so granted is effective even without the residence of both parties in the state at the time the divorce is granted. *Cheever v. Wilson*, 9 Wall. 108; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723. In the first case cited both parties (husband and wife) appeared to the action in the court of the state of Indiana, where the divorce was granted. In the second case cited the legislature of the territory of Washington acted on the prayer of the husband in the absence from that territory of the wife. But the supreme court of the United States has been careful to deny that the courts of the United States government had any original jurisdiction in the matter of granting divorces, and it may be as well to say that, in both of the cases just cited, rights of property were involved under divorces which affected the rights of third parties.

Another reason which may be advanced why the conclusions of the circuit judge in denying force and effect to this Illinois judg-

ment of divorce should be sustained by this court is that the whole record may be examined to see if the court pronouncing the judgment had jurisdiction, and that, even if it be admitted that divorce judgments should have accorded to them extraterritorial effect, in case the record discloses that such court based its judgment upon the seizure of the res, this authenticated judgment is silent as to any such jurisdictional allegation. But, while this is true, we prefer to meet the issue as it has been joined in the case at bar; and therefore we base our refusal to give force and effect to the judgment of divorce, as rendered by the court of the state of Illinois, upon the grounds already indicated.

It may not be amiss to refer to our own laws on the subject of marriage and divorce. As already indicated, we admit that there is no power in any court in South Carolina to grant any divorce other than that a *mensa et thoro*. While this latter divorce is a judicial barrier to any attempt to exercise the rights or enforce the duties of the parties affected by the judgment, yet the courts are only too willing to have the parties restored to their original status quo, upon good cause shown. While the remedy is a harsh one, and, to a certain extent, interferes with the operation of the laws of nature, still woman must be protected. After all, an unbending adhesion to the laws of right living has a healthy effect upon the lives of others. If self-denial is thus necessitated, it should not be forgotten that many natures are perfected through its beneficent influence. True philosophy would extract good from every condition. As to our law on the subject of divorce, we apprehend that the expressions used and admissions already made show that, in the state of South Carolina, we do not recognize the power in our courts to grant divorces a *vinculo matrimonii*. By article 4, § 15, of our constitution, the courts of common pleas have exclusive jurisdiction in all cases of divorce; and by article 14, § 5, divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law. Thus the general assembly is denied the power to grant divorces directly, but is permitted to clothe the courts of common pleas with that power. This last they have refused to do, by repealing the act of 1872, which did permit the courts to grant divorces in this state for adultery. Thus we have the common law restored to us on this subject. And as before remarked, the common law is at variance with the dissolution of marriage by divorces. We might add case after case from our Reports on this subject, but they would every one confirm this doctrine.

It may be proper to say that if the present contention had been made in the courts of the state of New York, and an effort had been made there to interpose the divorce a *vinculo matrimonii* granted by the court of

the state of Illinois, on the ground of *saevitia* practiced by the husband, *McCreery*, upon the person of his wife, the courts of the former state (New York) would have refused to give such judgment of divorce any effect. In the leading case of *People v. Baker*, 76 N. Y. 78, the husband had been married to *Sallie West*, in the state of Ohio, in the year 1871, and thereafter the married couple resided at Rochester, in the state of New York. Some time afterwards the wife, *Sallie West*, returned to the state of Ohio, and began her action against *Baker* for an absolute divorce on the ground of gross neglect of duty by the husband. The husband was domiciled in the state of New York during the pendency of such divorce proceedings in the state of Ohio, and did not appear in or plead to such action. Divorce was granted. The husband, *Baker*, still domiciled in the state of New York, after such judgment of divorce, married again, whereupon he was indicted in the court of New York for bigamy. Being convicted, an appeal was taken. Thereafter the appeal from such judgment was finally considered in the court of appeals of the state of New York, and the conviction was then affirmed. The court held, among other things, in answer to the question: "Can a court in another state adjudge to be dissolved, and at an end, the matrimonial relation of a citizen of this state, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that state?" The court answered this question squarely in the negative, and that, too, after reviewing the federal decisions bearing on the subject. Many citations are made of New York decisions and those of other states by Judge *Folger*, who pronounced the judgment of that court. So, too, in the case of *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, although the court of appeals of New York upheld a divorce of a New York marriage by the courts of Texas, it was done because the husband, who was domiciled in the state of New York when the wife began her action for divorce in the courts of the state of Texas, appeared in said action, and answered to the merits of the action. The court of appeals of the state of New York was careful to announce in its judgment "that the marriage relation is not a res within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service, or actual notice of the proceeding, given without the jurisdiction of said court; and, like other contracts, the contract of marriage cannot be annulled by judicial sanction without jurisdiction of the person of the defendant." (Extract from the syllabus of the case cited.) And also the case of *Williams v. Williams*, 130 N. Y. 193, 29 N. E. 98, decided in Decem-

ber, 1891, is in point, as illustrating the attitude of the courts of New York on this question of divorce, so far as judgment therefor rendered by the courts of a state different from that in which the domicile of the defendant was had, and to which action for divorce he neither appeared nor answered. In the case just cited the leading facts seemed to be these: The husband, after living a year or more with the wife after their marriage, demanded that the wife should give up all intercourse with her mother. This, at first, the wife declined to do, and he then lived apart from her. But before the husband removed to the state of Minnesota the wife made an unconditional offer, in good faith, to live with her husband. This last proposition he declined, and removed to the state of Minnesota, where he commenced an action for absolute divorce, on the ground of desertion. To this action the wife was made a party by publication. She was not in the state of Minnesota at any time, nor did she appear or plead to his action. Still the judgment adjudged that the parties were no longer husband and wife. When this husband returned to the state of New York the wife brought her action for a separation of the parties from bed and board forever, on the ground of abandonment. The husband attempted to set up in his answer his judgment for absolute divorce obtained in the courts of the state of Minnesota. But the court declined to recognize such a divorce as valid, and granted the wife's prayer for a legal separation for life. In the opinion of the court in the case just cited the court admitted that every state may adjudge the status of one resident therein towards a nonresident, and that, so long as such judgment is confined in its operation to the territorial limits of that state, other states must acquiesce; but it tenaciously adhered to the position announced in *Jones v. Jones*, supra, that "the marriage relation is not a res within the state of a party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted or actual notice of the proceedings given without the jurisdiction of the court where the proceeding is pending." We have thus taken the pains to consult the decisions of the courts of the state of New York for the purpose of showing that, even if the marriage could be regarded as a New York marriage, the divorce here in question could not be regarded as valid. Having been admitted that the courts of New York are only allowed, by the laws of that state, to grant absolute divorces for adultery, and the alleged judgment of the court of the state of Illinois having granted the same on account of cruelty of the husband to the wife, it will be easily seen that Mrs. McCreery's contract of marriage did not have, as a part thereof, any right to divorce, except for adultery. But it might have been contended that, at the time she entered into

such contract of marriage within the state of New York, that state recognized as valid any judgment of divorce granted by other states than New York. This refuge is denied her, for we have seen such is not the case in the event such a judgment of absolute divorce was granted by the courts of any other state in an action therefor to which the husband was not a party.

But the appellant suggests that divorces must be recognized in this state under the section of our Revised Statutes which reads as follows: "All marriages contracted while either of the parties has a former wife or husband living, shall be void: provided, that this section shall not extend to a person whose husband or wife shall be absent for the space of seven years, the one not knowing the other to be living during that time: nor to any person who shall be divorced, or whose first marriage shall be declared void by the sentence of a competent court." Section 2160. Upon examination, we found that that statute was adopted from the mother country where it was passed in the year 1712. We have no adjudications in our courts construing the statute, and yet we find that in the mother country the matter of divorce was never allowed under her laws until the year 1857. We do not propose to pursue the question to any extent. It cannot be considered that the divorce referred to in our statutes could be other than a valid divorce, —a divorce legal in its operation. As the states of New York and South Carolina recognize no divorces valid for the cause of cruelty of the husband to the wife, as is the present case at bar, it follows necessarily that no possible advantage can accrue to the appellant under this old statute.

Lastly, the appellant suggests that the plaintiff's titles tendered to the defendant are good and sufficient, notwithstanding the dower of Mrs. McCreery has not been renounced, and notwithstanding the judgment of divorce of the Illinois courts is void, because she would be estopped from making claim to dower. We do not care to base our views on this branch of the case upon the ground set out in the circuit decree, namely, that Mrs. McCreery is not a party to this case. In courts of equity, when questions of enforcing demand for specific performance of contracts are considered, we are not, by any means, prepared to say that the presence of a party who may possibly possess some right affecting the title tendered is always necessary before the court will proceed to pass upon such contract. Certainly, in the case at bar, by the agreed statement of facts, it is admitted that this decree of divorce obtained in Illinois especially reserved the question of Mrs. McCreery's right of dower. Apart from this, however, under our laws, we know of no way to defeat a woman's right of dower, that has once attached, unless it be under that section of our Revised Statutes (section 1903) which provides,

If a wife elopes with another than her husband, and continues with her advouter, and is not reconciled thereafter with her husband, she shall forfeit her dower in his lands. Under our law, "marriage is a valuable consideration. Some have considered it the highest known in law. None would say it was a lower consideration than money. There is nothing unreasonable in this. The great value of the consideration consists in this: that the wife surrenders her person and her self-dominion to the husband, and enters into an indissoluble engagement with him, foregoing all other prospects in life; and, if the consideration for which she stipulates fails, she cannot be restored to the status in quo. She can have no remedy or relief." *Rivers v. Thayer*, 7 Rich. Eq. 144. In *Wilson v. McConnell*, 9 Rich. Eq. 513, the court used this language: "But this claim is met by a corresponding equity on the part of the widow, who is entitled, under her marriage, to the position of a purchaser for valuable consideration, against all but existing liens,"—liens that existed before the marriage. So in *Brooks v. McMeekin*, 37 S. C. 303, 15 S. E. 1019, this court held: "We are therefore enabled to declare it to be the law, as derived from our own decisions, that in the commonwealth marriage is a valuable consideration paid by the wife for those rights and estates that by our laws are accorded the wife as a wife." It is true, at present, this right of dower of Mrs. McCreery in the lands of her husband, the plaintiff, is inchoate; yet it is substantial right of property, and not a lien. *Shell v. Duncan*, 31 S. C. 547, 10 S. E. 330. It must be remembered that this action of Mrs. McCreery in the courts of Illinois related only to the present and future relation of herself to her husband. It did not seek any action of the court as to the past, for she admitted she had been his lawful wife from 1885 to the date of her alleged judgment of divorce from him. We have held that this divorce is void in this state. It seems to us, therefore, that the plaintiff can derive no benefit from the alleged estoppel. It is the judgment of this court that the judgment of the circuit court be affirmed.

On Motion for Stay.

(April 29, 1895.)

McIVER, C. J. Upon hearing the petition of Charles W. McCreery in the above-entitled cause, it is ordered that the remittitur in the said cause be stayed for 60 days from the date of this order.

(95 Ga. 153)

RAY v. PEASE et al.

(Supreme Court of Georgia. Dec. 4, 1894.)

DEED—DESCRIPTION—RIGHTS OF VENDEE—ACTION FOR PURCHASE PRICE.

1. Where, in a deed to land, the quantity is mentioned as being a certain number of acres

more or less, and in the geometric description of the land two sides of a rectangle by courses and distances are given, and also a third line, which commences at a point not on either of the other two, but runs upon a designated course to the point of beginning, and these three lines, when properly platted, show three sides of a rectangle, a proper construction of such description, between the grantor and grantee and their privies in estate, would supply the fourth side, even though the effect would be to pass to the grantee a greater number of acres than that expressly named in the verbal description; and particularly would this be true where the grantee, soon after the execution of the deed, entered into possession, and, with the acquiescence of the grantor, inclosed by a fence the entire tract represented by such rectangle, and remained for a number of years in actual possession.

2. Where the grantee under such deed conveys a moiety of the premises covered by the same to a third person, taking his notes for a portion of the purchase money, it is no defense to a suit instituted thereon that there is an outstanding title remaining in the plaintiff's grantor, or his heirs, in consequence of alleged ambiguity or uncertainty in the description contained in the deed under which the plaintiff held. This is so, even though the nonresidence and insolvency of the plaintiff be alleged and proved. The alleged ambiguity or uncertainty, upon a proper interpretation of the deed, does not really exist. An injunction to restrain the prosecution of the suits upon the notes until the deed is reformed was therefore properly denied.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action for an injunction by Lavender R. Ray against Emma C. Pease and others. Defendants have judgment, and plaintiff brings error. Affirmed.

The following is the official report:

Ray, on March 14, 1894, presented his petition praying for injunction, etc., as will hereafter appear. A hearing being had, injunction was denied, to which decision Ray excepted. The petition alleged: On April 25, 1890, Ray bought of Mrs. Pease, of Chicago, Ill., and her husband, P. P. Pease, and L. B. Davis, as her trustees, for \$15,000, a tract of land in the Seventeenth district of Fulton county, Ga., part of land lot 106, "beginning at the junction of the north line of said lot number 106 with the east side of West Peachtree street, which point is half the width of said street from the northwest corner of said lot of land, runs south, along the northeast side of West Peachtree street, 711 feet to a street not yet named, which divides block number 5, according to map of the property of P. P. Pease sold to William D. Grant from this tract; thence east, along the north side of said last named street, 571 feet to the land now owned by J. N. Smith; thence north, along the west line of the land now owned by Smith and the land now owned by Pat. Calhoun, 711 feet, to the north line of said lot of land number 106; thence west, along said north line of said lot of land, 571 feet, to the beginning corner,—said tract being the land conveyed by Thomas F. Grubb and ——— [to] P. P. Pease and L. B. Davis, as trustees for Mrs. Emma C. Pease, by deed executed May 1, 1862, and recorded in Book G, page 68.

clerk's office superior court Fulton county, Ga.,"—the above being the description in the bond for title, copy of which is attached. Of this amount Ray paid \$3,000 cash, and gave his four promissory notes of \$3,000 each, due annually, April 25th, of the four years thereafter, respectively. Each of these notes was payable to Emma C. Pease, P. P. Pease, and L. B. Davis, trustees for Emma C. Pease, or bearer, "being part of the purchase money for ten acres of land on West Peachtree street." On April 25, 1891, Ray, believing from the representations made by Mrs. Emma C. Pease and her agent that a good title to said land could be made to him by said vendors, paid the first note and interest upon all the others. Mrs. Pease, by her said trustees, on May 1, 1892, bought said land of T. F. Grubb, now deceased. Since the purchase of said land by Ray, and the payment of said money, he has learned by inspection of the original deed made by Grubb that Mrs. Pease has not a good title to the land, and hence cannot comply with her contract in the bond for titles. The premises of the deed made by Grubb read: "And doth by these presents grant, bargain, sell unto the said P. P. Pease, L. B. Davis, trustees for Mrs. Emma C. Pease, their heirs and assigns,"—thus conveying the land to Pease and Davis, their heirs and assigns, and not to them as trustees of Mrs. Pease, her heirs and assigns. Mrs. Pease claims that this is a mistake in the deed, and that the title to the land should be in said parties as her trustees, her heirs and assigns. If this be true, it is her duty to have the deed reformed. The description in the deed of the land conveyed part of land lot 106, in the Seventeenth district of Fulton county, "bounded as follows: Commencing at the northwest corner of said lot; running south on Boring lot 1,500 feet; east 608½ feet to a stake corner; west 608½ feet to commencing corner,—containing ten acres, more or less,"—does not convey title to one-fourth of land by said parties sold to Ray and to which Mrs. Pease has bound herself to make him a good title, but conveys nothing, simply making a line, and for that reason is void for uncertainty of description; but, if by a liberal construction of the deed "west" can be construed to mean "northwest," it would convey a triangular piece of land to Ray's vendors instead of a parallelogram. Mrs. Pease claims that this description is a mistake, and should read: "Commencing at the northwest corner of said lot; running south on Boring lot 1,500 feet; thence east 608½ feet to a stake corner; thence north 1,500 feet to the north line of said lot of land No. 106; thence west 608½ feet to the commencing corner,—containing ten acres, more or less." If such was the intention of the parties, the deed should be reformed so as to make it speak the truth. If, on the other hand, it was the intention of the parties to convey a triangular tract, the deed should be reformed so as to substitute "northwest" for "west," and should give dis-

tances sufficient to extend said line to the commencing point, which the deed does not now do. If the deed is reformed upon the last theory, Ray cannot get all the land he bought from Mrs. Pease, because a part of the land described in the bond lies beyond the triangle, and in that event he ought not to be compelled to pay said entire purchase price. If the deed should be reformed as last mentioned, he would not get much more than a third of the land which he bought, and for which he holds the bond, which would not be worth as much as the money he has already paid to Mrs. Pease. The land has been vacant nearly the entire time since the purchase from Grubb to the time it was sold to Ray, and for that reason Mrs. Pease does not claim title by prescription. Notwithstanding these defects, she claims that she has an equitable title to the land, but it is not just that Ray should run the risk of deciding whether she has any title, and it is not just and he did not contract to be at the expense of establishing her title, nor is it just that he be made to pay the balance until the defects in her title shall be determined and corrected. She does not claim that the heirs at law of Grubb will admit that there is a mistake in the deed, or will allow it to be corrected, or will leave Ray undisturbed in his possession. She is of full age and of sound mind, and has no need, under the law, of a trustee. Pease is her agent, and also resides in Chicago. In the spring of 1892, Ray called the attention of Pease as such agent to the verblage of the Grubb deed, and, upon his alleging and admitting that there was a mistake therein, urged him and has since urged Mrs. Pease to proceed to reform the same, all of which she has failed and refused to do, notwithstanding which she insists upon his paying the balance of the purchase money, and has by her attorneys, King & Anderson, begun suit in the city court of Atlanta upon the notes due in 1892 and 1893, and has placed the note, due in 1894, in their hands for suit and collection. Ray is willing and hereby offers to pay said notes whenever she can and will make him a good title to said land as she has bound herself to do. She and her husband are nonresidents, and for this reason cannot be made to respond to Ray in damages, in case, after paying the notes, he should lose the land or part of it because of the defect in her title. He is informed and believes that she is insolvent, and hence cannot be made to respond to him in damages. When he purchased the land, she and her husband owned other valuable realty in Atlanta, but they since have been selling their land until they have but little, if any, left, and, if they still own any, are trying to dispose of it. Should the heirs of Grubb elect never to disturb him in his possession, the defects in the deed cast a cloud upon any title she might make him, and thus make it impossible for him to sell the land at its

full value, or use it as security in obtaining a loan. He has endeavored to obtain a loan upon it, but has failed because competent lawyers refused to certify that the title is good. He prayed that Mr. and Mrs. Pease, Davis, and the heirs at law of Grubb, naming them, be ordered to litigate among themselves and determine to whom the land described in the bond belongs, and to whom Ray should pay the balance of the purchase money, and what, if any, mistake there is in the Grubb deed. Further, that whatever mistake may be found in that deed it be corrected, and the deed be reformed; and if, upon such reformation, it appear that only a triangular tract of land was conveyed, an accounting be had between him and Mrs. Pease; and, if it be determined therein that he has already paid more money than that part of the land was worth when he bought, that she be decreed to pay back to him such overplus, with interest, and the note sued upon and that falling due in 1894 be surrendered and canceled, and that she make him a good title to such part of the land as she herself has a legal title to; but, if it be determined that she has a legal title to all the property described in the bond, then that he be decreed to pay his notes upon her making to him good title to the land described in said bond. He further prayed for injunction against Mrs. Pease and said attorneys, restraining them from further prosecuting the suit, and from bringing suit to collect the note falling due in 1894. Process was prayed against Mr. and Mrs. Pease, Davis, said attorneys, and the heirs of Grubb.

By amendment, Ray alleged: When he bought the land, Mrs. Pease, by her agents, pointed out the lines of the land as described in the bond, and represented to him that she had a good title thereto. He would not have so bought had he not been led to believe by such representations that she had a title to all of said land. In making these representations, she committed a fraud on him, and sold him land to which she had no title; that is, that part lying outside of the triangle, the legal title to which part is in the estate of Grubb, as appears of record, and is more than three-fourths of the land sold to Ray by Mrs. Pease. The land lying inside of the triangle, which was sold to him, is not worth as much as he has already paid her. Since his purchase he has expended \$731.54 in improvements on the land, stating them, greatly contributing to increase its value; and the land thought to be bought by him has since the purchase, because of said improvements, greatly enhanced in value, and is now worth about \$40,000. Since the purchase he has paid about \$376 in taxes upon the land, but, the land being unimproved, he has received nothing in the way of rents. If he should pay her the balance of the purchase money, and take her deed, he would have to surrender the bond; and, if he should afterwards lose the land because of

her having no title, he could not recover on the bond as damages the increased value of the land and the improvements placed thereon. She being a nonresident, he could not recover of her the purchase money paid and interest by suit in this state for breach of warranty of title. If there is shown to be a mistake in the deed claimed by her, and the same is corrected, he is willing and offers to pay the balance of the purchase money; otherwise he prays that the trade be rescinded, and that she be decreed to take back the land, or so much of it as she may have no title to, and pay him all damages he may have sustained because of her failure to comply with her bond, or pay him the purchase money already paid, with interest and the amounts he has paid out for taxes and improvements; and to this end he offers to surrender the possession of the land to her upon her paying to him said damages.

Defendants, except the heirs of Grubb, demurred upon the grounds. The petition is without equity, and plaintiff is not entitled to the relief prayed; the petition is multifarious; it makes a misjoinder of parties; and plaintiff has, as against these defendants, a full and adequate remedy at law. Said defendants also answered, the nature of which answer will sufficiently appear from the report of the testimony hereafter to be made, except that the answer alleged that on December 13, 1892, Ray filed a bill with substantially the same allegations as those contained in the present petition, and praying for substantially the same relief, and seeking to enjoin the suits in the city court; that upon the hearing upon this bill, on February 5, 1893, the injunction prayed for was denied; that Ray did not except to this ruling, and took no action with regard thereto, until March 14, 1894, when he dismissed said bill, and filed the present petition; that one of the suits in the city court had been assigned for trial for March 15, 1894, and this petition was filed on the eve of that trial; and that, the determining of the question as to whether an injunction should be granted upon the matter in question having already been adjudicated by a court of competent jurisdiction, Ray cannot be again heard in a prayer for the same relief.

Upon the hearing Ray introduced the bond for titles, the purchase-money note, which he paid April 25, 1891, and the original Grubb deed. It appears that the habendum clause of this deed is: "To have and to hold said tract or parcel of land unto them, the said P. P. Pease and L. B. Davis, trustees for Mrs. Emma C. Pease, her heirs and assigns,"—and clause of warranty is in similar language. Ray also introduced the suits in the city court, and further testimony to the following effect: In April, 1890, when Ray called the attention of West, the agent of Mrs. Pease in selling the land to Ray, to the description of the land in the Grubb deed as it appeared of record, West stated to him

that there must have been a mistake of the clerk in copying the description, and that on examination of the original deed Ray would no doubt find the description so written as to include all the land sold to Ray. West did not at that time have the original deed, but it was in possession of Mrs. Pease, in Chicago, and hence Ray had no opportunity of examining it. At the same time West stated that Mrs. Pease was becoming very impatient at the delay in consummating the trade, which delay was desired for the purpose of examining the title; that her agent Pease had written and telegraphed him to hurry up the trade; and that he was afraid, if the trade was not closed at once, she would sell the land to another. As Ray desired the land, and as there was by these representations danger of losing the same by further delay, after a full conference with West, Ray adopted his views as to a mistake of the clerk in copying the description, and that an inspection of the original would show such a description as would give Mrs. Pease good title to all land sold to Ray. The first time Ray saw Pease, the agent of Mrs. Pease, his wife, was in Atlanta, in May or June, 1892. Ray then, at his first opportunity, called the attention of Pease to the description of the land in the deed as of record, and inquired if it was so written in the original, saying at the same time that if it was so written the same would have to be corrected and made to convey to Mrs. Pease the land she had sold to Ray. Pease replied that he did not remember how the description was in the original, and that the description on the record was a mistake. At Ray's earnest request, Pease agreed to forward the original to West, and did so in June, 1892. Then it was for the first time that Ray had an opportunity of examining it, and in reading it was surprised to find the description of the land the same as set out in his petition and as of record. He at once called the attention of West to said description, and informed him that Mrs. Pease had no title under the deed to the greater part of the land she had sold to Ray, and that if there was a mistake in said description it would have to be corrected. On December 13, 1892, Ray adopted the view taken by Mrs. Pease and her agent Pease, and, believing from their assurances that the same was correct, filed his bill in Fulton superior court, alleging said mistake, and praying that it be corrected, and the deed reformed, so as to speak the intention of the parties; but Mrs. Pease, instead of assisting Ray in his efforts to perfect her title, actually resisted the bill, and employed counsel to defeat it, and finding he could not get her assistance, and that without it he could accomplish but little, on March 14, 1894, he dismissed it, and began this case. When he wrote the letters to Pease, he was and is now anxious to pay Mrs. Pease all justly due her. The money referred to in the letters is that

claimed to be due upon the note maturing in April, 1892. Pease was in Atlanta in the spring of 1892, and, upon his attention being called by Ray to the description in the Grubb deed, at once pronounced it a mistake, assured Ray there was no cause for uneasiness, and promised to send on the original deed for his inspection, and said, if the mistake was in the original, they would make Ray secure in his title, and spoke so fair about the matter that Ray felt secure at the time, and inclined to oblige Mr. and Mrs. Pease in any way he could. At the same time Pease represented that it was necessary for them to have the money on the note due April 25, 1892, and, to accommodate him and with the assurance his title would be made good, Ray was then willing to waive his right to refuse further payment until Mrs. Pease had secured a title to the land lying outside of the triangle. At that time Ray had not made an estimate of the land within the triangle, and did not know that he had already paid more than it was proportionately worth. He never promised after he inspected the original deed to pay the entire purchase money before her title was made good, nor did he intend to pay more than the land in the triangle was proportionately worth. It was his purpose to negotiate a loan with the land as security, to pay the balance due, and was informed by those in the loan business that he could get said loan in the fall of 1893. Finding Mrs. Pease would not take steps to perfect her title, if it could be done, and finding that he had already paid more than the land in the triangle was worth, he refused to pay any more to her until he was certain his rights would be protected. He never had any conversation with H. F. West about paying or refusing to pay the balance due, but all conversations were with A. J. West. At the time he expressed his desire and intention to pay the money, referred to in the affidavit of A. J. West, said conversation was as to the note maturing in 1892, and no other, and he (Ray) then believed the statements of Pease that there was a mistake in the Grubb deed, and that it could and would be corrected in time to protect him. The parties to whom he applied for a loan, as stated in his letter to Pease, had never inspected Ray's title to the land and the title to [Mrs.] Pease; but, after the date of these letters and conversations with A. J. West, Ray found a party who was willing to make a loan of \$12,000 if the title were good. This caused him to realize the danger he was in as to the title, and then he determined to proceed to protect his rights. Had the title of Mrs. Pease been good, he could and would have obtained the money to take up the notes as they fell due. The tract of land as bought by Ray is becoming more valuable every day, has greatly enhanced in value since 1890, and is now worth about \$35,000, if Ray can get a good title to all the land described in the bond.

In Fulton county great value is set on good title to realty, and a flaw in such title makes it almost or quite possible to sell the same at its full value, and will injure it from one-third to almost one-half of its value. Mrs. Pease has made no return of property for taxation in Fulton county for 1891, 1892, and 1893. Pease, in 1891, returned for taxation realty in Fulton county at a valuation of \$10,000, and in 1892 at a valuation of \$7,000, returning no other property, and in 1893 returned no property for taxes there. An affidavit of A. J. West was introduced by plaintiff to the following effect, in brief: He was the agent of Mrs. Pease in selling Ray the land, the trade being made by telegram to and from Pease, agent for his wife. Ray paid a full price for the land at the time, giving \$2,500 more, as deponent is informed and believes, than any other party had offered. At the time of the trade, and up to the signing of the papers, deponent did advise and urge Ray to close the trade with as little delay as possible, for fear Pease would become dissatisfied by the delay and sell to some other party. Deponent was interested in the sale to the extent of his commission. The first time Ray met Pease, to deponent's knowledge, was in deponent's office in May or June, 1892. Deponent introduced them, and they had a conversation. Pease forwarded to deponent the original Grubb deed. Deponent notified Ray he had it, and Ray came to deponent's office and examined it. Ray may then have called deponent's attention to the defect in the original, and expressed his surprise and regret to find it so, but deponent's recollection is not clear on this point. If Ray ever saw the original before that time, deponent does not remember it. The latter himself believed and presumed the misdescription in the record was caused by the clerk in copying the original deed.

Defendants introduced the petition filed by Ray, December 13, 1892. The allegations in this petition, though not so full as those in the present petition, seem substantially similar, and injunction was prayed as against the bringing of any suits on the purchase-money note, or transferring of the purchase-money notes, etc. To this petition were attached copies of the bond, the purchase-money note due in 1891, and the Grubb deed. Defendants also introduced the order denying injunction of February 3, 1893, and the dismissal of the petition by plaintiff, March 14, 1894. Also defendants' plea to the suits in the city court, which plea sets up the mistake in description in the Grubb deed. Also letter of Ray to West, forwarded by West to Mrs. Pease, of June 1, 1892, asking Mrs. Pease to sign and execute and return a deed inclosed. The deed referred to in this letter was the deed made by Mrs. Pease, and by Pease and Davis as trustees for her, to Ray, but not delivered, dated June 1, 1892, conveying to Ray the land described in the bond;

and it also was introduced by defendants. Also letters from Ray to Pease of various dates from July 13, 1892, to November 30, 1892, making promises to pay, excuses for not having paid, and asking indulgence, and containing no reference to any defects in the title of Mrs. Pease. Also a letter from Ray to A. J. West of December 3, 1892, containing no reference to any such defects, and stating that Ray trusted, if West heard from Pease, West could wait until Ray returned from a certain trip. Also testimony to the following effect: Pease visited Atlanta twice in 1892, once in the spring, and again early in the summer, and on each occasion saw Ray, meeting him on the first visit at the office of West & Co., by appointment. The note, maturing in 1892, was then overdue, and Pease asked Ray about it. Ray apologized for his delinquencies, and asked Pease to be lenient, saying he thought he would soon be able to get the money. During that conversation Ray said nothing with reference to the description in the Grubb deed, nor at that time had he intimated to Pease, or to any one with Pease's knowledge, that there was any misdescription, or that he had any fault to find with the deed or the title, nor did he claim any mistake in the deed at any other interview with Pease. Pease did not state to him that there was no cause of uneasiness nor promise to send out the original deed for his inspection, nor say that, if there was any mistake in the original, Pease or his wife would make Ray secure in his title. Pease did tell Ray he wanted the money, and Ray asked for leniency, as above stated, but said nothing about accommodating Pease or Mrs. Pease, or that he would pay on assurance that the title would be made good, or that on such a promise he would waive his right to refuse further payments until Mrs. Pease should secure title to the land lying outside of the triangle. He made no excuse for not paying the note except that he was hard up. Later in the year Pease was again in Atlanta and met Ray at West's office. Ray said that he regretted that he had not been able to pay the note, but he had now made arrangements so he could take up all the notes, if Pease would have a deed executed by Mrs. Pease. West asked him if he had his money arrangements so he could certainly take up the notes, and Ray said he had. Ray then drew a deed, and gave it to Pease, which Pease sent to Chicago, and it was executed and sent back to West. At that conversation Ray made no complaint as to the description, nor as to his title. Mrs. Pease bought the land in 1861 or 1862, and had it fenced in with an adjoining piece of land which Pease owned. The fence remained until soldiers tore it down, in 1864. After the war, Pease fenced it up again with a wire fence and built a small house, which he used in the fishery business, which remained there four or five years. Persons

named looked after the property. The taxes were paid from year to year continuously by Mrs. Pease, from the time of her purchase until the conveyance to Ray. Ray's note falling due in April, 1894, is now owned by A. C. Arms of Chicago, and was transferred to him for a valuable consideration, in 1893. Mrs. Pease is perfectly solvent. She owns property in Chicago worth, above the incumbrance thereon, \$9,500, and owns a large amount of valuable realty, described, in Atlanta, which is unincumbered. She has no other debts than incumbrances on the Chicago property, and no debts overdue and unpaid. Pease owns valuable property, described, in Atlanta, which is unincumbered, valuable property in Chicago, and has \$1,500 cash in bank. His liabilities amount to about \$1,500. Taxes for the year 1893, on the property owned by Mrs. and Mrs. Pease in Atlanta, have been paid. Defendants introduced the tax receipt. Mrs. Pease is worth, above all liabilities, \$50,000, and Pease, \$22,000.

Affidavits of A. J. West were introduced, in which were stated, among other things, the following: Before the bargain was completed for the sale of the land to Ray, Ray investigated the title, and spoke to West about an alleged defect in the description in the Grubb deed. The matter of this defect was fully discussed at the time, and Ray expressed himself satisfied to accept the land at the price and upon the terms proposed and as finally agreed upon, in spite of said alleged defect. Afterwards, about April 25, 1891, Ray paid, through West, the first of the purchase-money notes. He did not then complain, nor had he before complained, to West that he was dissatisfied with the title. Since the maturity of the note, due April, 1892, West, as the agent of Mrs. Pease and her trustee, has made repeated demands upon Ray for payment, and has received many promises to pay. Up to a week before this suit was filed, Ray had never intimated to West, as agent of Mrs. Pease, that he would seek to defer the payment of his indebtedness because of any of the matters now complained about, always offering as his sole excuse for the delay his inability to raise enough money to meet the indebtedness, which he admitted to be just and due. About June 1, 1892, Ray brought him a deed to be executed by Mrs. Pease and her trustee, with the request that he have it executed and returned, saying he was preparing to pay the entire balance of the purchase money, and desired the deed to be ready for that event. This deed is in the handwriting of Ray. In the spring of 1890, about the time and before Ray purchased the land, Ray stated to West that upon inspecting the records he discovered there was an imperfect description in the Grubb deed, and discussed the matter at some length, finally stating that he did not consider the defect of great materiality, and would buy the property notwithstanding.

Something was said in the conversation as to whether the defect might not have been occasioned by a clerical mistake in recording the deed, and whether the original deed might not contain a more perfect description. West does not remember who suggested that it might be a mistake of the clerk, but thinks it was Ray. He stated to Ray that he did not know what the original deed contained, as he had not then seen it. Whatever was said about it was in the nature of a mere surmise, and it was not stated by either of them, nor accepted by Ray, as a thing to be relied upon in determining whether Ray would purchase. At the time of the negotiations there were others proposing to buy the land at a smaller price than that at which it was finally sold to Ray. Pease, as his wife's agent, was anxious to sell to raise money to buy certain land in Chicago. Ray was informed that Pease was growing impatient, and would probably accept the offer of the other parties, and Ray, having expressed his satisfaction with the title, closed the trade in order that he might not lose what he considered an advantageous trade. Ray at no time said that the imperfect description in the Grubb deed would have to be corrected, nor did West learn that Ray considered it material, or would claim that he should not pay the purchase money, until the bill, filed by Ray in 1892, was read to West. H. F. West, the other member of the firm of A. J. West & Co., made affidavit that at no time after the bargain of the land, in 1890, had Ray ever intimated to him that he did not intend to pay the balance of the purchase money, for any cause, but promised sometimes deponent, and sometimes A. J. West, to pay his past-due indebtedness on the land when he could succeed in getting together the money, offering as his only reason for the delay his inability to get the money.

J. L. Brown and L. R. Ray, for plaintiff in error. King & Anderson, for defendants in error.

SIMMONS, C. J. 1. It will be seen from the official report of the case that the controversy between these parties arises from a defective description of the land conveyed by Grubb to the trustees of Mrs. Pease, it being contended by the plaintiff in error that the description is so uncertain as to render the deed void, and that, if not void, it should be reformed. That description is as follows: "All that tract or parcel of land lying and being in the Seventeenth district of originally Henry, now Fulton, county, in said state [Georgia], being part of land lot number one hundred and six in the Seventeenth district aforesaid, bounded as follows: Commencing at the northwest corner of said lot; running south on Borling lot fifteen hundred feet; thence east six hundred and eight and a half feet to a stake corner; west six hundred and eight and a half feet to commencing corner,—con-

taining ten acres, more or less." The lines here given as bounding the tract, it will be seen, do not form a complete boundary. Courts, however, will not declare a deed void for uncertainty as long as it is possible, by any reasonable rule of construction, to ascertain from the deed what property was intended to be conveyed. A description of the land which can be made certain will be treated as sufficient, and the land will pass to the grantee. 1 Shep. Touch. p. 250; 2 Am. & Eng. Enc. Law, art. "Boundaries," p. 496. Looking to the above description, we find that there are two lines which are absolutely certain,—the first, which commences at the corner of a certain lot and runs south 1,500 feet; and the second, which commences at the south end of the first, and runs east 608½ feet. The next line given can also be made certain. It is of the same length, to half a foot, as the second line, and, although the point at which it begins is not stated, it is described as running west to the commencing corner. If, therefore, we run a line from that corner due east 608½ feet, we find the point at which the last line of the description should commence when it begins to run west. Construing the description in this manner, we then have three certain lines, which make three sides of a rectangle, thus: [

The question, then, is, will the court supply the fourth or missing side? In the case of *Com. v. City of Roxbury*, 9 Gray, 490, where the question was whether a side which had been omitted in the description could be ascertained, three sides being given, Shaw, C. J., said: "A deed is not to be held void for uncertainty because the boundaries are not fully expressed, when by reasonable intentment it can be ascertained what was considered and understood by both parties to be embraced, and intended to be embraced, in the description. The obvious and legal course, we think, is to lay down a plan on the land according to ascertained boundaries, abutments, and monuments on these three sides, and thus see where the fourth would come." While we have no abutments or monuments in this description, we have, as above shown, three fixed lines of courses and distances. Applying this rule to the courses and distances, and laying down a plan on the land accordingly, we have the three sides as above described; and all that it is necessary to do, in order to supply the fourth side, is to run a line north and south between the termini of the two lines which are designated in the description as running east and west. In our opinion, it would do no violence to the intention of the parties to supply this line. It seems to us to be manifest, from the description in the deed, that the grantor intended to convey all the land included within these four sides. The fact that the land thus included contains 20 acres, while the deed describes the quantity as 10 acres, more or less, makes no difference. Where a tract of land is described in a deed by metes and bounds, and as containing so

many acres, more or less, the quantity must yield to the metes and bounds. If the measurements contain 20 acres, that number of acres is conveyed to the grantee, although the deed may describe the number as 10, more or less. 3 Washb. Real Prop. (5th Ed. p. 427) *p. 630. The record discloses, moreover, that when the trustees of Mrs. Pease purchased the land from Grubb, they inclosed the tract with a fence on the four sides, as above described; that this fence remained there, with the knowledge and acquiescence of the grantor, for several years, and until destroyed; and that, after its destruction, it was replaced around the whole tract,—thus showing the construction put upon the deed by the parties themselves. It is a well-settled rule of law that where the description in a deed is susceptible of different constructions, or where the deed contains two inconsistent descriptions, the grantee has a right of election between them, and, when he exercises this right, the grantor is bound thereby; this rule being based upon the familiar principle of construction that, inasmuch as the fault is assumed to be in the grantor, if the terms of the description are uncertain, the deed shall be construed most favorably for the grantee. Id. (5th Ed. p. 422) *p. 628; 2 Am. & Eng. Enc. Law, 496; *Armstrong v. Mudd*, 10 B. Mon. 144. The grantees in the deed in question having elected to supply the missing line in the description, by building the fence on this line as well as upon the others, with the knowledge and acquiescence of the grantor, the latter was bound thereby, and the grantees obtained title to the whole 20 acres within the metes and bounds above described.

2. This being the proper construction of the deed in question, and the deed, according to this construction, covering the land sold by Mrs. Pease and her trustees to the plaintiff in error, there was no merit in the contention of the plaintiff in error that there was an outstanding title remaining in Grubb or his heirs in consequence of the alleged ambiguity or uncertainty in the description contained in that deed, or that the deed required to be reformed. The court below, therefore, did not err in refusing to enjoin the action against the plaintiff in error upon his notes for a part of the purchase money, even though the plaintiff in that action may have been insolvent and a nonresident. Judgment affirmed.

(94 Ga. 715)

TUTT v. SAND HILLS HOTEL CO. et al.

(Supreme Court of Georgia. Aug. 29, 1894.)

INSOLVENT CORPORATION—FORECLOSURE OF MORTGAGE—INTERVENING CLAIMS.

The material findings of the jury were warranted by the evidence, and the decree, as an equitable result, was warranted by the findings, in so far as it was rested on them, and in so far as it was rested on the discretionary power of the court, though open to question, involved no manifest abuse of such discretion. No error was committed in the progress of the trial,

or in any of the various rulings made by the court, for which a new trial should be ordered. The points made, being exceedingly numerous, while they have been separately considered in the light of the whole record, are overruled generally; none of them being sufficient to require another trial of the case, or any modification of the decree.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by William H. Tutt against the Sand Hills Hotel Company and others. A decree was rendered adverse to plaintiff, and he brings error. Affirmed.

The following is the official report:

The case of Tutt against the Sand Hills Hotel Company; Cohen and Lamar, trustees; Allen, who sued for the use of Coffin, cashier and trustee of the National Exchange Bank of Augusta, and the Augusta Savings Bank (Coffin, cashier and trustee); both said banks; Thompson; Schneider; Allen; Brown; Kernaghan; and Baker,—came on to be heard at the April term, 1893, of Richmond superior court. The court held that the issues to be tried were those arising out of the petition and answers, and also a rule to distribute certain money, and traverse of the answers of the receivers who had been appointed in the case. To this ruling defendants excepted *pendente lite*, and made further exception, as will appear hereafter. A verdict was returned by the jury in answer to questions propounded to the court, and both sides moved for new trial. Plaintiff moved for final decree upon the admissions in the pleadings and the findings by the jury. A decree was rendered by the court, to which plaintiff excepted, and afterwards, during the same term, moved to correct the decree, and vacate and set it aside, upon various grounds. This motion, as well as the motion for new trial, was overruled, and to these rulings the plaintiff excepts. He also assigns error upon certain exceptions *pendente lite* taken by him during the progress of the cause, as will hereafter appear.

The original petition was brought by Tutt, for himself and all other bondholders and creditors of the Sand Hills Hotel Company coming in and contributing to the expense of the suit against the defendants named. It alleged: The Sand Hills Hotel Company was incorporated to carry on hotel keeping. Payment was made of the capital stock, and it became necessary to raise other money to complete the plant. In May, 1889, it executed its deed of trust conveying the hotel and the hotel lot to Cohen and Lamar, trustees, to secure the payment of the bonds therein described. Out of the issue of \$65,000 of bonds, \$16,000 were sold to petitioner for cash, at par, and the company used the money in part payment for the completion of the hotel building. The remainder of the issue were never actually sold, but came into the hands of the Nation-

al Exchange Bank, and are claimed to be held by it and the Augusta Savings Bank as security for or on account of indebtedness to them by the hotel company, but petitioner denies the validity of the ownership of these bonds by said banks. Thereafter the hotel was completed, and has been since operated at a profit, yet the company failed to pay its state and county taxes, amounting to about \$1,200, the *fi. fa.* for which was taken up February 2, 1891, and assigned to Coffin, an officer of said bank, who holds it unsatisfied. The interest upon said bonds has not been paid. There is now due to petitioner \$1,920, interest to July 1, 1891, on bonds 50 to 65. He notified (in writing) the trustees that a default had existed for over six months on a part of the interest due him, and to immediately take possession of all the property the hotel company conveyed to them, and make sale thereof as required by the deed of trust, making distribution of the proceeds among the bondholders according to the deed and the law. Service was acknowledged by the trustees June 23, 1891, but they have taken no action thereunder, nor otherwise intervened to protect his rights as a bondholder. It was provided in the deed that the company should have the right to lease the hotel subject thereto, and so long as the rent was paid the lessee should not be disturbed by reason of default requiring intervention on the part of the trustee; but no such lease has been made, and there is no valid reason why they should not act under his notice, or proceed to foreclose the instrument. On June 23, 1891, there was levied on the hotel lot a *fi. fa.* in favor of Allen, for the use of Coffin, cashier, trustee for the banks mentioned, and also a *fi. fa.* in favor of Robbe, assigned to Thompson and Schneider, and under these levies the property will be sold, unless prevented. The liens set forth in these executions were recorded after the record of the deed of trust mentioned, but it is claimed by plaintiffs in these *fi. fas.* that their liens will take precedence over the rights of petitioner as a bondholder. These *fi. fas.* are now owned or controlled by, and proceeding at the instance of, said bank, over petitioner's objection. The execution of Allen is not founded upon such a debt as should give him a lien over that of the bondholders. He is now, and was at the date of the deed, a stockholder of the corporation, and had actual and constructive notice of the creation of the indebtedness set forth in that deed. No notice other than the record of his lien was given that could operate against the bondholders, and the lien showed on its face that he was working for a commission of 10 per cent., in overseeing the work, and disbursing the money of the corporation, instead of being a contractor to build. The president of the hotel company, who was served, was Baker, and he is also the presi-

dent of the two banks, who were the real plaintiffs; and the case was not defended, and went by default. No issue is made as to the amount of the *fi. fa.* of Robbe, but petitioner denies its priority over the trust deed, and calls attention to the excessive and illegal form of the levy, and the circumstances of its present ownership, which, he charges, places it under the control of said bank, and enforceable at its will. For equipping the hotel, it was necessary to raise \$40,000, which was advanced to the hotel company by the National Exchange Bank upon notes of the hotel company indorsed by certain of its stockholders, to wit, Thompson, Kernaghan, Allen, and Brown, to whom a mortgage was given May 7, 1890. Upon these notes petitioner became an indorser for accommodation of the corporation and said bank now holds about \$23,000 of them. By the terms of this latter mortgage it is provided that if, for any cause, the property conveyed should be levied on, the debt thereby secured should become due and payable, and the mortgagees might proceed to make sale of the property,—hence said debt is now due and enforceable; but none of the parties have proceeded, and petitioner, being an accommodation indorser, cannot act under the power set forth in the mortgage, but must resort to the court for relief, and to enforce his lien. Petitioner is also a stockholder of the hotel company, owning 300 shares of stock, fully paid. As such he attended a meeting of the stockholders May 8, 1891, called their attention to the financial condition of the company, and asked immediate action as to protection of the property; but, after discussion, nothing was done. At the subsequent annual meeting no quorum attended, and petitioner could do nothing more but appeal to this court for protection. If the property is allowed to be sold under the lien *fi. fas.*, nothing could pass but the interest of the corporation, and petitioner, as a bondholder would have to bid against the bank, which is forcing the property to sale under the lien *fi. fas.*; holding besides, as above stated, Allen's notes, and bonds other than those of petitioner. Their title to the bonds is, however, denied by petitioner. A sale would then have to take place of the furniture and equipment, which, unless bid in by the purchaser of the realty, would not bring enough to pay the amount secured by said second mortgage. Under the lien *fi. fa.* no judgment had been molded so as to sell the property as an entirety, and a sale piecemeal will not only be illegal, and render stock in the company worthless, but deprive any one from bidding with safety, except the bank. The banks have ample security in personal indorsements, and sale in the summer would be at an unpropitious time; and the property could be leased to advantage as it is,

until a propitious time arrives. The hotel company is insolvent, etc. Waiving discovery, certain questions were addressed to Allen, for the use, etc., and to Coffin, cashier and trustee; answer being prayed, but not under oath. And petitioner prayed: Temporary restraining order against the sheriff and defendants. Appointment of receiver, with authority to lease the property for such time as might be determined, and, by interlocutory order or final decree, to sell the property free from lien, transferring the liens to the proceeds of the sale. To foreclose the trust deed and the mortgage, and have payment made of them from the proceeds of the sale. To enjoin perpetually the special lien of the Allen *fi. fa.*, and decree that no lien existed, under it, upon the property, to plaintiff therein, as a contractor. To require defendants to execute such deeds as were necessary to pass the title in fee simple, and vest in the purchaser the franchise of the corporation. To require an accounting from the banks as to all the property of the hotel company which came into their hands, and direct the surrender and cancellation of all such collaterals as they held, consisting of bonds of the hotel company, and decree that they have no title to the same, as against petitioner, as a bondholder and stockholder. To open and set aside the judgment rendered in favor of Allen for the use of Coffin, trustee, on the grounds that it was collusive; that there was no legal service in the case, for the reasons stated above; because Allen was not a contractor; and because the hotel company was not indebted to him in the amount claimed. To apply the fund in court to the payment of the debt for which the bonds were issued. To apportion the proceeds of the sale among the several liens according to legal priorities. And for general relief. Attached as exhibits were the deed of trust covering the hotel and hotel lot; the Allen *fi. fa.*, with levy thereof; the Robbe *fi. fa.*, with levy and transfer thereof; and the mortgage upon the personalty of the hotel company, and also upon the realty, notice being given therein of the prior mortgage or deed of trust, and also of "a builder's lien on said real estate for \$35,382.55 [the amount of the Allen *fi. fa.*], and of another lien contested and disputed."

Under this petition, on July 21, 1891, the judge below ordered: That Lamar and Cohen be appointed receivers of the property of the hotel company, real and personal, with authority and direction to sell the same at public outcry to the highest bidder, at a time and place named. That said trustees and receivers sell as a whole the real estate, and on a separate offer, on the same day, the personal property as a whole, and make deed and bill of sale to the purchaser, who should be put at once into possession. "That the bidder may pay off the same in cash, or

in liens and claims against said company, to be left with said trustees in lieu of cash. At said sale any one or more of said parties hereto shall be at liberty to bid and buy." That the questions as to the distribution of funds should be left open for decision upon a regular rule to distribute at the October term of the court. That if it should appear that the liens or claims placed in the hands of the receivers were not entitled to be taken as money, or that liens belonging to others were entitled to consideration, in whole or in part, then said purchasers should make good the same, with cash, or else the property be resold at their risk. And that the levies be dismissed, all liens be preserved as of this date, and the priorities and validity thereof be determined on the rule to distribute, and all costs, fees, and expenses be paid out of funds in the hands of receivers from the proceeds of said sale.

On November 19, 1891, Cohen and Lamar, receivers, reported: Under the order above mentioned they advertised the property for sale, and proceeded to sell it at the time ordered. The realty was knocked down to Young, the highest and best bidder, for \$64,200. The personalty was also knocked down to Young for \$28,000. The receivers executed and delivered to Young a deed to the realty, and bill of sale to the personalty. Young did not pay them \$92,200 in cash, but acted under the following clause of the order: "That the bidder may pay off the same in cash, or in liens and claims against said company, to be left with the said trustees in lieu of cash." After the sale Young presented to Lamar a list of the executions, bonds and notes attached, stating that he would present in payment for the personal property the two notes for \$13,333 and \$13,334, secured by the mortgage on the personalty, and, as to the other papers held by him, that the Allen *fi. fa.*, the Robbe *fi. fa.*, and the tax execution were first liens upon the realty, and should be taken at their face value therefor; that he offered to pay the balance of the purchase price in bonds of the hotel company, but, if incorrect in his impression as to the priority of the said liens, he desired that the court, upon final distribution of the money, should credit them as their priorities existed in law. Said receiver told him that under the terms of the order he did not think the receiver could pass upon the priority of said liens, but that he might deposit all with the receivers, who would receive them, and the court would adjudicate the priorities. Thereafter Young conveyed and assigned to Cohen and Lamar, receivers, all of said *fi. fas.*, liens, and claims, which were accepted by them. They have proceeded to segregate the various liens, and report that in payment for the personalty they accept the two notes mentioned, secured by the mortgage on the personalty; that in payment of the bid for the realty they accept the tax *fi. fa.*

for \$1,242.80, the Allen *fi. fa.* for \$39,959.05, the Robbe *fi. fa.* for \$4,162.97, principal, interest, and costs on the same on the day of sale,—leaving balance of \$16,735.18, in payment of which they received the bonds set out in the exhibit to their report. There have been presented to them claims for certain expenses, and a written notice from F. H. Miller, Esq., that he would claim compensation, as counsel for plaintiff, out of the found brought into court for distribution, to such extent as might be allowed by the court on final decree. They have no funds in hand out of which to pay the costs, fees, or expenses, as the purchaser exercised the option offered by the order of sale; and they therefore prayed that Young be required to pay over \$4,510 as commissions due to them, as receivers, and such other sums for costs and attorney's fees, or other expenses, as the court might deem right.

Tutt excepted to this report upon the following grounds: Because the action set forth therein was in violation of the written notice served upon them by his attorney, on the day of and prior to the sale, that he objected to their receiving as cash, in part payment of the purchase money, any liens against the company, except the bonds secured by the deed of trust, and the notes secured by the mortgage. Because the receivers allowed Young, not a party to the petition, to seek to pay his bids, or any part thereof, in liens held by the other defendants at the time of the sale, and transferred to him thereafter without recourse, the language of the order of the sale being, "at such sale any one or more of said parties thereto shall be at liberty to bid and buy," under which language no one not a party could purchase except for cash. Because they accepted the liens presented by Young as receivers, and not as trustees, by whom the same were to be verified, this being the requirement of the provisions of the order of sale. Because they made a deed and bill of sale to Young, and put him in possession of the property, without requiring of him any security for the performance of the decree of sale, he being then no party to the record. And because the notice at the conclusion of the deed, after the habendum clause, stating that Young should make good with cash the liens or claims placed in the hands of the receivers found not to be taken as money, was not a sufficient notice, did not make them deeds or conveyances upon a condition, and is no protection to plaintiff against the title of any bona fide grantee or mortgagee of Young. Petitioner prayed that these exceptions be sustained, and a resale of the property ordered, and that pending the hearing bond and security be required of the purchaser to abide the final decree. The court ordered that Young execute a bond in the sum of \$32,000, payable to the receivers, and conditioned for the payment of the eventual condemnation

money, and a compliance with the provisions of the order of sale. Young executed a bond, with Baker as security. Petitioner excepted to this bond: Because the only surety was Baker, a party defendant to the original bill, who is president of the hotel company and the two banks, and, as such, transferred to Young the claim set forth in the receivers' report. Because, further, Baker, by his answer filed in this case generally, with his codefendants, pleaded that said sale was properly and legally conducted, and that the consideration received was a legal one, in which plaintiff had no interest, because he obtained an order requiring the purchaser, Young, to give bond and security to pay his (petitioner's) debt in the event it should be made to appear that the consideration of the sale was invalid. The exceptions to the bond were overruled.

The defendants, except Allen, answered the petition: The hotel was never operated at a profit, but at a loss. The tax *fi. fas.* were taken up by Coffin, but not with the funds of the hotel company, and to protect the property from sale, as much for the benefit of plaintiff as any other person interested. The interest due upon the bonds held by plaintiff was not paid because the coupons therefor have never been presented for payment, and no demand made for their payment, other than the allegation in the petition. The mortgage on the realty was executed legally, as directed by the hotel company. The Allen *fi. fa.*, and the *fi. fa.* of the Augusta Savings Bank, and the Robbe *fi. fa.* were levied on the realty, and the liens of these *fi. fas.* are superior to plaintiff's claims as a bondholder. The lien of Allen is valid; was properly sued upon; the defendant the hotel company was actually represented in court by one of the board of directors; and all the requirements of law were fully complied with, not only in the matter of the contract by which the lien was obtained by Allen, but also in the enforcement of the same. The right of plaintiff to attack the validity of the Robbe lien in this proceeding is denied. The National Exchange Bank advanced money to the hotel company on its notes indorsed by the persons named in the petition, and a mortgage on the personality was legally given it to secure said indorsements; and plaintiff's name was not inserted in the mortgage, for reasons known to him, as he was present and engaged in the meeting at which it was agreed the mortgage should be given. Plaintiff, as a stockholder, bondholder, and officer, for some time, of the hotel company, was present at all the meetings of the corporation at which anything was done relating to the claims of Allen or Robbe for taxes, and knew all the plans and purposes of the parties interested to try and save the hotel company from sale, and the stockholders from loss, and is estopped from setting up any demand founded on a want of knowledge of what was

done. Defendant Coffin set up that plaintiff, having waived discovery, was not entitled to propound to him the interrogatories set forth in the petition, and, until ordered to answer the same, declined to do so. Defendants further answered: That since the filing of the petition, by order of the court, all the property of the hotel company was sold by the receivers. That it was sold, and paid for by the purchaser, in pursuance of the terms of the order, and title thereto made, as authorized by the order. That plaintiff was present, and did not object to the sale, and was a bidder on the property then and there sold, expressed himself as satisfied with the sale, and stated that he had accomplished all he had in view in connection with the same. Said sale was properly and legally conducted, and the consideration received a legal one, in which plaintiff has no interest, because he has obtained an order requiring the purchaser to give bond and security to pay his debt, if it should be made to appear that the consideration of the sale was invalid.

Allen answered: He, with plaintiff and other defendants, was a stockholder in the hotel company, and, of his subscription of \$2,500, he has lost all except \$500. He knows nothing, of his own knowledge, as to plaintiff's purchase of \$16,000 of the bonds, the application of the proceeds, or the disposition made by the hotel company of the remaining \$49,000 of the bonds, nor as to the alleged indebtedness of the company to plaintiff, or steps taken by plaintiff to enforce collection of the same, nor as to the allegations in the petition touching transactions between other parties to the record. As contractor for building and furnishing material, in April, 1888, he contracted with the hotel company to erect for them a hotel building on their lot. By this contract he was to and did furnish, at his own expense, the material used, for which he was to be paid by the hotel company, together with 10 per cent. thereon as his profits under the contract. He denies that he acted as its agent or overseer in disbursing its funds, but erected the improvements with labor paid and material furnished by his contractor; the material having been bought by him upon his individual credit, a part of it being still unpaid for, owing to the delay in obtaining settlement with the company. Upon invitation of the company, he submitted his proposition to erect the improvements for a gross sum, and, at its request, explained the basis on which his bid was made; disclosing his estimate of cost of material, labor, and percentage of profits to himself as contractor. It thought his estimate of material and labor too high, but agreed that 10 per cent. profit to him was reasonable, whereupon it was agreed between them that he should keep an accurate account of the cost to him of material and labor, which, together with the 10 per cent., should constitute the aggregate amount of his bid as contractor. The contract was intended

by the parties thereto to express this agreement, and if it falls to do so it is the result of accident or mistake. The hotel company, from time to time, paid him various sums on account of the contract, but failed to make payment as agreed on in the contract; and he was compelled to receive its notes, and to discount the same in banks, to raise funds to complete his contract, or lose the amount already expended. A number of these notes were so discounted by him, all of which, by consolidations and renewals, were finally embraced in two notes,—one for \$9,400.82, due the Augusta Savings Bank, and one for \$23,516.55, due the National Exchange Bank. Upon the completion of the contract within the time prescribed by law, and in pursuance of the statute, he recorded his lien as contractor and material man, for the balance due him, \$35,382.55, and transferred the same to Young, trustee, as collateral security for these two notes. His lien is a valid one, and he denies the right of petitioner to attack its validity, and that of the judgment foreclosing it, in a collateral proceeding, as is sought to be done by the petition. He does claim precedence for his lien, and such precedence should be allowed. He admits constructive notice by record of the trust deed pending construction of the hotel, before the final completion of his contract, but denies that he had notice of the creation of petitioner's claim as holder of the bonds, or the disposition made by the hotel company of the remainder of the bonds. If the same were pledged to the bank as collateral security to all notes of the hotel company held by the bank, including the notes discounted by this defendant, he prays that the same may be so applied, if necessary to fully protect him. When the contract between him and the hotel company was made, and for a long time thereafter, petitioner was its president, and afterwards director, and, as such an individual, had actual notice of his (defendant's) claim and contractor's lien, and always referred to and recognized his claim as that of a contractor's lien, and was present in the meetings of the stockholders and directors when the same was constantly so referred to and recognized. Petitioner encouraged him to proceed with the work and expend large sums by such admission and recognition of his lien, and thereby estopped himself from denying its existence and validity. Defendant denies any collusion in the establishment of the lien and reducing it to judgment. The written contract between defendant and the hotel company was subsequently modified and altered in many particulars, and in substance, by the mutual agreement of the parties thereto. This defendant also set up various matters by cross petition, which were stricken on demurrer, as to relief prayed against Tutt. Attached to the answer was a copy of the contract between Allen and the hotel company. By it, Allen agreed to build an hotel, according to plans

made and under direction of the architects, for 10 per cent. on the amount of cost thereof. The hotel company agreed to pay Allen 10 per cent. on the cost of building the hotel, it being understood that the cost of the hotel included all material and labor required to finish the building. Allen was to charge percentage only on material and brickwork, carpenter's work, painting, tinning, and such plumbing as would be done in the house, with gas piping in the building. It was agreed that any discounts Allen could obtain on material should go to the benefit of the hotel company, and that the first payment would be due on June 1st thereafter, and monthly payments thereafter until the building was completed.

Plaintiff amended his petition by annexing a copy of the record in the case of Allen against the hotel company, and of the lien of Robbe against the hotel company, and, as an additional prayer, asked for general judgment against the hotel company for the amount of the principal and interest due on his bonds. It does not seem necessary to set out here the petition of Allen, except to say that it was in the usual form of a suit by him, as contractor and material man, to enforce his alleged lien and for general judgment, with the addition that it alleged transfer of the lien to Coffin, cashier, in trust to collect, demand, and sue for the same, and apply the proceeds to the notes to the National Exchange Bank and the Augusta Savings Bank; and the suit was by Allen for the use of Coffin, cashier, trustee. Attached to this petition of Allen was a statement of the amounts paid by him for labor and material in constructing the hotel, which, with 10 per cent. thereon, reduced by certain credits, left balance due of \$35,382.55. There was also attached the written transfer to Coffin, cashier. Service was made upon Baker, president. Plaintiff then, in view of the pleadings, the receivers' report, the exceptions thereto, the answer of Allen, and cross relief prayed by him, and the answer of the other defendants, renewed a motion, which he had previously presented, to refer the case to an auditor or master in chancery. This motion was refused. By exceptions pendente lite, plaintiff excepted to the ruling of the court overruling his exceptions to the bond given by Young, and to the ruling refusing his motion to refer the case arising under the pleadings, receivers' report, and exceptions thereto, to an auditor or master. Upon these exceptions pendente lite, petitioner assigns error in his final bill of exceptions. The receivers were ordered to show cause why they should not distribute the proceeds of the sale, and pay over to plaintiff the amount claimed to be due on the bonds owned by him, and, further, why the exceptions to their report as to claims accepted by them should not be sustained, and the same made good in cash by the purchaser. They answered: They are informed and be-

lieve plaintiff's bonds are secured by a mortgage on the realty of the hotel company. The tax *fi. fa.*, Allen's *fi. fa.*, and the Robbe *fi. fa.* are superior to the lien of this mortgage, and to the bonds secured thereby. In addition to these *fi. fas.*, taxes for 1891, claims for advertising, caring for the property, costs, for attorneys' fees and receivers' commissions, are of file with them; but, the same being undetermined, they cannot subtract the sum from the amount of the bid, so as to state exactly what is left in their hands for distribution. Excluding the above undetermined amounts and amount of cost for these proceedings, and deducting the aggregate sum of the *fi. fas.* from the purchase price, there is left in their hands \$16,735.18, to be prorated among the \$65,000 of bonds secured by the mortgage, or per cent. on each bond, which percentage, reduced by the amount of costs and undetermined claims mentioned, respondents are advised they should pay on the \$16,000 of bonds held by plaintiff. As soon as the rights of the parties are adjudicated, and the questions as to the amount due plaintiff and for costs are fixed, they will make demand upon Young for the amount in cash required by the court to be made good in cash by him. They accepted the claims, liens, and bonds mentioned in their report in compliance with the following statement in the order of the court: "That the bidder may pay off the same in cash, or liens and claims against said company, to be left with the said trustees in lieu of cash." They did not understand the language, "at said sale, any one or more of said parties hereto shall be at liberty to bid and buy," to exclude others who might become purchasers from presenting liens and claims in conformity with the order, and for this reason accepted those presented by Young, who was not a party to the proceedings of file. A transfer of notes, *fi. fas.*, and liens without recourse is legal; putting title in the transferee, and entitling him to the same rights as the original holder. Therefore they accepted the *fi. fa.* and liens presented by Young, to whom they had been transferred without recourse. A transfer of notes without recourse, secured by collateral, carries the collateral, and does not render void the title of the holder of the collateral. They therefore accepted from Young the claims, liens, and collateral so transferred to him. A tax *fi. fa.* on which no levy has been made may be transferred, and the holder may thereafter, and without recourse, pass title to his transferee. They therefore accepted the same from Young. The holder of the collateral may sell and transfer the same. They had no knowledge that the Robbe *fi. fa.* was held as collateral by Baker on his personal indebtedness indorsed by Thompson and Schneider, and that the transferee held title only as indorser to protect the note not surrendered up nor transferred to Young. The holder of collateral may

transfer the same without recourse, and therefore they accepted the same from Young. The transfer of the note for \$22,266.04, secured by 30 bonds, to Young, without recourse, did not render void the title of the Augusta Savings Bank to said bonds, and the same is true as to the note of May 8, 1890, to Baker. They therefore accepted the same. The Allen *fi. fa.*, they are advised, was valid, and the title thereto in Coffin, cashier, trustee, who had a right to transfer the same to Young without recourse, and thus Young acquired title, and could transfer the same to the receivers. They therefore accepted the same. They were not required by the order to take from the purchaser presenting liens and claims obligation or security to stand by the final order of the court, but, in the deed made to Young, notice was given that failure to pay any sum required by the court would cause a resale of the realty. The deed made shows that they sold under the order of the court, and in compliance therewith; and where the power under which they were appointed, and by virtue of which they sold, is recited and referred to in the deed, it was not necessary to add any designation to their signatures. By virtue of the power conferred on them in said order, whether as receivers or trustees, or both, they accepted and verified the liens and claims presented. They put the purchaser in immediate possession.

Plaintiff demurred to this answer of the receivers: Because they had not made such response as entitled them to discharge of the rule, and he is entitled to judgment against them, upon their own showing, for the amount due him as bondholder. Because they returned that they had accepted the tax *fi. fa.* This *fi. fa.* had ceased to be a lien upon the property from the date of the transfer thereof without recourse by the National Exchange Bank of Augusta, to whom the same had not then been transferred by Coffin, the first assignee from the sheriff; and being a second assignment, not recorded on the execution docket, it had no longer any validity as a lien, particularly against plaintiff's rights, when tendered to the receivers. Further, because the receivers accepted the Allen *fi. fa.* The alleged lien of Allen was not sued out until after the trust deed was recorded, and title deposited in the receivers, with all the powers usual and incident to trustees holding realty for the benefit of bondholders; and plaintiff's rights as a bondholder thus secured were unaffected by work and labor done, or proceedings had, by Allen, after such record; and, by the record Allen and his usee had notice, so that any lien in his favor as contractor was not superior to plaintiff's rights as bondholder, particularly as no written notice was ever given by Allen or his usees to said respondents, as trustees under the deed, of any claim by him or lien as contractor, nor were they made parties to the suit of Allen, which was not

resisted, and went by default. The alleged lien of Allen, if valid, attached only to the proceeds of sale of property, and the sale, having been made under process from a court of the highest jurisdiction, which was not objected to by Allen and his usee, divested the contractor's lien on the property, and transferred it to the proceeds of the sale, so that the Allen judgment and execution, so far as it sought to enforce the contractor's lien, was no longer valid so as to be accepted from Young for any such purpose; the only remedy of Allen or his usee being to give notice to respondents to hold up the money until the next session of the court, and to claim payment from the amount paid into their hands by the purchaser in cash, which notice has not been given, and which session of the court has finally adjourned. Code, § 1980, defining what is necessary to make good the lien of a contractor, has not been complied with, in that the lien recorded, and the verdict and judgment thereon, do not set out or establish a lien against the corporation as a whole, but only against specific property described therein, by reason whereof the judgment establishing this lien is void against petitioner's right as a bondholder. The act of February 24, 1873 (Code, § 1979), under which Allen's lien as contractor is claimed, is unconstitutional, in that it is class legislation for the benefit of particular individuals, without the consent of those to be affected thereby. Said act is in violation of the constitution of the United States, in that it impairs the obligation of the contract set forth in the plaintiff's bonds, and secured by the trust deed. Because the receivers returned that they had accepted the Robbe *fi. fa.* assigned to Thompson and Schnelder. This should not have been done, for reasons set forth as to the Allen *fi. fa.*, except that plaintiff was a plumber, the amount is defined, and the verdict and judgment were established against the corporation as such, and after a defense set up against the same. Further, because the receivers returned that they had accepted bonds 12, 13, and 14, transferred to Young by the National Exchange Bank without recourse, accompanied by the note of the hotel company, payable to said bank for \$2,532.35, in which note these bonds purport to have been deposited as collateral security for said debt. By the transfer of this note without recourse, without the consent of the stockholders of the hotel company, to a stranger to the record, no party to the order of sale, all the lien of the bank, or its title, if any, to the collateral described therein, ceased, and the bonds were no longer a valid security which could be presented by Young. Further, because the receivers returned that they had accepted from Young bonds from 1 to 11, and 22 to 40, transferred to him by the Augusta Savings Bank without recourse, accompanied by note of the hotel company, payable to it, for \$22,860, under which note these bonds purported to

have been deposited as collateral security. These bonds should not have been received, for the reason set forth last above. Further, because the receivers returned that they had received from Young bonds 45, 46, and 47, accompanied by note of the hotel company to Baker, and indorsed by him in blank for \$2,604, but which note does not give the numbers of the bonds. These bonds should not have been accepted, for the reasons last above stated, and because there was nothing in the note to identify the bonds. Further, because the receivers returned that they had received from Young bonds 21, 41, and 43. The notes produced by the receivers as transferred by the savings bank (one for \$3,672, and one for \$3,415.18) had no pledge of securities therefor (one having no indorsement on it, and the other being indorsed by Baker and Carwile), and there was no evidence submitted as to how any right, title, or interest in these bonds passed to Young. Further, because the receivers have returned no account as to the action had by them as to the proceeds arising from the sale of the personal property,—\$28,100. Further, because by Act Aug. 26, 1872 (Code, § 1980, subd. 4), a contractor's lien is made inferior to other general liens, when actual notice of such general liens had been communicated before the work was done and materials furnished. Such actual notice is not denied, so that bondholders claiming under the trust instrument, whether a deed or mortgage, have priority over contractor's liens, as to work and labor done thereafter, and whose liens were recorded after the trust instrument. Further, because there has been no absolute transfer or delivery by Young of any of the liens transferred by him to the trustees or receivers; his transfer, annexed to the original report of the receivers, having reserved on its face all balance in these claims after the payment of his bid, so that he still retains title. Petitioner also traversed the truth of the answer of the receivers.

Afterwards Allen amended his answer as follows: After his lien was sued out and recorded, by agreement with the two banks mentioned above, he substituted his individual notes for notes of the hotel company discounted by him as set out in his original answer, and transferred, in writing, his lien to Coffin, cashier of the National Exchange Bank (instead of to Young, cashier of the Augusta Savings Bank, as stated in said answer), as trustee; and pledged the same to said banks as collateral security for the payment of his indebtedness to them, as evidenced by his said promissory notes. On August 25, 1891, Coffin, trustee, and the two banks, transferred his said lien to Young, and Young used the same as far as it would go, as cash, in paying for the hotel property bought by him at the receivers' sale. Young acted as agent for the banks in making the purchase, and has since the purchase transferred said property to them, and to others

by their direction, or is preparing to do so. The appropriation by the banks and transfer to Young of said lien satisfied in full the debts due the banks by respondents, and converted a collateral pledge for debt into an absolute taking and appropriation of said lien at the face value thereof. On August 30, 1891, defendants' said lien amounted, with interest, to \$39,959.05, and the amount of his indebtedness to the banks, with interest, to \$37,272.81, leaving the difference due and payable to him, with interest from said date, for which he prays judgment. His contract for improvement of the real estate was entered into more than a year before the execution and record of the mortgage trust deed. At the time of the execution of said mortgage he had expended in said improvement about \$55,000, and had actually performed the principal part of the work, and furnished the bulk of the material used by him in the construction of the hotel. But the legality and priority of his lien for work done and material furnished after as well as before the execution of said mortgage are not affected thereby, under the law. Each and every holder of the bonds took the same with actual notice of his right to a contractor's lien, and his intention to sue out the same upon the completion of his contract.

The other defendants amended their answer, and alleged: Coffin is and was cashier of the National Exchange Bank. It and the savings bank had loaned large sums to Allen and to the hotel company. Said bank had an interest in the property of the hotel, because of its ownership of a large amount of liens thereon; and in 1890 an execution for state and county taxes against the hotel company was in the hands of the sheriff, and the hotel company had no money to pay it, and the National Exchange Bank, to protect the property from sale under it, requested Coffin to take it up, agreeing to furnish him with the money on his note with the *fi. fa.* attached. Coffin did this, depositing his note and the *fi. fa.* therewith, though formal assignment of the *fi. fa.* was [not] made. When the other liens and claims held by it were transferred to Young, it assigned all of its interest in this *fi. fa.* to him, and he transferred and delivered the same to the receivers. If the legal title is in Coffin, the equitable title is in Young, by virtue of said facts; and they pray that Coffin, who is willing, may be allowed to enter upon the *fi. fa.* a formal assignment of it to the National Exchange Bank, and it will then formally transfer it to Young. After the transfer to Coffin was recorded on the general execution docket, no further assignment was necessary; but defendants pray that, if the same be necessary, it may be temporarily withdrawn from the receivers, to have the transfers above referred to entered on said docket, if the court will permit these transfers to be made, and, if not, that the *fi. fa.* be left in the hands of the receivers, to receive its distributive share of

the assets, to be by them paid to Coffin, who will deliver the same to Young, to whom it belongs in equity. Allen transferred to Coffin, in trust, the claim of lien and account, copy of which is attached to his suit to foreclose said lien. The written contract attached to Allen's answer was signed and executed a month before the order incorporating the hotel company, and, upon the organization of that company, it verbally agreed with Allen to do the work of building the hotel, in many respects similar to those stated in the form prepared between Tutt and Allen, but the same was afterwards radically altered in form and substance, by consent of parties. Immediately upon beginning the work the original plan contemplated was changed, a much larger and more costly building erected, and the hotel company agreed with Allen that he should build the hotel, and it would pay the actual cost to him of labor and material, with 10 per cent. thereon as his profits as contractor. This was prior to the execution of said mortgage and bonds, and with the notice of Tutt. Said written contract, if ever of force, was materially altered; but, so far as defendants know or believe, there was no written contract in force at the date of the completion of the hotel, except as aforesaid, though terms in part similar to the ones originally proposed prior to the organization of the company may have been, and probably were, of force. But said contract creates the relation of contractor, and entitles Allen to a contractor's lien, if of force at the date of completion of the building. At all times from the organization of the company, and under all changes and modifications with Allen, Tutt was president or director of the company, and as such, and individually, recognized and treated Allen as a contractor. The trustees knew he was a contractor, and as such was building the hotel, and every person connected with the company, as officer and stockholder, so treated and regarded Allen. All the bonds of the hotel were held by Tutt and the two banks, the banks also holding a large amount of other claims and liens, including the Allen *fi. fa.*, and Tutt recognized its validity and priority as a contractor's lien before and after its foreclosure; and he and other officers of the company had used every exertion to induce the stockholders, at a regular and called meeting, to devise some plan of paying the debts due. And, all efforts having failed, Tutt agreed with the two banks to bid on the property at the sale under the Allen *fi. fa.*, and, with them, to bid an amount not exceeding their joint claims; it being believed that this was the most satisfactory and expeditious method of foreclosing the lien of the bonds, which were to be placed in the sheriff's hands, to claim their pro rata after paying higher liens. Thereafter he filed his bill for injunction, pending this agreement, when, for the first time, defendants learned that he contested in any way the validity of said lien. Defendants attach a copy of the

minutes and meetings of stockholders of the hotel company, showing his action at said meetings, and the fact of his knowledge that the property was to be sold under fl. fa. He was then an active director, familiar with the facts as to the lien, foreclosure, and proposed levy, and it was distinctly agreed he would be a bidder at the sale. At his request the sale was postponed a month, that he might try to secure purchasers in connection with himself and the banks. The transfer of the collateral and notes held by defendants to Young was known and assented to by the hotel company and each officer thereof. The notes given to defendants by the hotel company expressly confer upon the banks the right to sell said collateral at private sale, and without notice; but when these notes were transferred to Young the collaterals were transferred, as part of the same transaction, the hotel company having actual notice of and assenting thereto. The notes to which the Allen fl. fa. was held a collateral also authorized a private sale of the fl. fa. without notice to Allen. The legal title to this fl. fa. was in Coffin, trustee, and both he and Allen knew of the transfer of the fl. fa. to Young. Coffin joined in the assignment to Young and signed the same, and Allen has ratified and approved it, and is claiming the benefit of it, against the receivers and these defendants. The mortgage on the personalty and the notes it was given to secure were made to Thompson, Kernaghan, Allen, and Brown, as original mortgages and payees, and not as indorsers. The National Exchange Bank held these notes, and [title] to said mortgage was in the bank; and Tutt had no interest therein as bondholder, nor as indorser, until he paid the debt due the bank, and no interest or right justifying him in foreclosing a mortgage not made to him, and not owned by him.

The receivers amended their answer to the rule against them, and attached thereto, as additional cause why they should not pay off the bonds held by Tutt, the answers of the defendants, and the several amendments thereto filed since the service of the rule, and answers thereto. The defendants, except Allen, also amended their answer, alleging: Robbe was employed by the defendant prior to December 20, 1888, to do the work for which he subsequently obtained his judgment, actually beginning work December 18, 1888. The entire amount of his work was about \$10,226.78, and the amount for which he filed his lien was \$3,794.20 principal. Said lien was filed August 24, 1889. At the date said bond mortgage was put upon the property, Robbe had completed all except a very small part of his work. Plaintiff did not purchase any bonds of the hotel company until long after said work was completed and lien recorded. The hotel company, the trustees, and plaintiff all had actual notice of his employment, his claim as a material man, plumber, etc., long before the execution of

said mortgage. Plaintiff, as president of the hotel company, and individually, indorsed some of the same, and Robbe received payment by discounting said notes to the amount of about \$6,500. Plaintiff always recognized Robbe's claim, and the only dispute that ever arose in connection with it was as to whether the balance claimed by Robbe, of about \$4,000, was correct, and the question thus raised was finally settled by the verdict of the jury and judgment of the court.

Plaintiff moved to strike the amendment of the receivers to their answer last above stated, when the defendants other than Allen filed the amendment to their answer last above stated. Plaintiff then again moved to strike the amendment of the receivers, and, subject to this motion, to have his demurrer to the answer of the receivers sustained. No decision was rendered, and the case came on again to be heard in term time, June 13, 1892, when the plaintiff renewed his motion to strike the answers of the receivers adopting the answers of the several defendants, upon the grounds: Because these answers so adopted were not sworn to. Because they set up new matter in avoidance, and explanatory, to meet objections urged by plaintiff in his demurrer against the claims accepted by them from Young; and particularly in setting out allegations in the pleadings and consents given by him, none of which were in writing, nor averred to have been acted upon. Because these answers make explanatory statements outside of the record of the court, with reference to the claims accepted from Young, to whom the Allen and Robbe fl. fas. were assigned, and the bonds of the hotel company transferred by the banks, and averred to have been transferred to Young with the consent of all the officers of the hotel company. Subject to this motion, plaintiff insisted on his demurrer to the answer of the receivers to the rule. The court overruled both the motion to strike the amendment and the demurrer to the answer as amended; and to these rulings plaintiff excepted *pendente lite*, and upon them assigns error in his final bill of exceptions. Thereupon plaintiff filed written traverse of, and tendered issues of fact as to, the answer of the receivers to the rule.

The answers of the jury to the questions submitted to them were, briefly stated: (1) Sixteen bonds of the hotel company were sold, and they were sold to Tutt. (2) In the suit foreclosing the Allen lien, Coffin, trustee for the two banks, was the usee. Baker was the president of these two banks. (3) Baker was president of the hotel company when this lien was transferred to the banks, and the foreclosure proceedings had. (4) The directors of the hotel company, other than Baker, were not served with copy of the petition and process in said suit. (5) The suit was not defended. One of the directors of the hotel company (Corwile) was present.

(6) The act of Baker, president of the banks, in acquiring and foreclosing the Allen lien, was not an improper act, nor injurious to the hotel company. (7) It was the intention of the hotel company and its stockholders, in issuing bonds, to pay off any and all claims existing for labor and material used in constructing the hotel. This was shown by actual issue of bonds. (8) An agreement was entered into between Allen and Baker, as president of the banks and the hotel company, whereby the form of the indebtedness due by Allen and by the hotel company to the banks was changed, and in lieu thereof the individual note of Allen taken by the bank, along with an assignment of the alleged contractor's lien. (9) This was for the purpose of giving the banks additional and higher security for the debts due by the hotel company to them than they had, and the intended effect of it was to give the banks' indebtedness precedence over the bonds. (10) The substitution and transfer and foreclosure proceedings instituted by Baker, president of the banks, were improper, and injurious to the hotel company, of which he was president. (11) This arrangement between Allen and Baker interfered with the rights of Tutt as a bondholder. (12) The suit to foreclose the Allen lien was brought at the instance of "bank." (13) The notes of the hotel company, given to Allen for its construction, and which he transferred to the National Exchange Bank, and which were surrendered and canceled when the arrangement as to the lien was made, were that class of indebtedness intended to be paid off and retired by the bonds. (14) The amount of these notes was \$23,515.65. (15) The manner and circumstances of acquiring and foreclosing the lien, and procuring the judgment thereon, were such as to amount to that kind of legal or constructive fraud in obtaining said judgment, which, though consistent with innocence, is contrary to the legal or equitable duty which Baker, as president of the hotel company, [owed] its stockholders and bondholders. (16) Allen had personal security from the hotel company for the indebtedness claimed by him as contractor and builder when he took out the lien, to wit, its notes or indorsements. (17) The gross total of Allen's account for the construction of the hotel, as shown by his own books, was \$71,976.52. (18) As shown by his books, he was paid on account of the erection of the hotel \$67,714.28. (19) The bonds of the hotel company were put in the possession of Baker, its president, to be sold to pay its debts. (20) In pledging its bonds to secure a debt to the two banks, Baker made an improper contract, and one injurious to the hotel company. (21) As president of the hotel company, Baker did not have the express authority to pledge the bonds to the banks to secure an indebtedness due them. (22) If the notes of the hotel company held by Allen February

11, 1890, and discounted in the two banks, were, with the knowledge and consent of the hotel company, surrendered to Baker, president thereof, and with his knowledge and consent a lien was sued by Allen, and assigned in trust for the banks, who had surrendered up the hotel notes, this action was not done with the knowledge or consent of Tutt. (23) The directors of the hotel company knew of the pledging of the bonds to the banks, and the acquiring and foreclosing of the Allen lien, and consented to go in with Baker and buy the hotel, when sold under legal process, and form a new corporation, and Tutt was one of these directors. (24) Under the contract with the hotel company, Allen was a contractor, and entitled to a contractor's lien. (25) "Was there anything fraudulent, or in bad faith, in the foreclosure of his lien? If fraudulent, was it actual, or was it constructive, fraud?" Answer. "No." (26) Allen agreed in January, 1889, to give the National Exchange Bank a transfer of his lien, to secure money to be advanced to him to be used in building the hotel. (27) "Did the board of directors of the Sand Hills Hotel Company know that Allen claimed to be a contractor, and entitled to a lien? If so, when did they ascertain this,—before or after the issue of bonds?" Answer. "(1) Yes. (2) Before the issue of bonds." (28) "Did the board of directors know that he had foreclosed his lien? If so, when did they learn of it, as a board?" Answer. "Yes. January 8, 1891." (29) Tutt learned on January 5, 1889, that Allen claimed he was entitled to a lien. (30) He made no objection to the Allen lien prior to the filing of the bill for injunction. (31) "Did the stockholders of the Sand Hills Hotel Company know that Allen claimed a lien? If so, when were they so notified?" Answer. "Yes. (2) When said lien was filed in the clerk's office." (32) "Did the stockholders know that he had foreclosed his lien? If so, when did they learn of it?" Answer. "(1) Yes. (2) January 2, 1891." (33) They never did, at a stockholders' meeting, object to Allen's lien as being invalid for any reason. (34) The board of directors of the hotel company never objected to the lien as being invalid for any reason. (35) They knew that the hotel company was borrowing from time to time from the two banks. (36) The stockholders of the hotel company knew after the money was borrowed that the hotel company had borrowed from the two banks. (37) Tutt knew that the hotel company had borrowed money, "and the National Exchange Bank," at a date unknown to the jury. (38) The board of directors never repudiated the act of the officer of the hotel company who borrowed the money. (39) The stockholders never objected to, nor repudiated, the borrowing of the money. (40) The board of directors knew that bonds had been pledged as collateral for debts due the two banks, after they were so pledged. (41) This is also true as to the

stockholders. (42) Neither the directors nor stockholders ever repudiated such pledge. (43) Tutt first knew that the bonds had been pledged as collateral May 8, 1891. (44) The directors of the hotel company, when the money was borrowed from the banks, knew that Baker was president of the banks. (45) This was known to the stockholders of the hotel company at the time they learned that money had been borrowed from the banks and bonds had been pledged therefor. (46) The directors and stockholders of the hotel company knew that Baker was president of the banks when the lien was being foreclosed. (47) They knew this before judgment was taken on the lien. (48) \$52,835.67 of work had been done by Allen before the date of the trust deed or mortgage. (49) Tutt was present at the stockholders' meetings at which notice was received of the existence of the Allen lien and pledge of the bonds to the two banks. He was a director of the hotel company during the time covered by these transactions with Allen and the banks and the hotel company and the banks. (50) The banks loaned the money to the hotel company and to Allen. (51) The National Exchange Bank advanced money to Allen upon the faith of his promise to secure the same by transferring his lien to it when he finished the building, and Baker communicated the fact to the hotel company. (52) Tutt knew January 5, 1889, that Allen had agreed to transfer his lien to the banks as collateral. (53) Baker did not act in bad faith in taking the lien from Allen to secure the debt due by Allen to the bank. (54) The principal and interest of the Allen lien, August 22, 1891, was \$39,423.30. (55) The amount of Allen's debt to the National Exchange Bank on that date, for which Coffin, trustee, held the Allen lien as collateral, was \$37,031.77. (56) And the difference between the amount of the lien and the debt on that date was \$2,391.53. (57) Allen had notice of the transfer of his lien *fi. fa.* by Coffin, trustee, and the banks, to Young, August 22, 1891, and consented thereto. (58) The two notes to Allen, of February 11, 1890, for \$23,516.55 and \$9,469.85, due the two banks, respectively, were paid off and discharged by the use made of his lien by said banks for their own purposes. (59) There is now due by the banks to Allen \$2,391.53, with interest from August 22, 1891.

The motion for new trial made by plaintiff contained the general grounds that the verdict and the answers of the jury were contrary to law, evidence, etc. Also because the court erred in refusing to submit the following questions to the jury, though requested by counsel at the proper time, to wit: "(a) Did the Sand Hills Hotel Company ever convey its property to trustees, for the purpose of issuing bonds which were to be sold to pay its debt due for the construction of the hotel company? If so, when, and to what amount; to what trustees, and when recorded? (b) Did the stockholders of the Sand

Hills Hotel Company, including C. B. Allen, actually know of the mortgage? (c) What amount of stock does Dr. Tutt own in the hotel company, and how long has he owned it? (d) Did Alfred Baker, as president of the two banks, in acquiring and directing the foreclosure of the alleged Allen lien, represent an interest that conflicted with that represented by Alfred Baker as president of the said hotel company?" And because the court erred in substituting for and instead of the foregoing question the following: "Was the act of Alfred Baker, president of the two banks, in acquiring and foreclosing the alleged Allen lien, an improper act, and such an act as was injurious to the hotel company." The error being—First, in withdrawing the question of fact, as to whether the two interests represented by Baker were conflicting; and, second, in submitting to the jury, in lieu thereof, a purely legal or moral question, to wit, was the act a "proper" one, which was a question to be determined by the court after the jury found the facts as to whether he represented conflicting interests in said transaction, and his act therein was injurious. "(e) Was it the purpose and intention of the hotel company and its stockholders, in issuing bonds, that the lien of said bonds should have precedence over all other liens, including any claim of lien for building?" The error in refusing to submit this question being that the evidence disclosed that both Allen and Baker were stockholders of the hotel company, present and consenting to the bond issue, and knew that the object and purpose of their issue was to retire the Allen lien and all primary debts, and thus advance the bonds to a lien of the first dignity, and that this amounted to a waiver of his lien by Allen, and charged Baker, who was an agent to sell the bonds, with notice that any other disposition of them by him to defeat this purpose, and gain an advantage for himself, or the banks he represented, would be illegal, and in bad faith to the hotel company and its bondholders. (f) "Were said substitution and transfer, and the foreclosure proceedings instituted by Mr. Baker, president of the banks, contrary to the duty which Alfred Baker, as president of the Sand Hills Hotel Company, was under to the hotel company and its stockholders and bondholders?" And the court further erred in substituting in lieu thereof the following: "Were said substitution and transfer, and the foreclosure proceedings instituted by Mr. Baker, president of the banks, improper, and injurious to the Sand Hills Hotel Company?" The error being—First, in eliminating the gist of plaintiff's question, which had reference to the conflicting duties of Baker, growing out of his relation as president of the three corporations interested in his act; second, in restricting the injury to the hotel company, instead of extending it to its bondholders and stockholders; and, third, in asking the jury if the act were "improper." (g) "Did this

arrangement (the substitution, transfer, and foreclosure proceedings) result in giving to Alfred Baker, the president of and stockholder in the Sand Hills Hotel Company, an advantage and greater security, as president of the banks, than that which was common to or enjoyed by the other stockholders and creditors of the Sand Hills Hotel Company?" The error being that if the jury had been permitted to pass upon this question, and had found it in the affirmative, the decree would necessarily have set aside the banks' holding of the bonds, on the ground that no one representing a corporation is permitted, by reason of that position, to obtain advantage for himself, or any other person or corporation represented by him, not common to or enjoyed by the other stockholders and creditors of the company. (h) "Did Alfred Baker, as president of the hotel company, in pledging its bonds to secure a debt to Alfred Baker, as president of the National Exchange Bank and the Augusta Savings Bank, represent conflicting interests?" The court further erred in substituting in lieu of this question the following: "Did Alfred Baker, as president of the hotel company, in pledging its bonds to secure a debt to the National Exchange Bank and the Augusta Savings Bank, make an improper contract, and was said contract injurious to the hotel company?" The error being in again refusing to present the main facts inquired of in plaintiffs' question, as to Baker representing conflicting interests, and in substituting therefor an inquiry as to the jury's opinion of the morality or legality of Baker's act. (i) "Did not Baker, president of the hotel company, use this position to play into the hands of Alfred Baker, as president of the two banks, in order to acquire for them greater security than they otherwise had, or other creditors of the hotel had?" The error being that if submitted, and the jury had answered in the affirmative, the decree would necessarily have declared the banks' holding of the bonds illegal, and also their holding of the Allen lien and the judgment collusive. (j) "What property of the Sand Hills Hotel Company came into the hands of the National Exchange Bank, and remains unaccounted for?" (k) "What property of the Sand Hills Hotel Company came into the hands of the Augusta Savings Bank, and remains unaccounted for?" (l) "If the National Exchange Bank or the Augusta Savings Bank, on February 11, 1890, held bonds of the Sand Hills Hotel Company, as collateral or otherwise, to secure existing indebtedness of the hotel company, and such banks had knowledge, through their president, who was also the president of the hotel company, that the hotel obligations then outstanding and held by the banks had been surrendered back by Allen to the hotel company, and, with the consent of the president of the hotel company, he had taken out, and assigned in trust for the banks, a lien as a contractor for the

amount of the notes then and there surrendered, upon the express agreement then had to give this debt preference, and the security of a lien, what bonds were then and there held by the banks, respectively?" Because the court erred in submitting the following question: "Was C. B. Allen, under the contract with the hotel company, a contractor, and entitled to a contractor's lien?" The error being that the contract was in writing, not ambiguous, and was for the court to construe, and was not such a contract as made Allen a contractor, and entitled to a lien as such. Error in charging the jury on question 16, in directing them to find that Allen had only the hotel company's notes and indorsement as personal security, whereas the evidence disclosed, as contended by plaintiff, that he also had five bonds of the hotel company, secured by a mortgage, and pledged as collateral security to the notes of the hotel company. The error being that the court undertook to instruct the jury as to what personal security Allen had, and ignored said bonds and individual indorsements, and limited their finding to the notes and indorsements of the hotel company, whereas, if he had not so charged, the jury would have been compelled, under the undisputed evidence, to have found that Allen had personal security, in the nature of bonds, to secure his debt, and therefore was not entitled to a contractor's lien. Because, in submitting to the jury the following question, "Were any of the directors of the hotel company present?" the court erred in directing the jury to answer, "One of the directors was present,—C. W. Carwile." The error being that this question should have been left to the jury, plaintiff insisting that none of the directors were present when the case was being made out, or attempted to be made out, but that Carwile had actually left the court room. Because the court, in submitting question 26, "Did Allen agree in January, 1889, to give the National Exchange Bank a transfer of his lien to secure money to be advanced to him to be used in building the hotel?" erred in instructing the jury: "The question is, did he agree in January, 1889, to transfer his lien to the National Exchange Bank to secure money to be advanced to him to be used in building the hotel? This question will carry you back to where the agreement was first made. If you find there was an agreement in 1889, then you will answer yes, if that is the proper date." The error being that the instruction implied that there was such an agreement, and left open only the question of the time when it was made, whereas plaintiff denied that there was such an agreement. Because the jury, in answer to questions 27, 28, 31, and 32, failed to answer when the directors and stockholders had actual notice that Allen claimed a lien, or when they had actual knowledge that said lien was foreclosed, but simply found that they had constructive notice of the existence

of said lien from the date of its filing, and of its foreclosure from the date of the judgment. Because the findings of the jury were irreconcilably conflicting on the questions submitted, thus rendering it impracticable to enter a decree or judgment upon the findings, in the following particulars: "To questions Nos. 6, 25, and 53, the jury answer that the conduct of Alfred Baker in acquiring and foreclosing the alleged Allen lien was not improper, and was not injurious to the hotel company, and that there was therein nothing fraudulent or in bad faith, and no actual and constructive fraud, whereas, in answer to questions Nos. 10 and 15, the findings are diametrically the reverse." Because the court refused to give in charge the following written requests of plaintiff: "That C. B. Allen, under the written contract in this case, is not such a contractor as entitles him to a lien by operation of law. Before any lien can be taken by any contractor, material man, or builder in this state, the debtor must be indebted to him. If you find from the evidence that the Sand Hills Hotel Company gave notes to C. B. Allen for work done in constructing the hotel, and that Allen transferred these notes to the National Exchange Bank, then I charge you that, while said notes were held by the National Exchange Bank, Allen could not take out a contractor's lien against the property. If you further find that after giving these notes, on February 1, 1890, the same were surrendered and canceled, pursuant to an arrangement made between Allen and Mr. Baker, president of the two banks, by which Allen was reinvested in the position of being a creditor of the Sand Hills Hotel Company, which he would not otherwise have been, had the arrangement not been made, and that Dr. Tutt was no party to this arrangement, but that his interest is affected thereby, then I charge you that such arrangement was fraudulent in law, against the interest of Dr. Tutt. There can be no ratification without a knowledge of all the material facts. This knowledge may be express or implied. The mere fact of the silence or nonaction of the corporation does not amount to much, in this connection, where the persons notified, although they be officers of the corporation, are really interested adversely to their interests in the corporation. If you find from the evidence that Mr. Baker, as president of the banks, made a contract with Mr. Allen on January 3, 1889, that he would advance his money, which was to be paid back or secured by a builder's lien upon the hotel property, when he would be authorized to claim the same upon completion of the hotel, which fact he did not communicate to Dr. Tutt, June 29, 1889, when he purchased the bonds, and if you further believe from the evidence that Dr. Tutt would not have purchased the bonds, had he been notified of these facts when Mr. Baker sold him the bonds, then I charge you that the failure to communicate this fact to Dr. Tutt

by Mr. Baker is fraudulent, as against Dr. Tutt. If you find from the evidence that Charles B. Allen, as a stockholder in the Sand Hills Hotel Company, agreed to the issuing of the mortgage, which should be a first lien upon the property, to secure the bonds issued thereunder for the purpose of paying the debts incurred in constructing the hotel, then I charge you he is estopped from now asserting a claim of lien against the said property superior to the mortgage. That Alfred Baker, as president of the hotel company, could not legally and lawfully act for that corporation, to accept back notes issued or bonds delivered to C. B. Allen, to enable him to better claim a lien against the hotel company, when this was done for the benefit solely of banks of which Baker was president, and who accepted, and are now claiming the benefit of, this security. The judgment against the hotel company for the use of the banks, based upon no service except upon Baker, president of all three corporations, and rendered by default, is void. If the bonds of the hotel company, other than those of the plaintiff, were in the hands of the banks at the time they surrendered back to the hotel company the notes discounted with them, to enable Allen to sue out a lien as contractor, and they accepted contemporaneously a transfer of this lien, and are now asserting its validity as of prior dignity to the bonds, that, as holders of collateral of said bonds, the banks can receive nothing thereon until the other bonds of complainant, unaffected thereby, are fully paid off. That Tutt is not bound by the recitals in the second mortgage on personalty of May 7, 1890, because his bonds had been acquired prior thereto, and he was not a party thereto. A collusive judgment is one obtained by an agreement or connivance between parties, as by playing into the hands of each other, whereby a judgment is obtained as a result of the agreement, when in the absence of such agreement it could not have been obtained."

The decree was: (1) The receivers do pay, from the proceeds of sale of realty and personalty, costs of court, advertising bills, and such other expenses incurred by them in the nature of administration as may be approved by the court or judge thereof, when presented. (2) In like manner, that they pay from said proceeds the taxes, state, county, and municipal, for 1890 and 1891, due said authorities or their transferees, and \$4,500 fees of the receivers, hereby fixed and allowed. (3) From the proceeds of the personalty alone, that they pay plaintiff's counsel \$1,405 fees hereby allowed for bringing the fund arising from the personalty into court. (4) That the Allen and Robbe *fi. fas.* are valid, and entitled to priority over the bonds. (5) That the receivers collect from Young, in cash, \$2,391.53, with interest from August 22, 1891, to be paid by them to Allen or his attorneys, in payment of Allen's interest in his

fi. fa., the same being the amount due him for the payment of the debt for which said lien was pledged. (6) That the receivers pay the Allen and Robbe fi. fas. in full. (7) That bonds held by Tutt and the two banks are of equal dignity, and entitled to be paid pro rata from the proceeds of the realty; and the receivers, after paying and allowing the liens and charges aforesaid, will distribute the balance of funds remaining in their hands pro rata among the same. (8) That the two banks produce in court the notes they hold of Allen for \$23,516.55 and \$9,469.85, respectively, and the clerk cancel the same, and Allen be discharged from further liability to the banks. (9) That the sale of realty and personality by the receivers to Young be ratified and confirmed. (10) That the receivers report to the court all payments made in pursuance of this decree, with proper vouchers for the same, and, upon so doing, receive their discharge.

The motion to vacate and set aside the decree was upon the following grounds: (1) Because, discovery having been waived, there was no sufficient finding of facts to authorize the decree. (2) Because, discovery having been waived, there was before the court for consideration only the admissions in the answers, and admissions of the receivers in their response to the rule issued against them, and the findings of the jury; and the court erred in rendering the decree, particularly in this: (a) There is no finding establishing the liability of the property to taxation for 1890 and 1891. The validity thereof is denied upon the grounds set forth in the demurrer to the receivers' return, and in the traverse thereto. Further, for the year 1891, it is assessable only against the purchaser, Young, and does not rest upon the proceeds arising from the sale. (b) The \$4,500 set aside to the receivers is not due and payable to them, in that upon the traverse of their answer, under the rule issued against them at the instance of plaintiff, they amended the same, and adopted the answers of defendants and the several amendments thereto, and by so doing adopted the defenses set up by the defendants, and did not stand neutral in the premises, as to these issues. The services rendered by them were in conducting and making the sale, and this was done after they had failed and refused, as trustees, to comply with the notice of plaintiff, prior to the filing of the petition, and prior to any levy of the Allen fi. fa. (3) Because the court refused to render a decree finding that the judgment of January 8, 1891, establishing a lien in favor of Allen, for the use of the banks, be set aside, as collusively obtained against the rights of plaintiff. (4) Because the court failed to enter a decree that the mortgages upon the property of the hotel company be foreclosed, as prayed in the petition. (5) Because the decree is contrary to the findings of the jury, and the law applicable to the same, in the following par-

ticulars: (a) The court erred in holding "that the Allen fi. fa. is a valid lien, because the fraud or collusion required to set it aside must be actual fraud." The error being—First, in holding, as a question of law, to set aside a judgment for fraud or collusion there must be actual, as distinguished from legal or constructive, fraud; and, second, in so holding when the jury had distinctly found such acts and doings of Baker, in acquiring and foreclosing the Allen lien, as, plaintiff contends, necessarily did affect his conscience, and import actual wrongdoing. (See answers Nos. 9, 10, 11, and 15.) These findings, taken in connection with the relation he bore as president of the three corporations, and the duties and trusts reposed by reason of those relations, and the fact that in said suit he was practically plaintiff and defendant, necessarily import actual and conscious wrongdoing on his part in acquiring the lien and obtaining the judgment. (b) The court erred in decreeing that "the pledging of the bonds by Baker, while not expressly authorized, was not illegal." The error being in holding that the president of the hotel company could, without express authority of that corporation, hypothecate its bonds to himself, as president of two other corporations, to secure a general debt due them, without the knowledge or consent of the hotel company at the time of the hypothecation, and in violation of the purpose, known to him, for which the bonds were issued and placed in his keeping. (c) The court erred in decreeing and holding that there had been any ratification by the hotel company or Tutt of Baker's act in pledging the bonds to the banks of which he was president; plaintiff contending that the jury having distinctly found, in answer No. 43, that Tutt first knew the bonds were pledged as collateral on May 8, 1891, this being at the last stockholders' or directors' meeting ever held, after the wreck had come, and everything had gone to pieces, and only a short while before Tutt commenced these proceedings, and the jury having found, in answers 40 and 41, that the directors and stockholders knew of said pledging, but that it was after the bonds had been so pledged, presumably at the same meeting at which Tutt for the first time knew it. The error was in so holding when said finding and the record of the case show that Tutt, within a reasonable time after learning of this unauthorized pledge of bonds, and as soon as he could take counsel, and decide upon the best course to save something from the wreck, and assert his legal rights as a bondholder, began this action. The error further being in holding and decreeing that ratification by the hotel company, if there were such, would bind Tutt, or estop him from asserting his rights as a bondholder and creditor of the company. Further in holding that "the power to sell the bonds for a specified purpose includes the power to pledge for the same purpose," es-

pecially as the jury found, in effect, that instead of being pledged for the same purpose the bonds were diverted from said purpose (which was to pay off the debts for labor and material, as shown by answer No. 7) and used and pledged to secure a subsequently acquired general indebtedness due by the hotel company to the banks. The error further being in holding that the hotel company, having got the benefit of the pledge, could not thereafter repudiate it; the facts being that the loan was made first, and the pledge subsequently, without authority, and no credit extended on the faith of the pledge. (d) Error in deciding that no actual fraud is charged by plaintiff, when it appears from the third ground of his traverse to the receivers' return that he averred that the judgment and execution of Allen "interferes with the rights of plaintiff, and was and is collusive." (e) Because the court, having held that collusion implies moral guilt, and is inconsistent with innocence, erred in holding that no actual fraud was charged by plaintiff, when it appeared that collusion in obtaining the judgment was charged in the traverse to the receivers' return. (f) Error in holding that the manner and circumstances, as disclosed by the pleadings and verdict, under which the banks acquired the Allen lien and sued it to judgment, although it was such as to give an unfair advantage over Tutt's bonds, yet such action did not constitute such collusion between them as invalidated the judgment establishing said lien, as against Tutt, a lien creditor affected thereby. (h) Because the court having, with the aid of the jury, found that the legal fraud had been imposed upon it by the rendition of the Allen judgment, proceeded to set it up as an honest transaction against the party injured thereby. (i) Because after the jury had found that the acquiring and foreclosing of the Allen lien was a legal and constructive fraud, and interfered with plaintiff's rights (Nos. 7, 9, 10, and 15), the court, by his decree, erred in allowing the banks to thus take advantage of their own wrong, and held their proceedings to be in accordance with equity and good conscience, and permitted them to set up in a court of justice, as just and equitable, a transaction robbed in the form of a judgment, which was found to be, and stigmatized by the jury as, a legal fraud. (j) Because the court held that the judgment against the hotel company, the result of the contract between it and the two banks, represented by Baker, president, and Allen, was good against strangers to the judgment, when it operated as a legal fraud as against said strangers. (k) Because the court erred in holding that the service of the petition on the president of the hotel company was good service, when the person thus served, Baker, was also the president of the plaintiff's two banks (see verdict Nos. 2, 3, 4, and 5), and when it was, under the facts and circumstances of the case, as found by the jury in

answers 10 and 15, a legal fraud; counsel for Tutt claiming in this matter that Baker did not represent the hotel company, but the banks, and that there was no service in the case, and that he (Baker), representing plaintiff and defendant, did not object, as he desired to obtain an unjust and inequitable advantage, as found by the jury (answers 9, 10, and 15). (l) Because the court held the judgment of Allen legal, when it appeared from his petition and the verdict of the jury (No. 17) that his whole claim was for \$71,977.62, which was credited in his petition by \$36,595.07, as the amount paid to him, thus making his suit for \$35,382.55, besides interest, when the jury found (verdict, No. 18), that by his own books he (Allen) has been paid \$67,714.25, leaving a balance due him of \$4,263.36, for which amount the judgment should have been sustained, if for any; counsel for Tutt insisting that there was no such claim existing against the hotel company as that sued for by Allen, the same having been novated, paid off, and discharged. (m) Because the court held that the Allen lien was superior to the mortgage, when it appeared from the pleadings and facts of the case that Allen was a stockholder in the company, was present and consented to the making of this mortgage, which recited it should be a first lien, before the taking out of his contractor's lien, and that such action was a waiver of his contractor's lien, as against this mortgage. (n) Because the court erred in holding the Allen lien a good and valid lien, superior to the bonds, when it appeared that this lien was taken out and recorded against certain property of the corporation, to wit, the real estate, and not against the corporation itself, and all its property, real and personal, as is required by the statutes in such cases made and provided. (o) Because the court allowed interest on the claim of Allen, Robbe, and others against the Sand Hills Hotel Company, when it appeared from the return of the receivers and verdict that the hotel company was insolvent, and the fund before the court not sufficient to pay its debts. (6) Because the court refused to decree, at the instance of plaintiff, that his bonds were, in equity, entitled to priority over the other bonds in this case, and refused to direct the receivers to pay to plaintiff or his counsel \$16,000 principal and coupons due upon his bonds, before paying anything on the other bonds. (7) Because the court erred in holding that Tutt ratified the pledging of the bonds of the hotel company, as the majority stockholder, when it appeared that he did not hold the majority of the stock of the Sand Hills Hotel Company. (8) Because the court held that the action of Tutt in the stockholders' meeting of May 8, 1891, in proposing a new issue of bonds, to relieve the indebtedness of the hotel company, operated as an estoppel in this case; the court thereby announcing, in effect, the position, that the act of a member of a corporation in trying to

save the property from ruin on the insolvency of the corporation, by proposing a new issue of bonds, prevented him from subsequently asserting his rights as a bondholder secured by a prior mortgage upon the assets of the corporation. (9) Because the court erred in holding that the plaintiff, when he filed his bill, alleged under oath that these bonds were owned by the banks; no such allegation having been made in the petition, and plaintiff having subsequently, on the trial of the case, in order to avoid any such construction, distinctly disavowed the same by an amendment to his petition, which amendment was allowed by the court. (10) Because the court erred in holding that, upon the insolvency of the corporation, its officers and agents could so dispose of its property, which is a trust fund for creditors, as to give them, or other corporations represented by them, preference over the existing lien creditors of the corporation. (11) Because the court refused, at plaintiff's request, to render a decree foreclosing the mortgage on realty given to secure plaintiff's bonds, and which was one of the main purposes of this suit; plaintiff, as a bondholder, being entitled to a decree of foreclosure, because his bonds were due by the terms of the bonds and the mortgage securing the same. Demand had been made on the trustees, and they had refused to act, which refusal entitled the bondholder to proceed in equity to foreclose this mortgage, and entitled him to a decree of foreclosure; also to a decree for all his expenses, including his counsel fees, the mortgage itself providing for attorneys' fees of 5 per cent. (12) Because the court erred in holding that plaintiff's counsel were not entitled to fees from the proceeds of real estate put into the hands of the receiver by them under the proceedings in this case. (13) Because the court erred in refusing to pay plaintiff's attorneys their proper and legal fees for bringing the money arising from the sale of the property under plaintiff's petition into court, and in holding that the services of plaintiff's attorneys did not inure to the benefit of all the creditors of the hotel company; the fact being, as shown by the record, that the entire fund was brought into court under plaintiff's petition, and that the contest between the several creditors was alone over the fund itself, after it had been brought into court under plaintiff's proceedings. (14) Because the court erred in holding that, as the Allen *fi. fa.* was levied when the petition for receiver was filed, plaintiff's attorneys could not be allowed fees for bringing the funds arising from the realty before the court for distribution, when it appeared from the record that plaintiff made demand on the trustees to act June, 1891 and on the next day (June, —, 1891) said levy was made, in order to sell out the property under said lien *fi. fa.* before any proceedings were instituted by plaintiff; that this levy was afterwards dismissed by the court, when the receivers were

appointed under plaintiff's petition, and the sale under the order appointing the receivers, and all parties having obtained their money in this proceeding, which has been of great benefit to all claimants in the fund. (15) Because all defendants recognized the necessity for a receiver, and consented on the record for an immediate hearing, as under a rule to show cause, returnable that day; and on such hearing the court ordered (all parties consenting) that all levies be dismissed, the priorities and validity of all liens be preserved as of that date, and that all costs, fees, and expenses be paid out of funds in hands of receivers from the proceeds of sale. (16) Because the court allowed to the receivers the sum of \$4,500, and refused to allow plaintiff his attorneys' claim to same amount, when it appeared from their report, of file, that the services rendered by the receivers, as such, was to conduct the sale; that from the date of this sale, plaintiff contends, they aligned themselves with the defendants, and, if plaintiff's attorneys are not entitled to fees by reason of subsequent issues raised, the receivers are not, especially as, when a traverse was filed to their answer under the rule issued against them, they adopted each and every answer of the defendants as a part of their answer, the attention of the court being called specifically to the language in these answers respectively so adopted by the receivers. Plaintiff concedes receivers entitled to compensation, but objects to his own action being held as a reason why the attorneys' fees should not be allowed, when receivers did likewise. Plaintiff asked that the decree be set aside, or that the court would correct and modify the same, and decree in his favor (1) that the Allen judgment be set aside as collusively obtained against him, for reasons stated; (2) that taxes for 1890 and 1891 be disallowed; (3) that plaintiff's bond be paid in full; (4) or at least that plaintiff's claims, in equity, stand equal to the claim of Allen, and be paid prior to other bonds; (5) that attorneys' fees of 5 per cent. on the whole fund that went into the receivers' hands be paid to his counsel of record, who brought the fund into court under these proceedings.

The motion for new trial made by the defendants was overruled. In addition to the exception *pendente lite* by the defendants hereinbefore noted, they also excepted *pendente lite* as follows: The cause going to trial, before and pending the introduction of evidence plaintiff, over defendants' objection, amended the original petition by inserting therein the words "claimed to be, but petitioner denies the validity of the ownership of said bank of said bonds," so that when amended the paragraph to which the addition was asked would read, "that the remainder of the issue held (the bonds issued by the hotel company, \$16,000 of which, it was alleged, had been sold to Tutt) was never actually sold by the corporation, but came

into the hands of the National Exchange Bank of Augusta, and are claimed to be held by it and the Augusta Savings Bank as security for or on account of indebtedness to said banks by said hotel company, but petitioner denies the validity of the ownership by said banks of said bonds." And further amended the petition by inserting, "Their title to the bond is, however, denied by petitioners;" and later by adding after the word "loss," in the allegation that the banks had security against loss, the words "in personal indorsement," so as to allege that the banks had ample security against loss, in personal indorsements. To this amendment, defendants objected. In the exceptions pendente lite, defendants allege that the court erred in allowing these amendments, because they introduce a new cause of action; because they were contradictory of the allegations in the petition under which the petitioner had obtained relief, in the appointment of the receiver, and in the order of sale of the property; and because the original petition recognized the validity of the holding by the banks of said bonds, and the sale had taken place, and the bonds had been received by the receivers in view of that allegation; and it was error to allow plaintiff to attack the title of the banks to the bonds thereafter.

Frank H. Miller, W. K. Miller, and Boykin Wright, for plaintiff in error. J. R. Lamar, Harper & Bro., and J. S. & W. T. Davidson, for defendants in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 108)

READ v. BARNES, Sheriff.

(Supreme Court of Georgia. Nov. 12, 1894.)

DISSOLUTION OF ATTACHMENT—EXPENSES OF OFFICER—WHO LIABLE FOR.

Where an attachment which had been levied upon live stock was afterwards dismissed because no declaration had been filed as required by law, the levying officer had no legal right to sell the animals to reimburse himself for the expense of keeping them, and it was error for the court to so order upon his application. Under section 3696 of the Code the expenses of keeping the animals were a part of the costs of the case, for which the party who prevailed in the action was not liable. The levying officer should look for his reimbursement to the attachment bond, one of the conditions of which made the plaintiff in attachment and his surety liable for the costs, in the event the former failed to recover.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

After the writ of attachment issued at the suit of one Williams against L. O. Read had been dissolved, J. J. Barnes, sheriff, moved for leave to sell the property attached to reimburse himself for expenses in keeping the property before the dissolution of the writ. This motion was granted, and defendant Read brings error. Reversed.

Frazer & Hynds, for plaintiff in error. Calhoun, King & Spalding, for defendant in error.

ATKINSON, J. The issue involved in this case being controlled by the principles declared in the case of Ward v. Barnes (decided at this term) 22 S. E. 133, no opinion or statements of facts, further than as stated in the headnotes, is necessary. Judgment reversed.

(95 Ga. 204)

ALMAND v. ALMAND et al.

(Supreme Court of Georgia. Dec. 21, 1894.)

JURISDICTION OF JUSTICE'S COURT—INTEREST AND ATTORNEY'S FEE.

1. An action having been brought in a justice's court upon a promissory note for \$90, principal debt, with interest, "and ten per cent. attorney's fees on principal and interest in case of collection by suit or through an attorney," and it appearing that, at the time of the institution of the action, the principal debt with attorney's fees amounted to more than \$100, the case was not within the jurisdiction of the justice's court, and the judgment rendered thereon in favor of the plaintiff was void.

2. The cases of Beach v. Atkinson, 13 S. E. 591, 87 Ga. 288, Searcy v. Tillman, 75 Ga. 504, and the cases cited in both of those cases upon this point, reviewed and affirmed.

(Syllabus by the Court.)

Error from superior court, Rockdale county; Richd. H. Clark, Judge.

To property levied on as that of one Born under execution in favor of Almand & George, John H. Almand interposed a claim of ownership. From a judgment holding the property subject, claimants bring error. Reversed.

The following is the official report:

Execution issuing from a magistrate's court in favor of Almand & George against Born, there being no personal property of defendant to be found, was levied on certain land as the property of Born, to which John H. Almand filed a claim. The cause was submitted on an agreed statement of facts to the judge below, who held the property subject, to which decision claimant excepted. From the agreed statement of facts the following appears: Plaintiffs held six notes, for \$90 each, made by Born June 27, 1889, and due October 1, 1889, with interest at 8 per cent. per annum after maturity, and 10 per cent. attorney's fees on principal and interest in case of collection by suit or through an attorney. They brought suits on these notes in a justice's court of Rockdale county, and obtained judgments therein in each suit on June 6, 1891, for \$90 principal, \$12.12 interest, \$10.21 attorney's fees, and \$1.05 costs, upon which judgments executions were issued, which were entered on the general execution docket. The execution in question in this case was one of these. Cannon, the magistrate who rendered the judgment, was related to Born by marriage with in the fourth degree, but the parties [to the

suits] agreed in writing that Cannon, as the magistrate of the district, should issue summons and render judgments, etc., as though not so related. Claimant claims under a deed from Born dated February 18, 1892, made upon a valuable consideration. Claimant had notice of the judgments before he bought the land, but knew nothing of the written consent last above mentioned, though he knew that Cannon and Born were related. The principal and attorney's fee at the date of bringing the suit amounted to \$100.11.

Geo. W. Gleaton, J. R. Irwin, and A. O. McCalla, for plaintiffs in error. J. N. Glenn, for defendant in error.

ATKINSON, J. The facts upon which the judgment excepted to was rendered are sufficiently stated in the official report. The controlling question—the only one necessary to determine—is whether the judgment rendered in the justice's court, and upon which the execution in this case issued, is void for want of jurisdiction in that court. The plaintiff brought his suit upon a promissory note for a stated principal debt of \$90, bearing interest, with the stipulation to pay 10 per cent. upon principal and interest in case it became necessary to collect the debt by suit. At the date of the institution of the suit, the accumulated interest upon the principal debt was \$11.10. This added to the principal debt amounted to \$101.10. Ten per cent. for attorney's fees estimated on this gross sum made the aggregate principal and attorney's fees \$100.11. By the constitution of this state, the jurisdiction of the justices' courts is limited to cases in which the principal sum does not exceed \$100. Treating the attorney's fees as a part of the principal debt, it exceeded the jurisdiction of the justice's court by 11 cents, and the judgment of the court would be void for want of jurisdiction of the subject-matter.

That the attorney's fees constitute a part of the principal debt is decided by a long and uniform current of decisions in this state, commencing with the case of *Baxter v. Bates*, reported in 69 Ga. 587, and continuing through successive volumes of our Reports to the case of *Beach v. Atkinson*, reported in 87 Ga. 288, 13 S. E. 591. Counsel for plaintiff in error, conceiving that these decisions were founded in a misapprehension upon the part of this court of the true law controlling the question therein adjudicated, asked leave to review them. This request was granted, and, upon consideration thereof, we are well satisfied with the correctness of the principle there declared. The attorney's fees are not in any sense interest, nor are they any accretion upon the principal. The stipulation for their payment is a covenant, independent of principal or interest, and the mention of them is only incidental as a means of computing and estimating a sum which the defendant un-

dertakes to pay in the event the plaintiff is forced to bring suit. The joinder of this demand with what is stated as technical principal makes the principal debt for the recovery of which this action is brought, exclusive of interest, exceed the sum of \$100; and this it is that renders the judgment void.

Aside from these considerations, there is another cogent reason why the principle of these decisions should not be disturbed. It became many years ago ingrafted upon and is now deeply imbedded in the jurisprudence of this state. The courts have uniformly administered the law with reference to it. Important property rights have grown up under it, and, to justify the court now to set aside such a uniform current of decisions, it should be satisfied by the most convincing logic that the principle is itself unsound, and as well vicious in its effect. The doctrine of stare decisis is a conservative one. Its application is essential to the permanence of a well-ordered system of jurisprudence. It gives the public confidence in the stability of the law, and even in doubtful cases it is of infinitely greater importance to public as well as private interests that the law should be definitely settled, affording a fixed rule of conduct, than that it be settled in a particular way. We do not mean to say that every decision, however erroneous, should be permitted to stand; nor ought reverence for a mere precedent control the judgment of a court of last resort. Yet, where a precedent is well reasoned and supported by a logically correct application of true legal principles, it becomes authority, and, clothed in its new dignity, it is and should be respected as law.

These considerations lead us to the conclusion that the principle declared in the decisions of this court which have been called in question is correct; that they should not be disturbed. They, therefore, stand affirmed; and the judgment of the lower court, being in conflict therewith, is set aside. Judgment reversed.

(94 Ga. 591)

SMITH v. STATE.

(Supreme Court of Georgia. June 4, 1894.)

HOMICIDE—INSTRUCTIONS—EVIDENCE.

1. In view of the whole charge as given, there was no error in any of the instructions complained of, nor in refusing to charge as requested.

2. The evidence warranted the jury in rejecting the theory of accidental drowning, and in finding that the accused drowned his wife in the manner charged in the indictment, and the court did not err in denying a new trial.

Simmons, J., dissenting.
(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Will Smith, having been convicted of murder, brings error. Affirmed.

The following is the official report:

Will Smith was indicted for the murder of his wife by shoving her into a pool of water and drowning her. He was found guilty, and recommended to imprisonment for life. His motion for new trial was overruled, and he excepted.

The motion contained the grounds that the verdict was contrary to law, evidence, etc.

Error in charging: "It is admitted that Laura Smith is dead, and that she died from being drowned." Defendant says this is error, because it might create in the minds of the jury the impression that the court considered that the death of the deceased resulted by reason of the wrongful act of another, and that the defense admitted this fact; and because it is not sufficiently guarded as to whether the admission was as to the fact of drowning by accident or the fact of having been drowned by violence. In a note to this ground the courts states that counsel for defense, in arguing the case, admitted and argued before the jury that the death of deceased was caused from drowning, but insisted that defendant had no connection with it.

Error in charging: "And that, after throwing her in, he did not rescue her, when he could have done so, when it was in his power to do so, you would be authorized to find the defendant guilty as charged in the indictment." Defendant says this is error, because there was no evidence, other than that the defendant could swim, that he could have rescued the deceased, or that it was in his power to do so; and it was an error for the court to suppose such a case as was not authorized by the evidence; and further, because, even if such a supposition was authorized by the evidence, the offense of simply standing by was certainly not murder, if any offense at all was made out; and further, because the use of the words, "when it was in his power to do so," might have been construed by the jury into an expression of opinion as to defendant's power to have rescued the deceased.

Error in charging: "That means that if, upon investigation of the case, because of the evidence in the case, or because of the want of evidence in the case, because of the insufficiency of the testimony in the case, or the character of the evidence that has been offered to establish the guilt of the accused, the minds of the jury cannot reasonably and certainly come to the moral and reasonable conclusion that the defendant is guilty, why, then the law gives to the accused, and calls it a reasonable doubt, and requires the jury to acquit him." Defendant says this is error, because the court restricts the reasonable doubt to the doubt that arises out of the evidence, the want of evidence, the insufficiency of the testimony, or the character of the evidence that has been offered to establish the guilt of the accused; thereby excluding from the jury the prisoner's state-

ment, and any conflict of the testimony. And defendant says this is more especially error because the court charges elsewhere in the same charge that the prisoner's statement is not, strictly speaking, evidence thereby entirely withdrawing it from the minds of the jury on the subject of reasonable doubt; and further, because the court was specially requested by the defense to mention the prisoner's statement under the head of reasonable doubt, which request was in writing, and is set out hereinafter.

Error in charging: "The rule with reference to circumstantial evidence is to prove such facts and circumstances connected with or surrounding the commission of the crime charged are true, to show the guilt or innocence of the party charged; and, if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty." Defendant says this is error, because said charge is calculated to confuse the minds of the jury, and to cause them to believe that even in cases depending on circumstantial evidence the minds of the jury must only be convinced beyond a reasonable doubt, whereas he should have allowed the charge on circumstantial evidence, as contained in other parts of the charge, to go to the jury without the addition of this part; and further, because said portion of the charge withholds the principle that said circumstantial evidence must not only exclude every other reasonable hypothesis than that of the guilt of the accused, but must also be irreconcilable with any other reasonable hypothesis.

Error in charging: "The facts constituting the crime may be proved by circumstances, and then, whatever the character of proof, the true question is whether they be dependent upon positive or circumstantial evidence; not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient proof to satisfy the minds and consciences of the jury beyond a reasonable doubt." Defendant says this is error, because it places the required amount of proof upon which a verdict of guilty can be based, in cases depending entirely upon circumstantial evidence, on the same basis with cases depending on positive testimony.

Error in charging: "And while it is true, in cases depending solely upon circumstantial evidence, that the circumstances should, to a moral certainty, actually exclude every other reasonable hypothesis but the guilt of the accused,—that is, beyond all reasonable doubt,—yet if the facts proven coincide with, and are legally sufficient to establish the truth of, the hypothesis claimed, namely, the guilt of the accused, and are inconsistent with every other reasonable hypothesis, then the jury would be authorized to convict, though upon circumstantial evidence." De-

fendant says this is error, because it is calculated to confuse the minds of the jury, and to distract them from the plain rule that the circumstances must exclude every other reasonable hypothesis than the guilt of the accused. "Where verbal admission of a person charged with crime are offered in evidence, the whole of the admission must be taken together; that part which argues for the accused as well as that against him; and if the part of the statement which is in favor of the defendant is not disproved, and is not apparently improbable or untrue, why, consider it with all the other evidence in the case, and then such part of the statement is entitled to as much consideration from the jury as any other part of the statement. But you are instructed, where any evidence is given whatever to show admissions made by the defendant, the defendant is entitled to have the whole statement heard. But you are not obliged to believe or disbelieve all of such statements. You may regard such parts, if any, as are consistent with the other testimony, or which the jury may believe, from the facts and circumstances proven on the trial, are true." Defendant says this is error, because there was no evidence introduced as to any admission made by the prisoner, and such a charge was apt to raise in the minds of the jury the impression that the court considered that something that had been said by the prisoner amounted to an admission; and further, because it did not give the converse of the proposition, namely, that if they believed parts of the admission, if any, inconsistent with the other testimony, they might disregard the testimony with which it conflicts.

Error in charging: "The law declares, in all criminal cases in this state defendant shall make to the court and jury just such statement in his defense as he thinks proper to make. Such statement is not to be under oath, and is to have just such force and effect only as the jury think proper to give it; but the jury may believe it in preference to the sworn testimony, if they think proper to believe it, provided the defendant shall not be subject to cross-examination, except by his own consent." Defendant says this is error, because the use of the word "shall" instead of the words "shall have the right to" is calculated to raise the impression in the minds of the jury that the defendant is required to make a statement, and the statement as made is deprived of that force which it would otherwise have as a voluntary statement by the accused; and further, because the use of the words "just such effect only" tend to restrict the force that it might have with the jury, and to convey the impression that it should be received with great care and caution. And defendant says it does not give the law on the subject as found in section 4637 of the Code. In a note to this

ground the court states that the court charged on the subject of prisoner's statement, section 4637 of the Code, by reading the same to the jury.

Error in charging: "In a case of homicide, motive may be important, and the absence of any motive is a fact and circumstance that the jury may consider in determining the guilt or innocence of the accused. It is a circumstance that you may consider; and if you believe in the case that any motive has been shown, you may consider that fact and circumstance in determining the guilt or innocence of the accused." Defendant says this is error, because there is absolutely no evidence of any motive whatever, and absolutely no reference to a motive anywhere in the record, except in said portion of the charge. The state made no reference to a motive in its argument, and the defense claimed the absence of motive as one of the leading points in its case. Defendant says said portion of the charge is error further, because it leaves the jury to convict in either case, and no distinction is drawn between the effect of motive and the effect of absence of motive.

Error in refusing to charge the following written requests of defendant: "Prisoner's statement,—Code, § 4637. You have the right to believe the statement of the prisoner in preference to any and all of the sworn evidence of the witnesses; and, if you believe it, it is for you to say whether the death was the result of an accident." "You have the right to consider the prisoner's statement in deciding whether or not the theory advanced by the defense is correct." "Your doubt may arise from the evidence and from the prisoner's statement, taken in connection." "It is incumbent on the state to prove that the death resulted exactly as they alleged, by drowning, and that by the action of the prisoner." "It is not sufficient for you to believe that defendant allowed her to drown. He may have stood by, and seen her drown; but that will not be sufficient for you to base a conviction on. You must believe that it resulted by the act of the defendant; that he shoved her."

J. L. Anderson, M. G. Ogden, and Geo. S. Jones, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., and J. M. Terrell, Atty. Gen., for defendant in error.

PER CURIAM. Judgment affirmed.

SIMMONS, J. (dissenting). The evidence tends only to raise a suspicion of guilt. It is altogether circumstantial, and does not exclude every other reasonable hypothesis than the guilt of the accused. It does not show his guilt beyond a reasonable doubt. The law does not sanction a conviction on suspicion, however strong it may be.

(94 Ga. 61)

HALE-BERRY CO. v. DIAMOND STATE IRON CO. et al.

(Supreme Court of Georgia. March 26, 1894.)

INSOLVENT CORPORATION — RECEIVER — APPOINTMENT AFTER CORPORATION CHASES BUSINESS — PETITION—ASSETS—CHOSES IN ACTION PLEDGED TO CREDITORS.

1. An insolvent corporation, not municipal, is subject to be proceeded against under section 3149a et seq. of the Code, and a receiver may be appointed to administer its assets, although it may have ceased to do business before the creditor's petition against it was filed.

2. The petition need not describe the assets of the corporation, the object being to have a receiver as to all its assets. In such case, however, the receiver, in making a seizure of anything not expressly mentioned, will act at his peril as against the rights of other persons.

3. It is not matter of error, as against an insolvent corporation, to treat as assets still belonging to it, its accounts, or books of account, which it has assigned to one or more of its creditors as collateral security, without having complied with the statutory requirements touching voluntary assignments by insolvent debtors, with respect to a sworn inventory of all assets, and a sworn schedule of all indebtedness. While, by section 1953 of the Code, a debtor, though insolvent, may give a lien by mortgage, or other legal means, or may transfer negotiable papers as collateral security, his insolvency precludes him from voluntarily assigning, as mere security for a pre-existing debt, anything which requires an assignment to pass the title, such as nonnegotiable choses in action.¹

4. The evidence showing that under its charter the capital stock of the defendant corporation was to be \$10,000, with the privilege of increasing the same to \$50,000, which privilege was never exercised except to the extent of increasing the capital stock to \$15,000, which amount was subscribed for and fully paid in, and the evidence further showing that long before the filing of the petition the corporation had parted absolutely with all of its property, other than choses in action, the whole proceeds going to the payment of its debts, and no fraud being alleged or shown, there was no case for the appointment of a receiver to sue for any unpaid stock subscriptions, or take possession of the property with which the corporation had so parted; and as some of the choses in action consisted of notes, and these were transferred as collateral security to certain creditors whose claims far exceeded the amount likely ever to be realized by collection, and the fair presumption being that the notes were negotiable, there was apparently no case for a receiver as to them.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by the Diamond State Iron Company and others against the Hale-Berry Company, for the appointment of a receiver. Decree for plaintiffs. Defendant brings error. Reversed in part, and affirmed in part.

McHenry, Nunnally & Neel, for plaintiff in error. Reece & Denny and C. A. Thornwell, for defendants in error.

LUMPKIN, J. 1. The decision of this court in *National Bank of Augusta v. Richmond Factory* (decided at the last term) 91 Ga.

284, 18 S. E. 160, supports the ruling announced in the first headnote.

2. The object of the petition filed against the Hale-Berry Company being to have a receiver appointed to take charge of all the assets of this corporation, there was no indispensable necessity for alleging of what the assets consisted, or for describing them in detail. The equity of the petition was complete without such description. It would have been better, however, to state distinctly what the assets were, and where they were located, as this would have enabled the receiver more readily and intelligently to understand and carry out his duty in the premises. He was undoubtedly authorized by the order to take possession of all the assets of the defendant corporation, but, as all of them were not definitely described or pointed out, he would necessarily act at his peril, so far as the rights of other persons might be concerned, in making a seizure of anything not expressly mentioned. Of course, a receiver would be protected in taking possession of any particular property, when authorized and directed to do so by the plain terms of the judge's order; but when an order, in mere general terms, directs him to take charge of "goods," "property," or "other assets," belonging to an insolvent corporation, with no further description, he must be careful to seize only what actually belongs to this corporation, and if he seizes what belongs to other people, it will be at his own risk. If this is not good law, a receiver armed with an order of the kind mentioned could, with impunity, take possession of any property he pleased, provided, only, he in good faith believed it belonged to the defendant. Although this is a day of receivers, and their dominion seems to be rapidly extending all over the land, the courts, as yet, are hardly prepared to sanction their being let loose upon the general public, free from all restraint or responsibility.

3. It appears that the Hale-Berry Company, in order to secure its indebtedness to the First National Bank of Rome, executed and delivered to the bank a mortgage upon its entire stock of goods and fixtures, and also, as collateral security for this indebtedness, transferred to the bank its notes and accounts and books of account. It also transferred and assigned to other creditors, as collateral security for debts due them, all the notes and accounts in the hands of the bank,—“that is, all the notes and accounts remaining after the debts of the bank were paid.” At the time these assignments were made, the Hale-Berry Company was undoubtedly insolvent. Our judgment in this case was rendered March 26, 1894, and it was then decided that the transfers of these accounts and books of account were, in effect, voluntary assignments of an insolvent debtor for the benefit of creditors, and that the same were, under the act of October 17, 1885 (Acts 1884-85, p. 100), void, because

¹ The doctrine of this note is overruled. See opinion in *Boykin v. Eppstein*, on page 218, 22 S. E.

made without the sworn inventory and schedule required by that act. On the 10th of May thereafter, while the opinion in this case was being prepared, the case of *Boykin v. Eppstein*, *infra*, from the Eastern circuit, came on to be argued, and permission was then granted to review the ruling in the present case as announced in the third headnote. For this reason, it was determined to delay filing an opinion in this case until after the case of *Boykin v. Eppstein* had been decided. The decision in it was rendered on October 25th. After a full and careful deliberation upon the question thus presented for reconsideration, it was adjudged that the previous case should be overruled in so far as it holds that accounts or books of accounts are not assignable as collateral security for a debt owing by an insolvent debtor to the assignee, without complying with the statutory requirements as to sworn inventory and schedule. We will not, at present, discuss further the question involved, but will undertake to deal with it in the opinion which will be written in the case of *Boykin v. Eppstein*.

4. The evidence shows that, under its charter, the capital stock of the Hale-Berry Company was to be \$10,000, with the privilege of increasing the same to \$50,000, but that this privilege was never exercised, except to the extent of increasing the capital stock to \$15,000, which latter amount was subscribed for and fully paid in. It is true that Hale, one of the stockholders, borrowed from the bank the money with which to pay for his stock, and that Berry, another stockholder, indorsed this note; paid it off, took Hale's stock as collateral security, and continued to hold the same, and that Hale has never paid Berry for the advance; but it also appears that the entire amount of cash due upon the stock subscription of Hale and the other stockholders was received by the company and went into its business, and that none of the indebtedness of the corporation is for money borrowed by its stockholders, or any of them, with which to pay their stock subscriptions. We are therefore quite clear that no case was made for the appointment of a receiver to sue for and collect any unpaid stock subscriptions. The evidence further shows that, after giving to the bank the mortgage mentioned in the preceding division of this opinion, the property covered by this mortgage was (with the consent of the bank, and also with the consent of other creditors holding a second mortgage on the same) fairly sold for its full value at private sale, and all the proceeds applied to the payment of the debt due the bank. This, therefore, amounted in substance to an absolute sale by the corporation of a portion of its property in payment of its indebtedness. There is no law to prevent a transaction of this kind, and as no fraud was either alleged or shown in this connection, there was no occasion for appointing a receiver to take

possession of the property covered by the mortgages mentioned, and disposed of as above stated. As already seen, some of the choses in action transferred primarily to the bank, and secondarily to the other creditors, consisted of notes. The claims of the creditors to whom these notes were transferred as collateral security far exceed any amount likely to be collected upon the notes. In the absence of evidence to the contrary, the fair presumption is that these notes were negotiable; and if so, the insolvent corporation undoubtedly had a legal right, under the above cited section of the Code, to transfer them as collateral security. Apparently, therefore, there was, so far as the record before us shows, no occasion for a receiver as to them. In view of the foregoing, we adjudged that the judgment of the court below should be reversed in so far as it directed the receiver to take possession of any of the assets referred to in the order of appointment, except the accounts, books of account, and other books of the defendant corporation. With this disposition of the case, save as to the exception mentioned, we are still satisfied, but with the light now before us, we think the judgment below should have been reversed generally. Judgment reversed in part, and in part affirmed.

(94 Ga. 750)

BOYKIN et al. v. EPPSTEIN et al.

(Supreme Court of Georgia. Oct. 25, 1894.)

FRAUDULENT CONVEYANCES — SECURING SINGLE CREDITOR—TRIAL—OPENING AND CLOSING.

1. The scheme of the Code of 1863 (sections 1854, 1855), with reference to transfers and assignments by insolvent debtors, was that in case the debtor parted with title, except as to negotiable papers transferred as collateral security, the effect of the transfer or assignment had to be either the actual extinguishment of a debt or debts, in whole or in part, or the creation of a fund for the equal benefit of all his creditors. But by the act of February 24, 1866, this scheme was changed so as to allow transfers and assignments of any property whatsoever, including choses in action, for the benefit of a single creditor, or of a number of creditors, to the exclusion of others. Hence, under this act, an insolvent debtor (though he could not have done so under the original Code) may assign to a creditor, for that creditor's exclusive benefit, accounts or choses in action not embraced in the descriptive words "negotiable papers," as collateral security for the debt; and as such assignment creates no trust, there being no person other than the assignee taking any benefit under it, the assignment acts of 1881 and 1885 do not apply to it. (a) The case of *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61, 22 S. E. 217, was correctly decided with reference to the Code of 1863, but it is not a correct exposition of the law of the Code as modified by the act of 1866, above cited, and is therefore overruled, in so far as it holds accounts or books of account not assignable as collateral security for a debt owing by an insolvent assignor to the assignee without complying with the statutory requirements as to sworn inventory and schedule.

2. Two suits against the same debtor, the first brought by certain preferred creditors, and the second by other creditors, having been consolidated for trial, the opening and conclusion,

whether treated as matter of right or of discretion, could be awarded by the court to the plaintiffs in the first suit, notwithstanding they were codefendants with the debtor in the second.

3. Touching other matters complained of as error, no cause for a new trial appears, the case, according to its substantial merits, having had a right result, both as to the range of questions submitted by the court to the jury for determination, and the findings thereon.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Boykin, Seddon & Co., and others against Eppstein & Wannbacher and others. From the judgment rendered, plaintiffs bring error. Affirmed.

The following is the official report:

Boykin, Seddon & Co. and numerous others, on behalf of themselves and all other creditors of Eppstein & Wannbacher who might choose to come in and join with them, filed their petition against Eppstein & Wannbacher and the members of that firm, and against S. Herman, Fanny Joseph, Sophie Lehman, I. G. Haas, S. Mann, M. Boley & Son, I. Eppstein & Bro., H. M. Selig, A. Ehrlich & Bro., the Savannah Grocery Company, Moore & Johnson, Mirian L. Lillenthal, Herman & Kayton, L. Steyerma & Bro., Rheinstrom Bros., Bendheim Bros. & Co., Cook & Bernheimer, and Levy & Bro. It appeared from the petition that the court had previously appointed a receiver, and taken charge through him of the assets of Eppstein & Wannbacher, as far as the receiver was able to do so, under a prior creditors' petition, filed in said court against Eppstein & Wannbacher by Samuel Herman, Fanny Joseph, Sophie Lehman, and Herman & Kayton, all of whom, except the latter, claimed to be secured by mortgages, the mortgages of the first two being of equal dignity and that of Sophie Lehman being a second mortgage. Eppstein & Wannbacher having answered the petition of Samuel Herman and others, and in their answer having set out the names of various parties to whom Eppstein & Wannbacher had assigned open accounts as collateral security, the petitioners Herman et al. amended their petition and added said persons as additional parties defendant, to wit, Boley & Son, Eppstein & Bro., Haas, Selig, Rheinstrom Bros., Cook & Bernheimer, Bendheim Bros. & Co. and Moore & Johnson. Various parties, claiming to be unsecured creditors of Eppstein & Wannbacher, were made parties plaintiff in the case of Herman et al., but were afterwards stricken as parties plaintiff in that case without affecting their status in the Boykin, Seddon & Co. et al. case. Various other persons were made parties plaintiff in the Herman et al. case, and afterwards stricken in that case upon their motion, and made parties plaintiff in the Boykin, Seddon & Co. et al. case. Cook & Bernheimer, claiming to be creditors of Eppstein & Wannbacher, were, by consent and order of the court, stricken as defendants from the Boykin, Seddon & Co. et al. case, and granted leave to intervene as plaintiffs,

and many others parties plaintiff were made in the Boykin, Seddon & Co. et al. case, etc. Both of said petitions were called for trial at the same time and were tried together before the same jury, under an order passed at the preceding term, upon motion made to consolidate them by Eppstein & Wannbacher, Samuel Herman, Fanny Joseph et al. A verdict was rendered by the jury, it being a special verdict in answer to questions propounded. Boykin, Seddon & Co. et al. moved for a new trial, which motion was overruled, and to this ruling they excepted.

The following are the answers of the jury to questions suggested by S. Herman et al.: Eppstein & Wannbacher are indebted to Samuel Herman in the amount of the demand note of August 25, 1890, for \$24,247.34, as set out in his petition and foreclosure proceedings. He has paid the accommodation notes, aggregating \$13,500, set forth in the mortgage foreclosed by him, and they owe him for the amount of these notes. The mortgage from them to him of August 25, 1890, is valid. Eppstein & Wannbacher are indebted to Mrs. Fanny Joseph \$5,500 principal, besides interest, on the two notes as set forth in her foreclosure proceedings and petition; and the mortgage from them to her of August 25, 1890, is a valid mortgage. Eppstein & Wannbacher are indebted to Mrs. Sophie Lehman in the amount of a note of \$5,000, as set forth in the petition of S. Herman et al., less the net collection under the assignment of accounts to her, and the assignment of accounts to her as security is a valid transfer. I. Eppstein & Bro. have paid as accommodation indorsers the notes set forth in their answer, aggregating \$9,000, and Eppstein & Wannbacher owe them for these notes, less the net collection under the assignment of accounts to them, which assignment of accounts to them as security is a valid transfer. Eppstein & Wannbacher are indebted to Herman & Kayton \$242.25 on open account, as set forth in the petition of S. Herman et al. Neither S. Herman, Mrs. Fanny Joseph, Mrs. Sophie Lehman, nor I. Eppstein & Bro. are guilty of the charges of fraud alleged against them, respectively, in the petition of Boykin, Seddon & Co. et al. The receiver has sold the property covered by the mortgages of S. Herman and Mrs. Fanny Joseph since the pendency of these proceedings, and the fund in court represented the proceeds of said sales, as shown in the receiver's report. The foreclosure proceedings of S. Herman and Mrs. Joseph, and the petition for injunction and receiver filed by them and Mrs. Lehman and Herman & Kayton were instituted in good faith, for the enforcement of their debts and securities.

The following were the answers by the jury to questions suggested by counsel for H. M. Selig et al.: H. M. Selig has paid as accommodation indorser the notes made by Eppstein & Wannbacher, set forth in the assignment of accounts made on August 25, 1890,

and in his answer, aggregating \$8,500, and they are indebted to him for the amounts paid upon said notes, less the net collections under the assignments of accounts to them; and said assignment of accounts to H. M. Selig as security is a valid transfer. The same is true as to H. M. Boley & Son, the amount in their case being \$13,500, and Boley & Son received as further security the money and notes on the 25th of August, 1890, shown in their answer. I. G. Haas has paid as accommodation indorser the notes set forth in the assignment of accounts made to him by Eppstein & Wannbacher on the 25th of August, 1890, and referred to in this answer. They owe him for the amounts paid on these notes and for the debts for goods sold and money loaned by him, as set out in said assignment of accounts and his answer, said debts and accommodation indorsements aggregating \$7,089.04, less the net collections under the assignment of accounts to them. Said assignment of accounts to Haas as security is a valid transfer. Haas bought from Eppstein & Wannbacher, August 25, 1890, goods to the amount of \$1,120.46, in payment of an account due him of \$343.21, and disbursed the balance of said sum, at the request of Eppstein & Wannbacher, to the creditors of Eppstein & Wannbacher, as set forth in his answer. He loaned Eppstein & Wannbacher \$2,700 August 23, 1890, and they repaid him this sum August 25, 1890. The Savannah Grocery Company bought in good faith from Eppstein & Wannbacher, on August 25, 1890, to the extent of \$3,352.40, as set forth in its answer, and said goods were delivered to and paid for by the grocery company on that day, and the sale was a valid sale. A. Ehrlich & Bro. bought in good faith from Eppstein & Wannbacher, August 25, 1890, coffee to the extent of \$525.13, and other goods to the extent of \$3,524, and these were valid sales. They paid on the same day to Eppstein & Wannbacher \$3,524, as set forth in their answer. They received the coffee, as alleged in their answer, and further received goods to the extent of \$954, as set forth in their answer, and have not received the remainder of said goods so purchased, to wit, to the extent of \$2,051.21. Ehrlich & Bro. brought suit to the November term, 1890, city court of Savannah against the Ocean Steamship Company, to recover said goods not received by them to the extent of \$2,051.24. They obtained a verdict against defendant in said cause June 30, 1891, and the cause was carried to the supreme court, and a new trial granted by that court, 14 S. E. 707. Neither H. M. Selig, I. G. Haas, the Savannah Grocery Company, Boley & Son, nor Ehrlich & Bro. are guilty of the charges of fraud alleged against them, respectively, in the petition of Boykin, Seddon & Co. et al.

The jury found, in answer to the other questions submitted to them, in favor of the petitioners Boykin, Seddon & Co. et al., and interveners therein, against Eppstein &

Wannbacher, for the respective amounts claimed by them, and found said amounts correct, except a few irregularities noted in the original bill. They found in favor of the petitioners and interveners in the suit of Boykin, Seddon & Co. et al. against only Eppstein & Wannbacher and the persons composing that firm, S. J. Eppstein and G. Wannbacher. They further found that Eppstein and Wannbacher had, respectively, withdrawn from their assets, failed to account for, and wrongfully and fraudulently withheld, \$11,124.38 and \$12,603.37, reduced by the following sums, accounted for by Wannbacher: Paid Mrs. Joseph \$2,000, S. Herman \$1,500, and M. Boley & Son \$3,052,—and further stated in their verdict that they could not verify these figures, but, as near as could be ascertained from the books, considered them correct.

The motion for new trial contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court in carving up the questions or issues made by the pleadings into questions of fact, refused to, and did not, submit to the jury all the issues and facts involved in the case. Further, because the court did not carve up the case in and by the questions submitted to the jury into all the issues involved therein. Also, because the verdict is not definite enough, nor sufficiently certain, to authorize a decree thereon by the court. Because the court, though duly requested thereto by Boykin, Seddon & Co. et al., refused to submit to the jury, as questions to answer, the following material issues involved in the bill or petition of Boykin, Seddon & Co. et al., and would not submit to them any of said questions:

(1) Do you or do you not find the goods mentioned in said suit and interventions of Boykin, Seddon & Co. et al. were obtained by Eppstein & Wannbacher from said petitioners and interveners by the frauds and deceitful means and practices of said Eppstein & Wannbacher related in said suit?

(2) Do you or not find that the purchases of said goods by Eppstein & Wannbacher were made with fraudulent intent at the time not to pay for them, and when they were insolvent, and by concealing their insolvency?

(3) Did Eppstein & Wannbacher, as related in said suit by Boykin, Seddon & Co. et al., procure said goods and merchandise from said petitioners and interveners, with the secret intention not to pay for the same, and with the intention, which they carried out as related in said suit, of deceiving and misleading said petitioners and interveners into a belief that they were solvent and intended to pay for said goods and merchandise, and did they thereby obtain the said goods and merchandise while they were insolvent?

(4) Did Eppstein & Wannbacher make and execute, as related in said suit, on August 25, 1890, the demand note and mortgages

and transfers and assignments and sales therein mentioned, covering the whole of their property, including their stock in trade, negotiable paper, and choses in action, or if not the whole, at least all of the valuable assets of said firm?

(5) Did said Eppstein & Wannbacher make the sales of merchandise mentioned in said suit to Levy & Bro. and L. Steyerma & Bro. (being sales made before August 25, 1890), and other sales during said month, as alleged in said suit, amounting to the sum of \$53,560.33, or other such sum of money, for the purpose of creating accounts to be transferred for the benefit of themselves and of the preferred creditors?

(6) Were said August sales large and unusual sales, and were their purchases of goods on credit during said month of August large and unusual purchases, and more than the demands of their legitimate business required, as alleged in said suit?

(7) Were said purchases and sales made by them with a view of making away with the same for their own benefit, and in fraud of their creditors for merchandise obtained by them, including said petitioners and interveners, and for the purposes of concealing the same in the hands of friends, and of conveying the same, or the proceeds of same, to the preferred mortgagees and transferees of accounts, as alleged in said suit?

(8) Is it true, as alleged in said suit, that as far back as the spring time, or other early period of time, of the year 1890, the said Eppstein & Wannbacher contemplated a failure in business, and made promises to certain preferred creditors to protect them?

(9) If not, at what time previous to the 25th of August, 1890, did Eppstein & Wannbacher prepare for a failure in business, if you find that the failure was not an unexpected one, as alleged by Eppstein & Wannbacher in their answers?

(10) Did they write the letters annexed as an exhibit to said suit, marked Exhibit B?

(11) Is it true, as alleged in said suit, that Eppstein & Wannbacher made the sales of goods, and got cash or negotiable paper therefor from the various parties mentioned in said suit, at less than the market price, and out of the usual course of business, during the month of August, 1890, and up to and on August 25, 1890, and paid large fees to their attorneys at law, in furtherance of a scheme to defraud and cheat their unsecured creditors, and to break fullhanded, including also, as alleged in said suit, the withdrawal during the month of August, 1890, by said Eppstein & Wannbacher of \$19,090.98 from the assets of said firm for their own personal use and benefit, or other large sums, to be mentioned by the jury in answer to this question?

(12) Is it true, as alleged in said suit, that on said August 25, 1890, the said Eppstein & Wannbacher conveyed or turned over money or property upon a secret trust? If

so, state the amount and the nature of the trust.

(13) The same question is propounded as to S. Mann.

(14) Is it true, as alleged in said suit, that Eppstein & Wannbacher continued to buy up to August 25, 1890, or had bought large and unusual quantities of goods, in pursuance of the fraudulent design alleged in said suit, and that \$10,000, or other such large sum, of said goods were stopped in transit by the vendors of the same?

(15) Is it true, as alleged in said suit, that the said Eppstein & Wannbacher, in pursuance of the fraudulent scheme as aforesaid, and with a view of disposing of their entire assets and property, made the said mortgages and transfers of accounts and papers and choses in action and sales, or any pretended sales, whereby they disposed and put into the hands of third parties their entire property on or before August 25, 1890, and having yet undisposed of large quantities of goods, ordered but not yet received, which were in transit from the vendors and which were subject to the vendors' right of stoppage in transitu, they sought also to dispose of these goods by a general order given to A. Ehrlich & Bro., to have said goods delivered to said A. Ehrlich & Bro., thereby to defeat said right of stoppage in transit? And is Exhibit C. attached to said suit, a correct copy of said general order?

(16) Is it true that it was the purpose or intention, design, and object of Eppstein & Wannbacher, in making and executing the various mortgages and assignments of accounts and transfers, and doing the various acts mentioned in said suit, to defraud their unsecured creditors, including said petitioners and interveners, and to delay them in the pursuit of their legal remedies, either or both, if the jury find that they did said acts and executed said documents?

(17) Was the purpose or intention of Eppstein & Wannbacher, in making and executing said mortgages, demand notes, and transfers or assignments of accounts, merely to prefer said preferred creditors, or with the additional object and intention to defraud or delay their unsecured creditors, including petitioners and interveners in said suit of Boykin, Seddon & Co. et al.?

(18) Did said Eppstein & Wannbacher make and execute said mortgages, demand notes, and assignments or transfers of accounts, bona fide, and with no purpose except to secure said preferred creditors, or did they do so with a fraudulent intent, in fraud of the rights of their unsecured creditors, including said petitioners and interveners, with the intent to defraud and delay them, and consummate a fraud upon them?

(19) Did said preferred creditors have knowledge of, or reasonable grounds to suspect, that Eppstein & Wannbacher, in giving them the securities mentioned in the pre-

ceding question, had the fraudulent intention or purpose mentioned in the preceding question?

(20) Did the preferred creditors obtain their said securities in good faith, as bona fide holders of the same, without notice or grounds of reasonable suspicion that Eppstein & Wannbacher intended to delay or defraud their unsecured creditors, or creditors generally?

(21) If any of said preferred creditors were bona fide takers of said securities, without notice or reasonable grounds of suspicion of an intention in Eppstein & Wannbacher to delay or defraud creditors, name such innocent preferred parties.

(22) Did any of said preferred creditors have knowledge before getting their securities that the unsecured creditors, or any of them, intended to institute legal proceedings against Eppstein & Wannbacher for the recovery of their goods or debts? If so, name them.

(23) Were any of the defendants in said suit who are alleged to have purchased goods from Eppstein & Wannbacher on the day, or about the time, of August 25, 1890, innocent purchasers, without knowledge, notice, or reasonable grounds of suspicion of an intention on the part of said Eppstein & Wannbacher to defraud or delay their creditors, or did they have such notice, knowledge, or grounds of reasonable suspicion at the time of their purchases? If some of them had such notice or grounds of suspicion, and some had not, name those who had not.

(24) Was any benefit reserved or surplus paid over to Eppstein & Wannbacher out of any of the assignments or transfers of goods, checks, or money made by Eppstein & Wannbacher on said August 25, 1890?

(25) Were any of the mortgages or assignments to preferred creditors recorded, except those mentioned as recorded in said suit?

(26) How much did Eppstein & Wannbacher pay their attorneys for fees, and was the amount paid for fees simply for drawing up the preferences, or, in addition thereto, to cover future services for anticipated or expected litigation with the unsecured creditors, in order to protect the preferences?

(27) Were the legal proceedings mentioned in said suit had and resorted to by the preferred mortgagees and Herman & Kayton, therein named, in pursuance of knowledge, had or obtained by them before the preferences were made, that the general or unsecured creditors expected or intended to institute legal proceedings in the United States court for the assertion of their claims, or to anticipate other and unsecured creditors in the pursuit of their legal remedies?

(28) Were not the said mortgagees and parties plaintiff to said foreclosure and receivership proceedings assisted therein by the said Eppstein & Wannbacher or their attor-

neys, and did not said Eppstein & Wannbacher personally, or through their attorneys, know that said mortgages were going to be foreclosed on the day they were given by the modes alleged? Was there not knowledge, both on the part of said mortgagees and Herman & Kayton and Eppstein & Wannbacher, either personally, or through their attorneys, before or at the time said mortgages and preferences were made and delivered, that means of foreclosure and a receivership would be resorted to, to enforce the said securities and protect the same on the same day, August 25, 1890?

(29) Is it true, as alleged in said suit, that assistance was rendered by Eppstein & Wannbacher, as stated, regarding the preparation of the order asked for by said preferred mortgagees and Herman & Kayton concerning said court proceedings?

(30) Is it true, as alleged in said suit, that all the said mortgages and demand notes and transfers were executed with haste and on the same day, and with the intent on part of Eppstein & Wannbacher to evade the letter and spirit of the assignment law of Georgia, regarding schedules of assets and creditors required by law to be annexed to the assignments by debtors, and with the intention or purpose on the part of Eppstein & Wannbacher to hinder, delay, and defraud their general or unsecured creditors?

(31) Is it true, as alleged in said suit, that the failure in business of Eppstein & Wannbacher was a premeditated one, and is it or not true, as stated by Eppstein & Wannbacher in their answer, that their failure or insolvency was unexpected, and caused by circumstances immediately recent?

(32) Is it true, as alleged in said suit, that all of the acts and pretenses of said Eppstein & Wannbacher, set out in said suit, were part and parcel of a scheme of failure and assignment of all their property, in part through agents and trustees of their own selection, and in part by said legal proceedings?

(33) Did or did not the said Eppstein & Wannbacher, by all of said transfers and instruments and acts on said 25th August, 1890, intend to make an assignment in fact, without a compliance with the law of Georgia in regard to voluntary assignments by insolvent debtors, and were or were not all of said papers and acts in pursuance of such design and object, with intent to evade the letter and spirit of the assignment act?

(34) Did or did not the preferred creditors have reasonable grounds of suspicion that such was their purpose? If some had and some had not, name those who had.

(35) Are the allegations true, as set out in part 4 of said suit, on pages 5 and 6, in regard to the assets found by the receiver, and debts and liabilities of Eppstein & Wannbacher, and their intentions to defraud as therein alleged, and as to the notice or grounds of reasonable suspicion of the pre-

ferred creditors and others therein mentioned, and as to the bolstering up the falling credit of said Eppstein & Wannbacher, as therein stated, with promises or assurances or expectation of preferences, to the prejudice of creditors from whom goods were obtained, as therein set out?

(30) Is it true, as alleged in part 5 of said suit, on pages 6 and 7, that the mortgage to said Samuel Herman contained the unusual clauses therein mentioned and created the said trust?

(37) Is it true that the transfer mentioned on page 7 was a secret trust in I. G. Haas as therein stated, and that the moneys therein mentioned, as taken from the assets of said firm by Eppstein & Wannbacher, should be accounted for and paid over to the receiver? Mention the amount to be paid over to the receiver by each of them.

(38) Do you or not find generally for said petitioners and interveners in the said suit of Boykin, Seddon & Co. against all of the defendants in said suit? If not, specify those against whom you do not find.

Also, because the court, though duly requested to submit the same, refused to submit to the jury the following additional material questions in the case, propounded by Boykin, Seddon & Co. et al.:

(1) Were the defendants Eppstein & Wannbacher solvent or insolvent on the 25th day of August, 1890?

(2) Did the defendant S. Herman, or his agent and attorney, have sufficient reason to lead him or them, or either of them, to excite attention, put them on their guard, and call for inquiry, as to the solvency or insolvency of the defendants Eppstein & Wannbacher?

(3) Did the defendant I. G. Haas have sufficient reason to excite his attention, put him on his guard, or call for inquiry as to the solvency or insolvency of the defendants Eppstein & Wannbacher?

(4) Did the defendants S. Mann, M. Boley & Son, I. Eppstein & Bro., H. M. Selig, A. Ehrlich & Bro., the Savannah Grocery Company, Moore & Johnson, Herman & Kayton, Fanny Joseph, by herself or her agents, S. Herman, and L. Kayton, and Sophie Lehman, by herself or her agents, I. Eppstein & Bro., S. Herman, and L. Kayton, as copartners, or any of said defendants, have sufficient reason to excite their attention, put them on guard, or call for inquiry as to the solvency or insolvency of the said defendants Eppstein & Wannbacher at any time before the 25th of August, and if so, which of the defendants are chargeable with such reason? Name them specifically.

(5) Were the circumstances within the knowledge of the said defendants S. Herman, L. Kayton, I. G. Haas, M. Boley & Son, H. M. Selig, I. Eppstein & Bro., A. Ehrlich & Bro., Fanny Joseph, Sophie Lehman, S. Mann, and Moore & Johnson, of the manner in which the defendants conducted their

business and sustained their credit, sufficient to put them as prudent persons on guard or on inquiry as to the solvency or insolvency of the defendants Eppstein & Wannbacher, prior to August 25, 1890? If so, state specifically which of said defendants are chargeable with such inquiry.

(6) Did the system of indorsing for the accommodation of the defendants Eppstein & Wannbacher, and of renewing said indorsements from time to time, contribute to maintain the credit of the defendants Eppstein & Wannbacher, so as to enable them to purchase large quantities of goods from the plaintiffs, and, if yea, which of the defendants, by their accommodation indorsements and renewals thereof, so contributed to maintaining said credit? Name them specifically.

(7) Was the purchase of merchandise from the defendants Eppstein & Wannbacher by the defendants the Savannah Grocery Company, I. G. Haas, A. Ehrlich & Bro., and Herman & Kayton, on the 25th of August, 1890, made in due course of trade, and under such circumstances as not to excite attention or put them on inquiry as to the bona fides of such sales? And, if so, state specifically which of said purchases were not in the usual course of trade.

(8) What obligations or indebtedness incurred by the defendants Eppstein & Wannbacher were due S. Herman at the time of the execution and delivery of the demand note and mortgage for \$37,700 by Eppstein & Wannbacher to him? How much was due?

(9) Were any accommodation indorsements of the said defendant S. Herman on the paper of the defendants Eppstein & Wannbacher matured, due, and unpaid at the time of the execution and delivery of said mortgage on August 25, 1890?

(10) Were any of the accommodation indorsements of the other defendants, I. G. Haas, M. Boley & Son, H. M. Selig, and I. Eppstein & Bro., matured, due, and unpaid on the 25th day of August, 1890?

(11) Was the effect of the execution of the demand notes and mortgages to the defendants S. Herman, Fanny Joseph, and Sophie Lehman, and the transfers of the notes and accounts to the defendants I. G. Haas, M. Boley & Son, H. M. Selig, and I. Eppstein & Bro., to hinder and delay other creditors, and were the circumstances under which such mortgages were given, and transfers made, sufficient to charge the said defendants or their agents with notice of such effect?

Because the court, though duly requested, refused to submit to the jury the following material questions propounded by the Mound City Distilling Company, one of the interveners in the case of Boykin, Seddon & Co. et al.:

(1) Did the defendants Eppstein & Wannbacher on or about the 15th of March, 1890, obtain goods from the Mound City Distill-

ing Company, under contract of purchase?

(2) If you answer yes, was such contract or purchase made by said defendants with bona fide expectation and intention of paying for said goods, or without such expectation and intention of paying for them?

(3) Were any of said goods in possession of the said defendants when the receiver in this cause took charge of said estate, and did any come into his possession?

(4) If you answer yes, what was the sum produced by the said goods at the sale of the receiver?

(5) Were the various instruments and preferences made by Eppstein & Wannbacher to their preferred creditors about August 25, 1890, and the subsequent bill and answers filed in this court by S. Herman and others against Eppstein & Wannbacher, parts of one general transaction, by which the debtors disposed of their apparent assets for the benefit of alleged creditors?

(6) Were the said instruments and preferences and legal proceedings resorted to for the purpose of evading the laws of the state concerning assignments for the benefit of creditors?

(7) Were any goods purchased by Eppstein & Wannbacher from the Mound City Distilling Company on or about March 15, 1890, with intent to defraud the said distilling company?

(8) If you answer yes, were any of said goods sold by the receiver in this case as the property of the estate of Eppstein & Wannbacher?

(9) If you answer yes, what was the amount received for said goods by the receiver?

Because the court erred in submitting to the jury only the questions submitted by S. Herman et al. and those suggested by counsel for H. M. Selig et al., including the five additional questions propounded by the court, which questions and the answers thereto constitute the verdict.

Because the form of questions 11, 12, 13, and 14, suggested by S. Herman et al., was improper and imposed upon the jury, by the use of the words "guilty" and "specify the same," the duty of particularizing each and every act of fraud contained in the petition of Boykin, Seddon & Co. et al., even after finding said petitioners' charges of fraud to be true. (The eleventh question was: "Do you find S. Herman guilty of the charges of fraud alleged against him in the petition of Boykin, Seddon & Co. et al.? If yes, specify the same." The answer was, "No." The twelfth, thirteenth, and fourteenth questions were similar questions as to Mrs. Joseph, Mrs. Lehman, and Eppstein & Bro.)

Error in submitting to the jury question number 14 of those suggested by counsel for Selig et al., as to suit by Ehrlich & Bro. in the city court of Savannah against the Ocean Steamship Company, etc., that not being one of the issues in the case, and being calcu-

lated to give undue prominence before the jury to the matters contained in said question.

Error in requiring the jury, in answer to questions 15, 16, 17, 18, and 19, propounded by counsel for Selig et al., to specify all the charges of fraud against the parties named in said questions, even should the jury find them guilty of the fraud alleged against them in the petition of Boykin, Seddon & Co. et al., all of which was required of the jury by the form of said questions. (The fifteenth question was: "Do you find H. M. Selig guilty of the charges of fraud alleged against him in the petition of Boykin, Seddon & Co. et al.? If yes, specify the same." The answer was, "No." The sixteenth, seventeenth, eighteenth, and nineteenth questions were similar questions as to I. G. Haas, the Savannah Grocery Company, M. Boley & Son, and Ehrlich & Bro., respectively.)

Because the court, after having compelled petitioners Boykin, Seddon & Co. et al. (and all interveners therein) to try their said case at the same time and along with the case of Herman et al., upon a motion to that effect made by Herman et al. and Eppstein & Wannbacher, defendants to both cases, and before any evidence was introduced, declined to allow the petitioners and interveners in the cause of Boykin, Seddon & Co. et al. the right, then and there claimed by them, to be allowed to open and conclude the evidence on the questions of fraud and other issues made in their application,—that is to say, the right to present their case to the jury first, by evidence on their part to sustain the allegations in their petition, the court having ruled that the petitioners S. Herman et al. had the right to be heard first, that after they were heard Boykin, Seddon & Co. et al. would have the right to introduce their evidence upon the issues in their case, and that S. Herman et al. had the right to conclude by rebuttal.

Because, after all the evidence was in and before beginning of the argument, Boykin, Seddon & Co. et al. and the interveners therein, claimed the right of opening and concluding the argument before the jury, whereupon no opposition was made to this claim by any of the parties except by petitioners in the cause of S. Herman et al., who claimed the right to open and conclude the argument before the jury, and thereupon the court ruled that S. Herman et al. had such right and refused to allow it to Boykin, Seddon & Co. et al.

Because the court refused to give in charge the following written requests of movants: "If the jury find from the evidence that Eppstein & Wannbacher obtained goods and merchandise from the petitioners and interveners, for which the suit is brought, by the deceitful means and practices alleged in the petition by Boykin, Seddon & Co. et al.,—that is to say, at time or times when Epp-

stein & Wannbacher were actually insolvent, —by false representations of solvency, or by concealment of their insolvency, they intending at the time of their purchase not to pay for the same, but to convert the same to their own use and to transfer, mortgage, or assign the same, or accounts or negotiable paper representing sales of same, to the use of other creditors of theirs for money loaned or accommodation debts, then the purchase of said goods and merchandise from said petitioners and interveners was fraudulent in law, and constitutes an intent to defraud their creditors, which is sufficient in law to invalidate the mortgages and preferences made subsequently in pursuance of such intent, so far as the said goods and merchandise of the avails or proceeds of the same can be identified." "If the jury find from the evidence that the title to the goods and merchandise obtained by Eppstein & Wannbacher from petitioners and interveners in said suit of Boykin, Seddon & Co. et al., was obtained by Eppstein & Wannbacher by means of the frauds alleged in said suit, and that said goods and merchandise have been mixed by said Eppstein & Wannbacher with other goods mortgaged to S. Herman and others, so that the same or the proceeds of the sale of the same cannot be separated and identified, the burden is upon S. Herman and other preferred mortgagees, or Eppstein & Wannbacher, to distinguish their own goods or lose the whole." "If the evidence enables the jury to ascertain with absolute accuracy that a certain percentage of the proceeds of sale in the registry of the court, obtained by the court's receiver from the sale of the mortgaged property, represents the money obtained by said receiver from the sale of petitioners' and interveners' goods and merchandise, the title to which goods and merchandise was obtained from petitioners and interveners by the fraud and deceitful means and practices alleged in said suit (if the jury find from the evidence that such frauds and deceitful means and practices were resorted to by said Eppstein & Wannbacher, to obtain said goods and merchandise), then such percentage of said proceeds of sale belong to said petitioners and interveners, and the jury should so find." "Independently of all allegations of fraud in the purchase of goods and merchandise by Eppstein & Wannbacher, from petitioners and interveners in the suit of Boykin, Seddon & Co. et al., and treating the purchase of said goods and merchandise as having been made by Eppstein & Wannbacher as bona fide purchasers, without any intention not to pay for the same at the time they were bought, yet if the jury have a rational belief, and find from the evidence, that at the time of making the mortgages and preferences alleged in the said suit, the said Eppstein & Wannbacher made the same with intent to defraud or delay their unsecured creditors, including said petitioners and interveners, then said mortgages and prefer-

ences are void, unless said mortgagees and preferential assignees, at the time of making and taking said mortgages and preferences, were bona fide creditors of said Eppstein & Wannbacher, with no knowledge of or grounds for reasonable suspicion of said intent of said Eppstein & Wannbacher." "Insolvency is a badge of fraud, and the law endeavors to environ a debtor with all possible perils, and make it appear that honesty is the best policy. A fraudulent grantee, therefore, is allowed to retain the property only against the fraudulent grantor, and not against creditors of the grantor. The grantee with notice, or grounds of reasonable suspicion, takes the preference or security as against the debtor, but it is invalid and void as to other creditors of the debtor. The debt of the grantee with such knowledge or grounds of reasonable suspicion may be a good, bona fide, actual debt, yet, if the debtor be insolvent at the time of the making of the conveyance or security, and by the conveyance or security the debtor intends to delay or defraud his creditors, and the preferred creditors have notice or ground of reasonable suspicion of such intention of the debtor, the security taken under such circumstances is void as to creditors of the debtor, the law treating grounds of reasonable suspicion as the equivalent of notice." "If the purpose or intention of an insolvent debtor, in giving security by way of preference over other creditors to one creditor, be to defraud or delay the unpreferred creditors by hampering or entangling the property as against other creditors, and the preferred creditor has knowledge of such debtor's intent, the preference is void. If the preferred creditor had not actual knowledge of said purpose, but has only grounds of reasonable suspicion of such debtor's said purpose, the preference is void." "A favored creditor or purchaser for value, or assignee, with such notice as is mentioned in the preceding request to charge, is held as a trustee for creditors, to the extent of the security or assets obtained by him, because he, by taking his security or assets under such circumstances, aids the arrangement of the debtor, and therefore participates therein. It matters not that the creditor's debt may be honest, just and valid, or that the purchaser may pay full value for what he gets, as it is a legal fraud to take security or buy in such case." "If the jury find from the evidence in the case that the preferences made, or any of them, were made with intent to hinder or delay creditors of Eppstein & Wannbacher, and that the preferred creditor or creditors had previous notice of such intent, and in addition thereto participated in such intent, the preference is void." "While a debtor may prefer one creditor to another, he must do so bona fide or in good faith, and if the preference is made by the debtor in execution of a secret agreement that the debtor should secure the preferred creditor to the exclusion of other creditors if he became

insolvent, the jury may consider this fact, together with all other facts and circumstances, in the determination of the question of fraud, and if they find that the preference is not made in good faith, and that the preferred creditor had either notice or grounds of reasonable suspicion of a fraudulent intent of the debtor to defraud or delay his creditors, the preference is void."

Because the court refused to give in charge, as applicable to preferences, the following written request of movants: "By the Code of Georgia (section 1952) every conveyance of real or personal estate made with the intention to delay or defraud creditors, if such intention be known to the party taking, is void as against such creditors, and either notice or grounds for reasonable suspicion will be treated as equivalent to knowledge. A mortgage or pledge is a conveyance within the statute. If only a lien be conveyed it is none the less void as against creditors, if made by the debtor with intent to defraud or delay creditors. A fraudulent conveyance cannot stand against creditors, whether made to secure a debt or not. The conveyance must be pure. It must be made bona fide, and with no purpose, known to or suspected by the creditor, to hamper and entangle the property, as against other creditors, for the sake of hindering or delaying them. If made partly to secure a debt and partly to hinder, delay, or in any way defraud other creditors, and the creditor taking the deed (deed of mortgage, pledge or other conveyance) has knowledge of this latter intention, or grounds for reasonable suspicion, no title will pass as against the other creditors. The morality of the conveyance or deed or instrument in writing or contract of any description to secure a debt must be as high as that of any other, but need not be higher. A conveyance to secure must be in all respects as clean and pure and clear as a conveyance for permanent ownership." The court read this request to the jury, but confined the request to cases of sale upon a new consideration, and charged that it was not applicable to preferences.

Error in refusing to give in charge the following requests of movants: "The possible indicia of fraud are so numerous that no court could pretend to anticipate and catalogue them, but the rule of law is that there must be no fraud which would vitiate any conveyance under any section of the Code, or any part of the common law in force here, and that no material badge of fraud must be left unexplained." Also: "Notice, or reasonable grounds of suspicion, means such facts and circumstances, within the actual knowledge of the preferred creditor, as in the opinion of the jury are sufficient to put a reasonable or prudent man upon his guard and call for investigation. Under such a state of facts and circumstances, the law treats such reasonable grounds of suspicion as grounds of reasonable suspicion equivalent to knowl-

edge, and holds the favored creditor to have notice, though he may deny he had notice, and not believe he had notice, and though the debtor's fraudulent intent or purpose was unknown for want of investigation; the favored creditor's negligence in such case being gross negligence, and therefore equivalent in law to actual notice." "If the jury find that Epstein & Wannbacher were insolvent at the time of the execution of these mortgages to Herman et al.; and the execution of the transfers of accounts, etc., to other preferred creditors, and if you find that the mortgage and these other writings or transfers were executed at or about the same time, and all springing out of the same purpose or agreement between the debtors and these preferred creditors, to provide a fund for the payment, not only of the debts due the special creditors, but also the banks who had discounted these notes of the creditors, then the mortgages and other writings are to be construed as one instrument, and the mortgages and other contemporaneous writings constitute an assignment within the meaning of the act of 1881, and, unless the sworn inventory and schedule required by that act were prepared and attached to the mortgages and transfers of other assets, are void. If no such inventory or schedule has been shown to have been attached, then the mortgages and transfers are void." "While a debtor has a right to prefer one or more creditors to others, if the preference be an honest preference, made in good faith, to secure bona fide debts, even if made to a considerable number of such creditors at or about the same time, provided no trust be created; and, while such preferences will not ordinarily constitute an assignment for the benefit of creditors under the voluntary assignment law of Georgia, yet such preferential transfers, even in cases where no assignments as such are made, will be held to be assignments for the benefit of creditors, when such is the intention of the parties, either actual or presumed from the character of the instrument or the circumstances of the transaction, and will be void against creditors if the statutory provisions for assignment for the benefit of creditors are not complied with. Especially are such preferential transfers void when simultaneous, or so nearly so as to be parts of the same agreement or transaction, and the purpose is to evade the statute, and the preferential transfers cover the whole, or substantially the whole, of the valuable assets and property of the debtor." "Open accounts cannot be conveyed by way of preference, under section 1953 of the Code of Georgia, to one creditor over another, except in payment of the debt; that is to say, they cannot be conveyed as collateral security. When sold in payment of the debt, the debt is extinguished. It no longer remains as a liability of the debtor, but, when conveyed as collateral security, the debt remains intact, and the creditor gets simply security

therefor. This cannot be done under the law of Georgia permitting preferences, and hence the court charges the jury that the assignments of open accounts in this case are illegal and void."

Because the court erred in charging, as requested by S. Herman et al.: "Where goods are sold without any reservation of the title, the title passes to the buyer, and the fact that the goods were not paid for gives to the seller no lien upon the goods, or upon the proceeds of their sale. If goods are alleged to have been obtained by fraud, it is incumbent upon the seller upon knowledge of the fraud to signify his election to rescind the sale, and to identify the goods of which he claims to have been defrauded, or the proceeds of their sale if they had been disposed of. He cannot sue the buyer for the purchase money of the goods, and at the same time assert his right to a recaption of the goods. In this case, the complainants in the petition of Boykin, Seddon & Co. et al., not having elected to rescind the sales of the goods purchased from them by Eppstein & Wannbacher, and not having by testimony identified the goods purchased from them, or the proceeds of their sale, they are not in a position to assert their claims for a recaption of the goods, and they must stand upon their rights as ordinary creditors suing for the collection of their debts; and therefore, in the consideration of this case, you should regard the mortgaged property as the property of Eppstein & Wannbacher, free from any liens or special equities in favor of the petitioners in the suit of Boykin, Seddon & Co. et al. The claim, therefore, of rescission or of recaption does not enter into this case, and you should eliminate it from your consideration." "Where an insolvent debtor executes a mortgage to a bona fide creditor, with the design of hindering and delaying other creditors in the enforcement of their claims, and the evidence does not show that the mortgagee had any intention of aiding in the fraudulent plans of the mortgagor for hindering and delaying other creditors, except so far as was necessary to secure his own protection, such mortgage will not be fraudulent or invalid if the sole purpose of the mortgagee was to secure thereby his debt. In this case, if you find that Eppstein & Wannbacher executed mortgages to creditors who had real and valid claims against them, and even if you should further find that the design of Eppstein & Wannbacher was to hinder, delay, or defraud other creditors, but the evidence does not show that Mr. Herman or Mrs. Joseph had any intention of aiding in such fraudulent plans, or had any intention of injuring other creditors, except as far as was necessary in order to secure their own protection, then these mortgages would not be fraudulent, but would be legal and valid." "A fraudulent purpose on the part of the debtor in giving a mortgage as security, although it be ex-

pressed, will not vitiate the preference, provided the creditor has an honest and valid debt, and takes the mortgage as security for that debt, and for no other purpose. When a debtor, although insolvent, or in failing circumstances, gives a mortgage to a creditor to secure an antecedent debt by way of preference over other creditors, the debt being honestly due, and no interest being reserved by the debtor, his mere fraudulent intent does not vitiate the mortgage, because the act itself is legal, and fraud without damage gives no right of action. These concurrent facts, namely, an honest debt, the taking of a mortgage alone to secure the debt, and not for the benefit of a debtor, rebut all inferences that might be drawn from attendant badges of fraud, and impart validity to the mortgage as an allowable preference of a creditor. In this case, if you find that the debts of Mr. Herman and of Mrs. Joseph were actual and real debts existing at the time the mortgages were given, and that they took them for the sole purpose of securing their debts, and not for the benefit of Eppstein & Wannbacher, the fraudulent intent of Eppstein & Wannbacher, if such intent existed, would not vitiate the mortgages and it would be your duty to sustain them." "The Code of Georgia provides (section 2751) that fraud may not be presumed, but, being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence. This does not mean that slight circumstances are sufficient, but in any case, no matter what the circumstances are, if, in view of all the evidence, fraud is not proven, then it is the duty of the jury to find against fraud, the presumption of the law being against its existence. In this case the burden of proving fraud is upon the unsecured creditors who charge it, and they cannot discharge that burden by merely raising a suspicion. They have to generate belief, and suspicion falls short of belief. Should fraud be established against Eppstein & Wannbacher, you should not permit such fraud to affect or prejudice in any way Mr. Herman or Mrs. Joseph or Mrs. Lehman or Messrs. I. Eppstein & Bro., unless it has also been established that they had a guilty connection with such fraud. Even if it were established that a party has a knowledge of a fraud, he is not to be made responsible for such fraud or its consequences, unless he is guilty of an intentional participation in such fraud." Said charge being especially erroneous in that, notwithstanding the court had refused to allow Boykin, Seddon & Co. et al. the opening and conclusion of the argument before the jury, it put the burden of proof upon them too strongly, and required them to generate a belief and establish that Herman and others not only had knowledge of the fraud therein mentioned, but were guilty of participation therein.

Error in charging as requested by Herman

et al.: "The petition of Boykin, Seddon & Co. et al. charges that Herman and other preferred creditors bolstered up the failing credit of Eppstein & Wannbacher by indorsing and accepting for their accommodation, and thus aided them in deceiving said petitioners as to their insolvency, and causing them loss and damage. If the evidence fails to show that said petitioners had any knowledge of the action of Herman or others in indorsing or accepting for said Eppstein & Wannbacher, then said petitioners cannot make this the ground for any complaint against said Herman and others. In order to make it a ground of complaint, it must appear not only that this was done by Herman and others as charged, but that it was done by them with fraudulent intent; and also that it was known to said petitioners, and influenced them in extending credit to said Eppstein & Wannbacher." "The mortgages in favor of Samuel Herman, Mrs. Josephs, and Mrs. Lehman are not assignments for the benefit of creditors, and do not, together or separately, constitute an assignment for the benefit of creditors; but they are mortgages, and are in form valid, and they are enforceable as mortgages, unless you should find them to be fraudulent and void under the law hereafter given you in charge." "These transfers of accounts [referring to the transfers of accounts to Mrs. Lehman, I. Eppstein & Bro., and others] are valid in form, and do not of themselves, or in connection with other papers, constitute an assignment for the benefit of creditors." "A debtor who is in insolvent or failing circumstances can also secure a bona fide debt by a preference in the shape of an assignment of accounts; and in this case, if you find that I. Eppstein & Bro. took a transfer of accounts in good faith, to indemnify them as accommodation indorsers, and that they were really and truly accommodation indorsers in good faith, it would be your duty to sustain such a transfer, and the principles hereinbefore charged in regard to a preference by mortgage will apply to such a transfer. If you find that Mrs. Lehman also took an assignment of accounts to secure an honest debt, and only for this purpose, it would be your duty to sustain her transfer, under the principles given you in charge with reference to a preference by mortgage." "Under section 1953 of the Code of Georgia, a debtor may prefer one creditor to another, and to that end he may bona fide give a lien by mortgage or other legal means, or he may sell in payment of a debt, or he may transfer negotiable papers as collateral security; the surplus in such cases not being reserved for his own benefit. Among the means which the law of Georgia allows a debtor by way of preference is the right to give a demand note for debts not yet due. If you find from the evidence that on August 25, 1890, Eppstein & Wannbacher were indebted to Samuel Herman upon a number of notes,

only one of which was at that time due, they had the right, for the purpose of giving him a preference, to consolidate these notes into a demand note, and to secure the same by mortgage, provided, however, no trust or benefit was reserved said Eppstein & Wannbacher, but the sole purpose of the mortgage was to secure said indebtedness." And immediately thereafter charged as follows: "If you find from the testimony that on August 25, 1890, Samuel Herman was an accommodation indorser on the notes of Eppstein & Wannbacher for the sum of \$13,500, as claimed by him, then said Eppstein & Wannbacher had the right, in and by said mortgage, to secure said Herman as to said indorsements, and to stipulate in said mortgage that, in case of its foreclosure upon the demand note, it could also be foreclosed for the purpose of putting said Herman in funds to protect and indemnify him as to said indorsements." Said charge being especially erroneous in regard to Herman's alleged right to receive said demand note, and to foreclose for outstanding obligations held by the banks or third parties, and to convert into cash for his benefit goods obtained from petitioners Boykin, Seddon & Co. et al. and interveners therein, by the fraudulent means and practices of the mortgagors, Eppstein & Wannbacher, as alleged in said petition.

Error in charging, as requested by counsel for Eppstein & Wannbacher et al.: "If I. G. Haas received from Eppstein & Wannbacher, on August 25, 1890, goods to the extent and value of \$1,120.46 in payment of a debt due to him of \$343.21, the balance being applied by him, under the direction of Eppstein & Wannbacher, to the payment of their debts, said transaction is valid if the debt of Haas was a valid, subsisting debt, and to be paid out of said proceeds, as directed to the creditors of said Eppstein & Wannbacher."

Error in charging as follows: "In the Boykin, Seddon & Co. bill there are certain allegations with reference to recaption, the right on the part of the creditors in that bill to have a lien or equitable claim upon the assets in the hands of the receiver. I charge you, as a matter of law, that that question, in view of the features of this case [presented], has no place in your consideration, and you will not, in your deliberation upon this case, consider at all the question of recaption." "A review of that bill [meaning the Boykin, Seddon & Co. et al. petition], and it has been presented before you, shows that its gravamen is that there was what was in effect a conspiracy on the part of Eppstein & Wannbacher and certain preferred creditors, conceived deliberately, and carried into effect deliberately, all persons being cognizant of what was intended, all parties conspiring and assisting to boom the mercantile character and reputation of Eppstein & Wannbacher by a fictitious credit, to enable them to buy largely from various creditors, to acquire a vast mass of goods,

with the intention always to secure those who thus boomed them for a fraudulent purpose, and with the intention finally to permit them to fail full-handed. Now I charge you absolutely and distinctly that if you find this to be true, if you find these allegations to be true from the facts before you, if you find that these defendants, the preferred creditors, were engaged in such a deliberately planned and concocted and carried-out conspiracy to defraud the petitioners Boykin, Seddon & Co. et al.; if you find that they participated, that these preferred creditors participated actively, designedly, and fraudulently in such a purpose, and that was the purpose,—then they are all equally guilty, and your verdict should be against them. Such a gross, unqualified fraud as that, if you find it to be true, and find it to be a fraud, should meet with the strongest censure and condemnation of the law. I say, if these things alleged are true, and you believe them to be true, that your verdict should be against the defendants in this case. But you are not to take allegations. You must be satisfied from proofs of these fraudulent intentions and fraudulent acts. You must not be satisfied by bare suspicions. Moral and legal certainty is all we can attain in a judicial investigation. Mathematical certainty is not required, nor is it attainable; but you must have a conviction, and that conviction must be established upon a preponderance of evidence, whether that evidence be positive or circumstantial. If the evidence be positive, it is the firmest basis that the law can have for the foundation of a verdict; if it be circumstantial, you must have the right, as intelligent jurors, to draw from those circumstances such reasonable inferences as you think proper in determining your verdict. But, whether the evidence be positive or circumstantial, your verdict must be a conviction, based upon the preponderance of evidence in your view. This generally." Said charge being especially erroneous in that it is not a fair statement of the gravamen of the bill or petition; in that such is not the gravamen of the bill or petition; in that said charge, in effect, relieved from all liability those of the preferred creditors who negligently and with reasonable grounds of suspicion assisted to boom the mercantile character and reputation of Eppstein & Wannbacher by their indorsements and credits at a time when they were insolvent, and with reasonable grounds to know or suspect that thereby Eppstein & Wannbacher would be enabled to buy largely from various creditors, including Boykin, Seddon & Co. et al., without intending to pay for them at the time of purchase, and finally to break full-handed, and required Boykin, Seddon & Co. et al. to produce a conviction in the minds of the jury, based upon a preponderance of the evidence, that the preferred creditors deliberately planned and concocted and carried out a conspiracy to defraud the petitioners Boykin, Seddon & Co. et al.

Error in charging: "The point has been

made that these various preferences, in the form in which they are presented, constitute what is called an 'assignment' under the laws of Georgia; and, the law requiring that in such cases of such assignments there must be certain schedules filed and attached, that these papers fail entirely, because of the failure to attach such schedules. I charge you, as a matter of law, that that question will not enter into your consideration, and I charge you that this, the case presented, is not a case of assignment under the law of Georgia, and that the failure to attach schedules had no effect of itself upon the issues in this case. Therefore you will completely leave that matter out of your consideration, so far as that point is concerned." "These several preferences, mortgages, and transfers must each stand alone upon its individual merits, and be determined each for itself by you, upon the facts in evidence and the law as given you in charge by the court. It will be for you to say,—and I consider that the issue really made in this case is, whether any or all of these preferences are fraudulent or not. If they are all fraudulent, in your judgment, you will so declare. If some valid and some fraudulent and void, you will state which are valid and which are fraudulent and void; and so with the alleged sales in this case." "Another question submitted, and which I am called upon to decide, is the question of the validity of transfers of accounts as security for indorsements and for debts. I have considered that question upon the law, and I charge you that, if such transfer or assignment of accounts as security for a debt is in writing, manifesting the intention of the parties, that it is sufficient under the law."

Error in charging as requested by S. Herman et al.: "Because a debtor may lawfully apply his property to the payment of the debts of such creditors as he may choose to prefer he may elect the time when it is to be done, so as to make it effectual. Such preferences must necessarily operate to the prejudice of creditors not provided for, when the assets of the debtor are not sufficient to pay his creditors; but such a result cannot in itself furnish any ground or reason for questioning the validity of the preference. The preference of one debtor over another does not constitute a fraud at common law or under the law of Georgia. If a debtor is unable to pay all his debts, he commits no fraud by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others. Nor does it make any difference that both the creditor and the debtor know that the effect of such appropriation will be to deprive other creditors of the means of reaching the debtor's property by legal process in satisfaction of their claims. If there is no secret trust agreed upon or understood between the debtor and the creditor in favor of the former, but the sole object of the preference is to secure the payment of a debt, the transac-

tion is a valid one. The bona fide creditor may receive from his debtor a mortgage to secure such a debt, even though the known effect may be to hinder or defeat the other creditors. The maxim that equality is equity does not in any wise conflict with this right of preference in a debtor, whether solvent or insolvent. It is a settled principle, both at law and in equity, that a failing debtor has a right to prefer one creditor or several creditors to another. This is a doctrine not only of courts of law, but of courts of equity. When a man does nothing more than the law allows him to do, it cannot be said with legal propriety that he has been guilty of a collusive fraud." And further: "A debtor may pay his individual debt with the assets of the firm of which he is a member. The mere preference of individual debts over partnership debts is not such a fraud upon partnership creditors that a court of equity will set it aside. The partnership creditors have no lien upon the property of a partnership if the partners themselves have none. This right to settle an individual debt with firm assets is not impaired by the fact that the partnership may be insolvent." The said charges being especially erroneous in connection with charges and refusals to charge hereinbefore assigned as error, in that such law, if good law, does not and did not apply to a case like that of Boykin, Seddon & Co. et al., and the interveners therein, whose goods have been obtained by fraud, as alleged in their petition, and as found by the jury in said case.

Charlton, Mackall & Anderson, R. R. Richards, Harden, West & McLaws, Lawton & Cunningham, Saussy & Saussy, O'Connor & O'Byrne, W. R. Leaken, W. C. Hartridge, and T. D. Rockwell, for plaintiffs in error. Garrard, Meldrim & Newman and Denmark & Adams, for defendants in error.

LUMPKIN, J. 1. Section 1954 of the Code of 1863 made void, as to creditors, "every assignment or transfer by a debtor, insolvent at the time, of real or personal property of any description to any person, either in trust or for the benefit of himself or any one or more of his creditors, or any person appointed by him, to the exclusion of any other creditor in the equal participation of such property, unless such assignment or transfer [was] a bona fide sale, in extinction, in whole or in part, of the debt of the purchaser, and without any trust or benefit reserved to the seller or any person appointed by him." It will thus be seen that the assignment or transfer of anything, except for actual payment, in whole or in part, of an existing debt, or else for the equal benefit of all creditors, was prohibited. Consequently, according to the provisions of that section, there could be no transfer or assignment of accounts or books of account to one creditor as collateral security for his demand alone,

nor to any number or class of creditors to the exclusion of others. Section 1955 of the same Code was as follows: "A debtor may prefer one creditor to another, and to that end he may bona fide give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security; the surplus in such cases not being reserved for his own benefit or that of any other favored creditor to the exclusion of other creditors." By virtue of this section, a debtor, irrespective of his solvency or insolvency, had the right to prefer one creditor to another, and to this end might create in favor of the preferred creditor a lien by mortgage or other legal means, or might transfer to such creditor negotiable papers as collateral security; or, as provided in the preceding section, a debtor might make payment by an actual and bona fide sale. Thus there were three modes of preferring creditors by an insolvent debtor; the first, by sale in payment or part payment; the second, by mortgage or other legal lien; and the third, by the transfer of negotiable papers as collateral security. So far as nonnegotiable choses in action are concerned, the only question which could arise under the language of section 1955 is whether what seems to have been made impossible by the preceding section, viz. an assignment of the same as mere security for one creditor alone was, under the name of a creating lien, rendered possible by section 1955. Prior to the Code, the assignment of accounts would create an equitable lien, but by the use of the words "other legal means" there is little room for doubt that the section last mentioned contemplated legal, and not equitable, liens. Hence, properly understood, there was not, for any reason yet suggested, any real incongruity between the two sections in the respect indicated.

The next consideration is, what effect should be given to section 2224 of the Code of 1863 (the language of which is exactly the same as that used in section 2244 of the present Code), which makes all choses in action arising upon contract assignable so as to vest the title in the assignee? That section certainly does not contemplate the creation of a lien merely, but a change of ownership relatively to the legal title. The conclusion from the foregoing is that, while the terms "negotiable papers" should be construed as comprehending anything which the Code in any of its provisions denominates "negotiable," there was, prior to the passage of the act of February 24, 1866 (Acts 1865-66, p. 29), no way to prefer a single creditor by making accounts mere security for the payment of his demand. Accounts could not, by assignment or otherwise, be made available as collateral security for creditors, unless it was done for the benefit of all creditors alike. Had the case of *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61,

22 S. E. 217, depended alone upon the Code of 1863, we think the decision therein rendered would have been a correct exposition of the law applicable; but, taking into consideration the modification of the provisions of the old Code made by the above-cited act of 1866, we are now of the opinion that the judgment rendered in that case is, to the extent indicated in the first headnote of this opinion, unsound. The provisions of the act of 1866 are embodied in paragraph 1 of section 1952 of the present Code, that paragraph having been, by the act in question, substituted for paragraph 1 of section 1954 of the old Code. In endeavoring to arrive at a correct solution of the question presented, we went back to that Code, to see how the law stood under its provisions, and concluded it was as has been stated above; but, in tracing it into the present Code, we somehow, as we now think, failed to grasp to the full extent the changes made by the act of 1866 in the law existing at the time of its passage. A comparison of the two paragraphs just mentioned will show that in the latter "choses in action" (which, of course, comprehend open accounts and other claims embraced in the descriptive words "negotiable papers") are specially designated, whereas the terms "choses in action" do not appear in the paragraph cited from the old Code. It may be remarked, however, that the words "real or personal property of any description" would, perhaps, be sufficiently comprehensive to include choses in action, without special mention. But the great change made by the act was that while, under the old law, an assignment or transfer save by absolute sale for the benefit of creditors was void unless all the creditors of the debtor were given an equal participation in the proceeds of the property, under the new law an insolvent debtor could lawfully transfer or assign any property, including choses in action,—whether negotiable papers or not,—for the benefit of a single creditor, provided only no trust or benefit was reserved to the assignor, or any person for him. In dealing with the Hale-Berry Case we were too much influenced by section 1953 of the present Code, which is in the same language as section 1955 of the Code of 1863; and, as this section provides for the transfer as collateral security of negotiable papers only, we came to the conclusion that nonnegotiable papers could not be transferred for this purpose. But we did not give proper recognition to the alteration in the law of the whole subject-matter, arising by necessary implication from the amendment made by the act of 1866, appearing in section 1952, in the respects indicated. The two sections must be read and construed together; and although, after the passage of that act, the language of section 1953 was left precisely the same as formerly, its restrictive effect was utterly changed, so far as nonnegotiable choses in action are concerned, because of the amendment which the

legislature saw fit to make in the matter and scope of the preceding section. The effect of this amendment was to reverse the general policy of the first Code, and by implication to allow an insolvent debtor to make preferences among creditors at pleasure by legal assignment or transfer, provided no trust for himself, or to any person for him, was reserved. This is the law now, and thus it has stood ever since the act of 1866 was enacted. By virtue of section 2244 of the Code of 1882, which, as already said, corresponds to section 2224 of the first Code, the owner may assign any chose in action arising upon contract, so as to vest the title in the assignee; and, his insolvency since the change of policy brought in by the act of 1866, being no obstacle to assigning such choses in action as collateral security, they are no less assignable for that purpose than are negotiable securities. The modes of giving preference enumerated in section 1953 of the present Code still remain, but to them is added, by virtue of the act of 1866, any assignment or transfer whatever, otherwise lawful, which does not involve some reservation of trust or benefit to the assignor, or to another for him. It was correctly ruled in *Powell v. Kelly*, 82 Ga. 1, 9 S. E. 278, that the object of the act of 1866 was to change the prior policy of the state touching the preference of creditors, and that the act allowed a debtor to prefer one creditor to another; also that it repealed by implication the latter part of section 1953 of the Code, the repealed words being, "or that of any other favored creditor, to the exclusion of other creditors." These words were appropriate to the general scheme of nonpreference which the first Code had in view, but are wholly inconsistent with the reverse scheme which the act of 1866 introduced and intended to legalize. In its last analysis the right to assign or transfer nonnegotiable papers for the purpose of securing one creditor to the exclusion of others does not rest in any degree upon section 1953 of the Code. It would be precisely the same without that section as with it. Its true and only source (save as to the mere element of assignability for passing title) is the act of 1866, and the substitution by that act of one single restriction upon assignments and transfers in place of the different and more numerous restrictions imposed by section 1954 of the first Code. We can find no reason satisfactory even to ourselves for falling into the error which we now feel was committed in the Hale-Berry Case, but we are glad that it was detected so soon, and this opportunity given to recall it. When the enormous amount of work we have to do and the want of time at our command are taken into consideration, some excuse for this and other shortcomings may be accorded us, but we neither expect nor ask complete justification for a mistake like this.

So far as the case of *Baer v. English*, 84

Ga. 403, 11 S. E. 453, is concerned, as it was correctly decided on its facts, it presents no essential conflict with anything we now rule. The suggestion in the opinion delivered in that case that "an account, not being negotiable paper, cannot, we think, be transferred as collateral security for an existing debt to the prejudice of another existing creditor," was toned down and qualified by what followed it in the next sentence, and was not meant to be an adjudication of the question now before us. This will be apparent to any one who will read the whole opinion in a spirit of candor. By oversight, section 1953 of the Code was quoted entire in that opinion, without any allusion to the repeal of the concluding words by the act of 1866, or to the previous case in 82 Ga. 1, 9 S. E. 278, cited *supra*, by which the repeal of these words was declared and recognized. It appears from the record of the case now under consideration that in every instance where Eppstein & Wannbacher assigned to creditors open accounts as collateral security for their respective demands the assignment was made directly to the creditor, and hence no trust was created, there being no person other than the assignee taking any benefit under it. Therefore the assignment acts of 1881 and 1885 do not apply, and decisions rendered by this court with reference to those acts are not pertinent, and need not be noticed. It does not appear that in making these assignments any benefit was reserved to the assignors, or to any one for them, and consequently, should there in any case be a surplus, the same would, by operation of law, be subject to the payment of Eppstein & Wannbacher's other outstanding indebtedness.

2. As will have been seen by reference to the reporter's statement, the first petition against Eppstein & Wannbacher was filed by Herman and others, who were preferred creditors of the defendants. Subsequently a number of persons were made parties defendant, and a number of other persons parties plaintiff, to this case. Afterwards the petition of Boykin, Seddon & Co. and many others, on behalf of themselves and all other creditors of Eppstein & Wannbacher, was filed against the latter, their preferred creditors and others. Some of the persons who were parties plaintiff in the first case withdrew from it, and were made parties plaintiff in the second. The two cases were consolidated for trial, and the court allowed the counsel for Herman and others the opening and conclusion, over the objection of counsel for Boykin, Seddon & Co. and their associates. Inasmuch as Herman and others instituted the original petition, which brought about all the litigation which afterwards arose over the affairs of Eppstein & Wannbacher, we think the court could, with great propriety, award them the opening and conclusion. If they were not, as matter of right, entitled to this advantage, it was at

least within the discretion of the trial judge to allow it to them, and in so doing his discretion was not abused. This is true although Herman and his associates, the preferred creditors, were made codefendants with Eppstein & Wannbacher in the petition filed by the general creditors. We cannot see that this fact at all affects the merits of the question as to who should have the opening and conclusion.

3. The record in this case is exceedingly voluminous. It covers very nearly 600 pages of closely typewritten matter. The motion for a new trial contains 47 grounds. It presented a large number of questions for consideration and determination by the trial judge, and upon his overruling of the motion the entire case was brought here for review. We have given to it a careful, deliberate, and most anxious examination. It has occupied the attention of the court for many days, and, notwithstanding the relative brevity of this opinion, it must not be supposed that any feature of the case has been slighted or overlooked. We have faithfully, and to the best of our ability, considered and discussed all the material questions involved. We have not, however, after patient and most thorough investigation, found it necessary to definitely decide a large number of them, because, in our opinion, the verdict was right, no matter what might be the law as to many of the disputed issues. The evidence was clear and convincing that the claims held by all the preferred creditors were bona fide and honest debts. There was not sufficient proof to authorize a jury to find that there was any collusion between these preferred creditors and their debtors, or that any conspiracy existed among them having for its purpose any plan or scheme to delay, hinder, or defraud other creditors. Nor was there sufficient evidence to warrant the jury in finding that the preferred creditors knew of or participated in any fraudulent design or intention on the part of Eppstein & Wannbacher to delay, hinder, or defraud their other creditors, if such a purpose existed at all on the part of the debtors. We also think the evidence fully authorized the jury in finding that the purchases made by the Savannah Grocery Company and other parties were fair, and free from fraud. The questions submitted by the court to the jury were, when considered with reference to the entire charge, sufficiently full to cover all the absolutely essential issues. We do not, of course, mean to assert that no error at all was committed. Indeed, taking into consideration the magnitude of the case and the great number of intricate and complicated questions presented, it would be little short of a miracle if any judge could, through a *non* trial occupying about a month, be perfectly correct in every ruling. We do mean to say that, in our opinion, there was no substantial error requiring another trial. We deem it not in-

appropriate to add, in this connection, that our very learned and accomplished brother of the Eastern circuit handled this case in all its branches with the most marked ability and skill. The record before us presents high evidence of his wisdom and efficiency as a judge. Had we found it necessary to rule upon all the numerous questions presented in the argument before us, we would have endeavored faithfully to do so, and would not shrink from preparing an opinion embracing as full a discussion of them as the time at our command would possibly allow; but to do this is not requisite, because we are convinced that the verdict and judgment rendered are about as nearly correct as any court or jury could render. The jury in this case was selected from the grand jury list. They have done their work well. It has had the sanction of the trial judge, and we are satisfied to allow their verdict, and the decree rendered upon it to stand. Judgment affirmed.

(91 Va. 518)

CLENDENNING'S ADM'R v. THOMPSON'S EX'R et al.¹

(Supreme Court of Appeals of Virginia. June 13, 1895.)

PRESUMPTION OF PAYMENT.

1. There is a recognized distinction between the statute of limitations, and the presumption of payment from lapse of time, the condition of the parties, and their relations towards each other. In the former case the bar is absolute; in the latter, it is a rule of evidence, and may be rebutted.

2. In April, 1868, T. executed his bond to Mrs. C., his niece, for \$3,500. In 1871 C. failed for a large sum of money, and through Mrs. C.'s influence, T. came to his assistance, advanced large sums of money for him, and rendered most valuable assistance. In April, 1879, Mrs. C. died, leaving no children, and her husband surviving. He was her sole legatee, but did not have her will recorded, as she was supposed to be worth nothing. In November, 1879, C. and T. had a settlement in which T. released a deed of trust against C.'s property, and C. confessed judgment in favor of T. for \$5,000. C. lived until January, 1883, and died in ignorance of the existence of said bond as a live obligation against T. His executors paid T. \$5,778.83 after they had discovered said bond, but never demanded its payment of him, although he was a wealthy man. After his death, and before the bond was barred by statute, suit was instituted on this bond. *Held*, that equity would presume that it had been paid under the circumstances.

Appeal from circuit court, Loudoun county; James Keith, Judge.

Action by Thomas E. Hough, administrator of William Hough, against Harrison Osborne, executor of John H. Thompson. From an order enjoining plaintiff from proceeding at law, he appeals. Affirmed.

Lee & Janney and Brooke & Scott, for appellant. Edward Nichols and Eppa Hutton, Jr., for appellees.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

HARRISON, J. On the 13th day of March, 1888, suit was brought on the law side of the circuit court of Loudoun county, in the name of Thomas E. Hough, administrator of William Hough, deceased, who was trustee for Elizabeth A. Clendenning, for the use of H. H. Russell, sheriff of Loudoun county, and as such administrator of Elizabeth A. Clendenning, deceased, against Harrison Osborne, executor of John H. Thompson, deceased, on the following bond:

"One day after date, I bind myself to pay William Hough in trust for Elizabeth A. Clendenning, \$3,500, for value received. Witness my hand and seal this 20th day of April, 1868. [Signed] John H. Thompson. [Seal.]"

After certain proceedings were taken as to the pleadings, and before any trial of the case, on the 5th of May, 1890, Harrison Osborne, executor of John H. Thompson, deceased, filed in the said circuit court a bill in equity, against the plaintiff in the suit at law and others, enjoining them from proceeding at law, and setting up, as a defense to the bond sued on, accord and satisfaction, the presumption of payment arising from the relations of the parties and transactions between them, laches in the assertion of the claim, lapse of time, though less than 20 years, and other circumstances, showing the settlement and satisfaction of said bond.

This bill was demurred to, answered, and the demurrer overruled. An amended bill was filed, and likewise demurred to, answered, and the demurrer overruled. In the progress of this suit the court required the defendant in the suit at law to confess judgment.

On the 22d day of January, 1892, the injunction suit was heard, when the court, being of opinion that the presumption of payment attached to the bond in controversy, so decreed, and ordered that the judgment confessed in favor of the plaintiff in the law suit, be set aside, and the injunction perpetuated. It is this decree we are now called upon to review. The suit at law was brought in the name of the representatives of the beneficial payee in bond against the representatives of the obligor, and the defense was that the bond had been satisfied to William Clendenning, the husband of the beneficial payee, who, it is claimed, had the right to reduce the same into possession. It is contended that this defense could not be made at law, and could be made alone in equity; that the technical nature of the legal pleading does not permit the defense of accord and satisfaction and payment to the husband of the cestui que trust, or her distributees at law or legatees, in a suit at law in the name of the personal representatives of the payee of the bond; that this post-nuptial chose in action was reduced into possession by William Clendenning, and that it would be impossible to set up this presumption of payment to him in any action at law

in the name of the administrator of the trustee named in the bond. While we are inclined to think that the appellees had the right to maintain the suit in equity, in order to properly make their defense, we are not called upon to express an opinion upon that point, as the appellant at the bar of this court waives his assignment of error to the action of the lower court on his demurrer to the original and amended bills, and asks that the case be now considered and disposed of on its merits.

The real question is, do the facts in this case raise such a presumption of payment of the bond in controversy as to justify the decree appealed from?

There is a recognized distinction between the statute of limitations, and the presumption of payment from lapse of time, the condition of the parties, their relations towards each other, etc. In the former case the bar is absolute; in the latter, it is a rule of evidence, not of pleading, and simply raises a presumption of payment. It is founded upon the idea that, in the ordinary course of human affairs, it is not usual for men to allow real and well-founded claims to lie dormant an unreasonable length of time. *Starke*, Ev. 72. Those who sleep upon their rights have never met with encouragement from a court of equity.

A brief statement of the facts disclosed by the record will suffice to show the wisdom of this rule, and the justice of its application in determining this controversy.

John H. Thompson, the obligor in the bond sued on, was a wealthy bachelor, living in the county of Loudoun, worth at the date of the bond, in assessed values, \$50,000, and at the time of his death in 1884 \$120,000. He is shown to have been a successful and prudent business man, prompt in the payment of every obligation, and died without owing a dollar, unless the claim here asserted is an outstanding liability against his estate.

William Clendenning, the husband of Elizabeth A. Clendenning, the beneficial payee in said bond, was a member of a firm of cotton brokers in Baltimore, and appears to have been the only member of that firm who had any considerable means. In April, 1871, this firm failed for a large sum of money, over \$60,000, and bankruptcy stared William Clendenning in the face. Mrs. Clendenning was a favorite cousin of John H. Thompson, and through her influence said Thompson came to the rescue of her husband, and undertook to settle this large indebtedness with the creditors of the Baltimore firm. To this end William Clendenning conveyed to John H. Thompson property valued at about \$15,000, including two farms in Loudoun county valued at \$12,160. After this Thompson raised large sums of money, having two notes of \$10,000 each discounted at one time, at the Loudoun National Bank, and proceeded to compromise and settle the debts of William Clendenning growing out of the failure of his

firm, at 35 cents on the dollar. As Thompson would settle these debts, he would take an assignment of them to himself, and in March, 1872, William Clendenning confessed judgment in favor of John H. Thompson for \$40,343; Thompson holding, besides this judgment, a large amount of other indebtedness of Hough, Clendenning & Co., which he had settled. From the date of this failure to the time of his death, the evidence shows that William Clendenning was hard pressed for means. There is nothing in the record to show that Mrs. Clendenning was worth any estate of her own, unless the bond in question was an outstanding, subsisting obligation.

If this bond was a living obligation in April, 1871, in the hands of Mrs. Clendenning, against her wealthy friend and relative, when she was appealing to him to come to the aid of her husband, in his great financial stress, it would at least seem probable that it would have formed part of the scant assets furnished by Clendenning and his wife with which to avert the tremendous load of debt which was about to overwhelm them.

Mrs. Clendenning died the 29th of April, 1879, leaving no children, and her husband surviving. Whatever may be said as to the power of William Clendenning to have converted this bond to his own use during his wife's lifetime, certain it is that from the time of her death it was his, not only as her sole distributee, but as her legatee under the terms of a will left by her giving her property to him. That Mrs. Clendenning left no property would seem to be plainly indicated by the fact that William Clendenning never had her will recorded, and never qualified as her administrator.

It appears from the evidence that John H. Thompson successfully carried out his scheme in aid of the Clendennings, and with most gratifying results to William Clendenning, for on the 27th of November, 1879, and again on the 23d of December of that year, more than eight years after Thompson had undertaken the task, and after innumerable transactions growing out of this and other matters, these two neighbors got together and made a full and complete settlement of all outstanding matters between them.

As a result of this settlement Thompson marked the large judgment he held against Clendenning satisfied, and reconveyed to him the land in Loudoun county, which Clendenning had conveyed to Thompson when he undertook the settlement of his debts, and, upon final accounting of everything, it was ascertained that Clendenning owed Thompson a balance of \$5,000, which was closed by Clendenning executing his bond for said \$5,000, payable in 10 years, with interest, and securing the same by a contemporaneous deed of trust on the real estate thus reconveyed to him.

At the time this settlement was made, Mrs. Clendenning was dead, and William Clenden-

ning was the absolute owner of the bond in controversy, and it is incredible that, in making this settlement, covering a number of years, and innumerable transactions, he would have closed it, and executed his bond to John H. Thompson for the sum of \$5,000 as the final balance due him, when at that very time he was the owner of a bond against Thompson, amounting, principal and interest, to about \$6,000. In answer to this it is said that, at the time of the settlement, Clendenning did not know of the existence of the bond.

That Mrs. Clendenning, a faithful wife as the record shows, ever ready to aid her husband, could have been, during all those years of financial trouble, the owner of a solvent bond against her wealthy relative for \$3,500, and accumulating interest, without her husband knowing it or ever hearing of it, is so foreign to the ordinary and usual experience of life that it cannot be accepted as a sufficient explanation for the bond not being forthcoming when Clendenning made the settlement with Thompson and executed his bond for \$5,000 as the balance due, especially when that explanation is offered by strangers without knowledge of the facts, and not by Clendenning himself.

The record shows that William Clendenning lived until January 14, 1883, nearly four years after his wife's death, and died in absolute ignorance of the existence of this bond as an outstanding debt against John H. Thompson. Before his death, to wit, on March 8, 1882, he executed to John H. Thompson another bond for \$372, and on the 5th of October, 1882, still another bond for \$300.

S. D. Leslie and W. D. Thompson qualified as executors of William Clendenning, deceased, and on the 30th day of March, 1883, they paid to John H. Thompson \$5,778.83 in full discharge of the three bonds,—\$5,000, \$373, and \$300, with unpaid interest,—held by him against their testator's estate.

The weight of evidence shows that this payment was made after the bond in question had been found by W. D. Thompson, one of the executors and a legatee of William Clendenning, in an old portfolio of Mrs. Clendenning, with some cook receipts and other valueless papers. This large payment to Thompson was also after he had heard of the finding of this bond, and had declared to Clendenning's executors that the bond was settled long ago, and belonged to him.

The weight of evidence indicates that the executors of Clendenning understood that this bond had no valid existence, and should be surrendered to Thompson. Leslie, one of the executors, did surrender to him another bond for \$600, perfect on its face; which had been executed by Thompson to Clendenning, and found among the latter's papers.

John H. Thompson died February 14, 1884, nearly one year after this bond was found, and yet it was never shown to him, or payment demanded. He left an estate worth

\$120,000, to settle which a suit was brought in Loudoun county. Under a decree in that suit, a call was made by a master commissioner for creditors of Thompson to come forward and prove their debts against his estate. Not one dollar of debt was presented. The executors of Clendenning never presented this bond to the commissioner to be audited, and made no demand upon the executor of Thompson for it.

Thus matters stood until March 13, 1888, within 1 month and 7 days of the absolute statutory bar of 20 years, and 4 years after the death of John H. Thompson, when this suit was instituted.

There are many other circumstances, disclosed by the record, which indicate that this bond is not a valid outstanding obligation against the estate of John H. Thompson. It would, however, extend this opinion to an unnecessary length to recite the facts further. Enough has been stated to justify the conclusion that the appellants are not entitled to the relief sought.

The circumstances of this case, together with the relations of the parties, the transactions between them, laches in the assertion of the claim, and lapse of time, are not only sufficient to raise the presumption of payment, but they lead the mind without difficulty to the conviction that this bond has long since been settled.

It is a wise and salutary rule that forbids us to encourage stale claims. The peace and repose of society depend upon the judicious application of this principle.

No man's estate would be safe, unless the door was at some time, and under some circumstances, closed against demands upon it.

The view taken of this case makes it unnecessary to consider other interesting questions, suggested in the petition for appeal and in argument.

The decree appealed from is right, and must be affirmed.

KEITH, P., not sitting.

(31 Va. 458)

FILLER v. TYLER.¹

(Supreme Court of Appeals of Virginia. June 13, 1895.)

JURISDICTION ON APPEAL—RIGHTS OF MARRIED WOMAN—CHARGING SEPARATE ESTATE.

1. An appeal will not be dismissed on the ground that certain claims were assigned collusively, for the purposes of jurisdiction, when such fact is not made to appear.

2. The equitable separate estate of a married woman is the creation of a court of equity, and an injunction will always be granted where necessary to protect, aid, or enforce such equitable estate or interest, even though she may have a complete remedy at law under section 2999 of the Code. The jurisdiction which courts of equity had prior to the enactment of a statute conferring like jurisdiction upon courts of law is not taken away by such statute, unless the statute uses restrictive or prohibitory words.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

3. A married woman who unites with her husband, by deed of trust, in charging her inherited lands with the individual debts of her husband, is his surety, and entitled to all the rights of a surety, in the absence of any agreement to the contrary.

4. Where it appears that a married woman allowed her land to be mortgaged for her husband's debts, and that she was his surety, she will be entitled to the relief of a surety, although the bill proceeds mainly upon other grounds, in asking relief.

5. The contracts of a married woman can only be enforced against the statutory or equitable separate estate which she held at the time of entering into the contract, or so much thereof as she owns when decree is rendered, and not against her separate estate which was acquired after the time of making the engagement.

Appeal from circuit court, Loudoun county; James Keith, Judge.

Bill by Mrs. Douglas Tyler against one Filler, for injunction. Decree for plaintiff, and defendant appeals. Affirmed.

Alexander & Tebbs, for appellant. W. E. Garrett, Eppa Hunton, Jr., and W. H. Payne, for appellee.

BUCHANAN, J. The first question to be disposed of upon this appeal is whether or not this court has jurisdiction of it.

The appellant is the owner of two debts by judgment, neither of which amount to the sum of \$500, but together amount to more than that sum. When the suit was instituted he was the owner of only one of the judgments, but before the decree was rendered in the cause, settling the rights of the parties, he had become the owner of the other judgment, by assignment. It is alleged in the pleadings of the appellee that the assignment was not made in good faith, but was obtained merely for the purpose of giving the appellant the right of appeal. If it was true that the assignment was not obtained in good faith, and was merely colorable, in order to give the right of appeal, this court would not have jurisdiction; but, in order to defeat its jurisdiction, the fact that the assignment was not made in good faith must be made to appear. *Fink v. Denny*, 75 Va. 603, 667, 668; 2 Bart. Ch. Prac. 1113. The assignment purports, upon its face, to be for value, and is under seal, and must be presumed to have been made in good faith, in the absence of evidence to the contrary. The motion to dismiss for want of jurisdiction must therefore be overruled.

The appellant insists that his demurrer to the original bill ought to have been sustained, because the appellee had a complete and adequate remedy at law.

The bill was filed by the wife of Douglas Tyler to enjoin the sale of certain personal property, of which she claimed to be the equitable owner, and which had been levied upon, as the property of her husband, under executions issued upon the judgments owned by the appellant.

The bill alleges: That she and her hus-

band were married in the year 1869. That her parents died soon afterwards, and that from them she inherited real estate of the value of \$50,000, and personal estate of the value of \$10,000, which came into the possession of her husband. That he had little, if any, property of his own, and was a man without business capacity. The result was that he had squandered the greater part of the personal property, and become heavily indebted. That in the year 1885 she agreed with her husband to convey in fee one of her two tracts of land, inherited by her as aforesaid, to satisfy certain individual debts of her husband, and to secure certain other debts which he owed, and that in consideration thereof, and contemporaneously therewith, he undertook to surrender and secure to her her inherited property, real and personal, free from his debts. That pursuant to this agreement she united with him in executing three deeds of trust upon her lands to secure his individual debts to the amount of \$18,000. The first was executed in 1885, for \$13,000; the second, in 1888, for \$1,500; and the third, and last, in 1890, for \$3,500. Contemporaneously with the execution of the last-mentioned deed of trust, and pursuant to the agreement aforesaid, her husband conveyed to a trustee, for her benefit, all the right, title, and interest which he had in the said real estate, together with the personal property which belonged to him, or which he had any interest in, upon the lands, including all stock, farming utensils, and furniture. This deed was duly recorded. She further alleges, among other things, that the amount for which she had bound her lands by uniting in the deeds of trust was much more than the value of her husband's marital rights or interest in her property; that in making such settlement, independent of their agreement, he was only doing what a court of equity would have compelled him to do; that in uniting in the deeds of trust, and thus charging her property with the payment of her husband's debts, she became his surety, and is entitled to all the rights of a surety; that her husband is hopelessly insolvent; that the personal property settled upon her has been levied on to satisfy the judgments of the appellant; that she is threatened with a multiplicity of suits; and that in order to prevent such sale, and to avoid such threatened litigation, she has brought this suit, and desires to have all matters connected therewith litigated, and, upon these grounds, prays for an injunction to prevent a sale under the executions of the appellant, and, upon a hearing of the cause, asks that the property embraced in the deed of settlement be decreed to be hers, and for general relief.

The demurrer to the bill, which, appellant insists, the circuit court erred in overruling, is based upon the ground that section 2990

of the Code of 1887 provides a complete and adequate remedy at law, and that a court of equity has no jurisdiction of the case.

Even if all the relief to which Mrs. Tyler was entitled, upon the facts stated in her bill, could have been had in a court of law, under the section of the Code referred to, a court of equity would still have had jurisdiction. The equitable separate estate of a married woman is the creature of a court of equity, and an injunction will always be granted, where necessary, to protect, aid, or enforce any equitable estate or interest which she may have. 3 Pom. Eq. Jur. § 1345. Courts of equity, having such jurisdiction before the enactment of the statute now found in section 2909 of the Code of 1887 (Revisers' Report of Code 1849, p. 765, note), still retain it, although the statute may furnish a complete and adequate remedy at law. Courts of equity, having once acquired jurisdiction, never lose it because jurisdiction of the same matters are given to law courts, unless the statute giving such jurisdiction uses prohibitory or restrictive words. 1 Bart. Ch. Prac. 60, 61. The circuit court did not err in overruling the demurrer.

Another error assigned is that the circuit court erred in sustaining the validity of the deed of settlement.

The record shows, as stated above, that Mrs. Tyler had united in three deeds of trust, charging the land inherited from her parents with the payment of debts amounting to \$18,000, of which sum more than \$16,000 remained due and unpaid. It further shows that her husband was 60 years of age, and is utterly insolvent; that the annual rental value of her lands is \$1,500; and that the personal property embraced in the deed of settlement, and levied on, was worth about \$100 more than the appellant's debts.

Mrs. Tyler does not attempt to prove the agreement between herself and husband set up in the bill, and her right to relief upon that ground is wholly unsupported, and was abandoned in argument by her counsel.

She relies entirely, for relief, upon the ground that, when she united with her husband in each of the three deeds of trust charging her maiden lands with her husband's individual debts, she became the surety of her husband, and that she is entitled to all the rights of surety, and that since her lands are bound for, and will have to be subjected to, the payment of those debts, which are greater in amount than the value of her insolvent husband's rights in her lands, the conveyance made for her protection is valid and binding.

The record shows sufficiently, we think, that the debts secured by the deeds of trust were the individual debts of the husband. At least, it appears that the notes evidencing such indebtedness were his individual notes; and in the absence of proof that the money for which they were given went into the hands of the wife, for her own use, as her separate estate, the presumption is that the debts secured are

the debts of the husband. *Huntingdon v. Huntingdon*, 2 White & T. Lead. Cas. Eq. pt. 2, p. 1929; *Clancy, Mar. Wom.* 589, 590.

It also shows that the amount of the husband's debts charged upon the wife's lands is greater than the value of the property conveyed by the husband for her protection. If, therefore, the wife can be considered as the husband's surety, and as entitled to the rights of a surety, against the husband and his creditors, the conveyance made for her benefit must be sustained.

It is well settled in this state that, where a wife unites with her husband in conveying her maiden lands absolutely, the presumption is that she gives to her husband all her interest therein; and it is insisted that the same presumption arises when she unites with her husband in charging her lands with the payment of his debts, and that she does not thereby become his surety, unless there is an express agreement to that effect.

Counsel do not refer to, nor has the court, in its researches, been able to find, any decision of this court upon this question. It was decided in England at an early day, viz. in 1702, in the case of *Huntingdon v. Huntingdon*, 2 White & T. Lead. Cas. Eq. pt. 2, p. 1922, that where a wife unites with her husband in putting a mortgage upon her estate of inheritance for the benefit of her husband, her estate was only a surety for his indebtedness.

In the English notes to that case it is said that it is a well-established general rule that, whenever husband and wife mortgage her estate of inheritance for the benefit of her husband, the wife or heir will be entitled, after the death of the husband, to have it exonerated out of the estate of the husband, real and personal, her estate being only considered as a surety for his debt. Even, it is said, a creditor of a wife may, upon the refusal of her representatives, file a bill to obtain such exoneration; and a number of cases are cited to sustain the statement made in the note, including decisions made by Lord Hardwicke and Lord Eldon.

Lord Chancellor Westbury, in the case of *Gleaves v. Paine* (decided in the year 1863) 1 De Gex, J. & S. 87, 95, said: "The estate of the husband being mortgaged, in the manner here described, for the husband's debt, the wife unquestionably assumes, in the eye of a court of equity, the character of a surety for the husband. Properly speaking, she is not a surety, but she is so called, by analogy. She has title to call upon her husband to exonerate her estate from the debt."

The court of appeals of New York, in such cases, treats the wife, or her estate, as the surety of the husband, and, as do the English courts, holds that she is entitled to all the rights of a surety.

In the case of *Bank v. Burns*, 46 N. Y. 170, 174, it was said: "The property of the wife having been mortgaged to secure the debt of her husband, she occupied the position of

a surety, with all the rights, legal and equitable, incident to that relation; and the defendants, having succeeded, by inheritance, to the estate and interest of their mother, occupy the same position, and are entitled to every defense which could have availed to the original mortgagor, had she lived. *Gahn v. Niemcervicz*, 11 Wend. 312; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135; *Smith v. Townsend*, 25 N. Y. 479."

In *Loomer v. Wheelwright*, 3 Sandf. Ch., at page 135, it was said: "I see no reason why a different rule should be applied to the wife's case from that which is applied in other instances of principal and surety. If I mortgage my farm to secure my friend's debt, and the creditor know it is my farm, I become surety for my friend, and the creditor is bound to respect that relationship. The law indulges him in no presumption that I intend to make a gift to my friend, or that the debt was secured in some way for the benefit of my property. Why should such a conjecture or presumption be applied to the wife, in order to disparage her claim as surety? If there should be any different rule, it ought rather to provide an inference in her favor than to strain a point against her."

Clancy, in his work on the Rights of Married Women, says: "If wife join her husband in a mortgage of her real estate (also of her separate estate) for his debt, she will be considered, in equity, as his creditor." *Clancy, Mar. Wom.* 589.

"Where a wife," he says, "joins her husband in a mortgage of her estate for his debt, the inference drawn by a court of equity from these circumstances is that she intends to be repaid; and, even though the equity of redemption should be reserved to the husband and his heirs, still there is a resulting trust to the wife, after the objects of the mortgage have been satisfied." *Clancy, Mar. Wom.* 590; 1 *Bish. Mar. Wom.* § 604.

The strongest reason urged against holding that the wife, under such circumstances, should be treated as a surety, is that it will encourage the perpetration of frauds upon the part of husband and wife. The opportunity for fraud in cases where the wife unites with her husband in charging her real estate with his individual debts cannot be very great, since her title to her lands will generally appear of record, as will also the mortgage or deed of trust charging them, and the creditors of the husband will have all the necessary means of ascertaining the ownership of the lands, and the character of the charges thereon. But, if it were otherwise, the wife cannot be deprived of her rights simply because the relation between her and her husband may enable him the more easily to defraud his creditors. The English courts, as above shown, treated her, in such cases, as a surety, when the rules of the common law prevailed in all their rigor, and the rights of the wife were much less liberally dealt with than now.

Both upon principle and precedent, we think that a married woman who unites with her husband, by mortgage or deed of trust, in charging her inherited lands with the individual debts of her husband, should be considered as the surety of her husband, and entitled to all the rights of a surety, in the absence of any agreement to the contrary.

In this case the consideration furnished by the wife was ample for the settlement made upon her by her husband, and the circuit court rightly held that the deed of settlement was valid.

It is claimed by the appellant that the settlement made upon Mrs. Tyler by her husband cannot be sustained upon the ground that she was his surety, because no such case is made in her bill. It is true, the bill is chiefly based upon the agreement between her and her husband alleged to have been made in the year 1885; but the facts which show that she was her husband's surety are fully stated in the bill, and it is also distinctly alleged that she was his surety, and she asks for all the protection to which she is entitled as surety. It would have been better pleading to have stated her case as surety more fully, but we think the allegations and prayer of the bill are sufficient to entitle her to the relief granted her by the circuit court.

The appellant insists that if it be held that such conveyance is valid, and that Mrs. Tyler became the owner of the property thereby conveyed for her own separate use, free from the debts of her husband, still she is bound for the judgment of the Patapsco Guano Company against her husband and the appellant, and which has been paid by the latter, because the note upon which that judgment is founded is the joint note of her husband and herself. This assignment of error cannot be sustained. When she signed the note upon which the appellant's judgment is founded, she owned no separate estate. This note was executed prior to July, 1890, when the deed of settlement was made. The agreement set up in the bill between Mrs. Tyler and her husband, by which he undertook to make a settlement upon her, was prior to the execution of the note; but that agreement was not proved, and no rights were acquired under it by the wife. Unless the wife had the power to charge her separate estate acquired after the note was executed upon which appellant's judgment was founded, the note was a mere nullity, as to her. The agreements of a married woman differ from contracts proper, inasmuch as they give rise to no personal remedy against the married woman, but only to a remedy against her separate estate.

This court held in *Crockett v. Doriot*, 85 Va. 240, 3 S. E. 128, that the statutory separate estate of a married woman could not be subjected for her engagements entered into prior to the acquisition of such estate. There does not seem to be any reason why the rule should be different in the case of equitable separate estate.

The ground upon which courts of equity have subjected her equitable separate estate for her engagements has been that both she and the party with whom she made her engagements dealt with reference to her existing separate estate. Mr. Pomeroy lays down what seems to be the correct rule upon the subject, as follows: "If a married woman, having separate estate, enters into an engagement which, if she were a feme sole, would constitute a personal obligation against her, and in entering into such engagement she purports to contract, not for her husband (i. e. not in behalf of her husband, as his agent), but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she is contracting has the right to make her separate estate liable." 3 Pom. Eq. Jur. § 1121.

Tested by this rule, it is clear that the equitable separate estate acquired after her engagements had been entered into cannot be subjected for their payment, for neither she nor the party with whom she entered into her engagements can be presumed to have dealt with reference to what did not exist when the engagements were made.

We are of opinion that the contracts or engagements of a married woman can only be enforced against the equitable separate estate which she held at the time of entering into the engagement, or so much thereof as she owns when decree is rendered, and not against equitable separate estate which was acquired after the time of making the engagement.

We are of opinion that there is no error in the decree complained of, and that it should be affirmed.

KEITH, P., not sitting.

(91 Va. 492)

LAGORIA et al. v. DOZIER.¹

(Supreme Court of Appeals of Virginia. June 13, 1895.)

DEED EXCHANGING LAND—CONSTRUCTION—EJECTMENT—EVIDENCE OF TRUST—ADVERSE POSSESSION—AS BETWEEN COTENANTS—EVIDENCE.

1. A deed for the exchange of real estate recited that R., one of the parties, owned a certain lot, and that the other parties (H. and his wife) owned another lot; that H. and wife, in consideration of R.'s lot and \$700, deeded their lot to R., and R. granted his lot without naming any grantee. *Held*, that the title to the lot formerly owned by R. was vested in H. and his wife jointly, although the title to the lot given by them in exchange stood in H. alone.

2. In an action of ejectment, in which one party claims under a deed to H. and wife, evidence that the consideration for the deed passed from H. alone is inadmissible.

3. The fact that a deed by a husband and wife recites that the land is the same piece which was sold and conveyed to the husband by a certain deed is not inconsistent with a

construction of the deed so referred to as being to both the husband and the wife.

4. The receipt of profits and the payment of taxes by a cotenant is not such an ouster of another cotenant as to give rise to adverse possession.

Error to corporation court of Norfolk.

Writ of error by one Lagoria and others to a judgment in favor of one Dozier. Affirmed.

Walke & Old, for plaintiffs in error. Loyall & Taylor, for defendant in error.

KEITH, P. This is a writ of error to a judgment of the corporation court of the city of Norfolk rendered in an action of ejectment. The record discloses the following facts: On the 31st of August, in the year 1860, a deed was entered into between Robert Rhea, of the one part, and Clement Hill and Mahala Hill, his wife, of the city of Norfolk, of the other part. The deed is as follows: "This deed, made this thirty-first day of August, in the year eighteen hundred and sixty, between Robert Rhea, of the city of Norfolk, of the one part, and Clement Hill and Mahala H., his wife, of the city of Norfolk, of the other part. Whereas, the said Robert Rhea is seised of a certain lot of land, lying and being situate in the city of Norfolk, on the corner of Chapel and Falkland streets, and bounded as follows: Beginning at a point three feet from the line of the lot of said Robert Rhea, now occupied by Mrs. Jane Ashley, and running on a line parallel to, and three feet distant from, the line of the said lot now occupied by the said Ashley (for the purpose and so as to leave a three-foot lane between the lot now conveyed and the said remaining lot of Robert Rhea), to the line of the lot of James E. Barry; thence eastwardly along the line of the lot of the said Barry to Chapel street; thence along the line of Chapel street to its intersection with the line of Falkland street; thence along the line of Falkland street to the place of beginning. And whereas, the said Clement Hill and Mahala H., his wife, are seised of a certain lot in the city of Norfolk, lying and being on the corner of Church and Moseley streets, bounded as follows: Beginning at the line of Benjamin Hill at its intersection with Church street, and running along the line of the lot of the said Benj. Hill one hundred and nine feet to the line of the lot of Mary Brown; thence along the line of the lot of Mary Brown thirty feet to Moseley street; thence along the line of Moseley street, to the intersection with Church street; thence along Church street to the place of beginning. And whereas, the said parties of the first and second parts are desirous of exchanging their said lots, the one for the other, and upon the terms and for the considerations hereinafter expressed: Now, this deed witnesseth that the said Robert Rhea, for and in consideration of the premises and the grants and covenants hereinafter mentioned, doth grant, with general warranty, all that lot of land lying and being in the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

city of Norfolk, on the corner of Chapel and Falkland streets, as hereinbefore described, with the appurtenances, reserving to him, the said Rhea, the three-foot lane next his said lot, now occupied by Mrs. Jane Ashley. And this deed further witnesseth that the said Clement Hill and Mahala H., his wife, for and in consideration of the premises and grant and covenants herein contained, and the sum of seven hundred dollars to them in hand paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth grant, with general warranty, unto the said Robert Rhea, all that lot of land, with the appurtenance thereto belonging, lying and being in the city of Norfolk, on the corner of Church and Moseley streets, and bounded by the lots of Benjamin Hill and Mary Brown, hereinbefore described. And the said parties of the first and second parts do mutually covenant and agree that they have good right to make conveyance of the lots of land hereby conveyed to each other; that they have done no acts to incumber the said lots; that they shall have, respectively, quiet possession of said lots, free from all incumbrances; and that they will mutually execute such further assurances of the said land as may be requisite. Witness the following signatures and seals: Robert Rhea. [Seal.] Clement Hill. [Seal.] Mahala H. Hill. [Seal.]

This deed fulfills all the essential conditions of a deed of exchange. The only peculiarity about it, and the one out of which this controversy arises, is that it wholly omits to name any grantee from Robert Rhea of the lot or parcel of land conveyed by him; but I apprehend that this omission may be supplied, and full effect may be given to the instrument, if, upon an inspection of the deed, enough shall appear to enable the court to say in whom the title to the lot vested. It is a familiar principle that courts will so construe the contracts of parties *ut res magis valeat quam pereat*. Applying this rule, and remembering always that it is the duty of courts to give effect to the true intent of the parties, ascertained, not by straining the signification of words so as to reach what to the court may appear a more rational or more equitable construction than that to be deduced from the language actually employed, but by construing the language used in accordance with its common and usual acceptance, and searching the entire writing in which the parties have seen fit to set out their agreement.

Confirming our view to the deed itself, we find that it declares that Clement Hill and Mahala, his wife, are seised (that is to say, possessed) of a freehold in a lot of land, describing their interest therein in the precise terms employed to describe the interest of Robert Rhea in the lot conveyed by him. Robert Rhea is named as "party of the first part." Clement Hill and Mahala, his wife, are named as "parties of the second part."

The lots owned by them are described, and the instrument states that the parties of the first and second parts, being seised of their respective lots, desire to exchange them, the one for the other; Robert Rhea paying, in addition, \$700 in cash to Clement Hill. Apt words to convey the lots are employed, and the usual covenants are introduced; the only thing unusual about the paper being, as before observed, the omission of the names of the grantees from Rhea. This being a deed of exchange, the party who granted to Rhea must, of necessity, be his grantee. The deed describes Clement Hill and Mahala, his wife, as the parties of the second part (not the one more than the other); and unless some rule or principle of law or of construction can be shown which, under such circumstances, requires the exclusion of Mahala, I can see no reason, in the nature of things, why her name should not be introduced as well as his. They are declared to be seised of the lot which they conveyed to Rhea; they (the two together), and not either one of them, by the express terms of the deed, are the parties of the second part; and it is with them, as parties of the second part, and not with either of them individually, that the party of the first part contracts. And finally, "the said parties of the first and second parts do mutually covenant and agree that they have good right to make conveyance of the lots of land hereby conveyed to each other; that they had done no acts to incumber the said lots; that they shall have, respectively, quiet possession of said lots, free from all incumbrances; and that they will mutually execute such further assurances of the said land as may be requisite." It is to them as parties of the second part, and not to either of them individually, that Rhea must be held, under the terms of this deed, to have conveyed the lot. Does this result violate any rule or policy of the law? Is it a thing unheard of that a man should thus make provision for his wife? May not the relinquishment of her dower interest in the more valuable parcel of land have furnished the consideration for the interest thus vested in her by this deed? If this be the legitimate construction to place upon this deed, we have nothing to do but so to decide. But the idea seems to be entertained that this view does not reflect the intent of the parties, because, as is alleged, the whole consideration moved from Clement Hill. In the first place, there is nothing to show that such an intention existed as that Clement Hill, and he alone, should be the grantee in fee. That assumption, if not wholly gratuitous, rests for its sole support upon the deed from Capps to Hill set out in the record. If the deed of August 31, 1860, as written, does not accurately set forth the contract of the parties; if, by mutual mistake, it fails to contain that which the parties intended it should contain,—then I apprehend that a bill in equity is the proper mode by which to seek reforma-

tion of the instrument. Certainly, a court of law is powerless to furnish any such relief. We cannot, in the construction of this deed, look outside of its context. It is plain and unambiguous. To seek elsewhere for its true construction would be, in effect, to reform it. If, by consulting other papers filed in the record, the construction of this deed is to be controlled, then these papers are, in my judgment, inadmissible for any such purpose; for that would be, in effect, not to interpret this deed, but to make a new one. Looking to this deed, and to this deed only, in order to ascertain the intention of the parties, there would seem to be no room for doubt that the names of both Clement Hill and Mahala, his wife, must be read into the deed, as grantees therein. This being the legal effect of the deed, it would seem to be clear that it vested the legal title jointly in them. If this be so, then any evidence showing, or tending to show, that the consideration for the conveyance by Robert Rhea moved from Clement Hill only, and that, therefore, the conveyance must be construed as intended for his benefit only, would be, in effect, to set up a resulting trust in Clement Hill; and this, I apprehend, cannot be done in a court of law. If, therefore, we were permitted to look beyond the instrument for evidence to aid in its construction in a case in which the paper to be construed presented no ambiguity, the only effect of the evidence to which our attention has been invited, to wit, the deed from Wilson Capps to Hill, dated the 6th of October, 1857, would be to show that the consideration for this exchange consummated by the deed under consideration moved from Clement Hill, and therefore created, or tended to create, a resulting trust in him. But, inasmuch as a court of law is incapable of dealing with interests of this nature, it would avail the plaintiff nothing in this case.

Nor do we think that the deed of the 28th of September, 1860, from Clement Hill and his wife to George Newton, throws any light, by which we can be guided, upon the difficulty in this case. It is true that deed conveys a part of the land which was conveyed by Robert Rhea to Clement Hill by the deed under investigation, but there is nothing in the deed to Newton inconsistent with the construction placed upon the deed from Robert Rhea to Clement Hill and wife by the corporation court. The deed to Newton recites that "it is the same piece or parcel of land which was sold and conveyed to the said Clement Hill by Robert Rhea by deed of record in the clerk's office of the court of the corporation of the city of Norfolk,"—the fact being that it is not the same piece or parcel of land which was so sold and con-

veyed, but only a portion of it; and, even though Clement Hill and Mahala Hill, his wife, had been jointly seised of the undivided tract, the most that could be made of this deed is that Clement Hill and Mahala Hill, being so jointly seised, conveyed a part thereof to George Newton, the effect of which would be, with respect to the residue not conveyed, that Mahala Hill would be entitled to so much thereof as would make her share equal to that of her cotenant, he being charged in the partition (had such partition been made) with the portion thus sold. I am of opinion, therefore, that this assignment of error is not well taken, and that the corporation court did not err in holding that under the deed of the 31st of August, 1860, Clement Hill and Mahala, his wife, took a joint estate, in fee, in the lot of land conveyed by Robert Rhea.

The agreed facts in the case show "that Clement Hill was in actual, open, continuous, exclusive, and notorious possession of the land from the time of Mahala's death until he conveyed it to A. Lagoria; that during that time he received the profits, and paid the taxes; that A. Lagoria, and those claiming under him, have been in actual, open, continuous, exclusive, and notorious possession of the land from that time until the present." It appears that Mahala Hill died in 1864; that the plaintiff in error attained his majority on the 30th of April, in the year 1872; and that the deed to A. Lagoria of the land in controversy was made in August, 1881. Upon the death of Mahala Hill, there having been no issue born to her marriage with Clement Hill, her interest in this land vested in her son, as her sole heir, and he became tenant in common with Clement Hill. With respect to persons so situated, it is well settled that the possession of one, though exclusive, does not amount to a disseisin of the cotenant. As was said by Judge Marshall in *McClung v. Ross*, 5 Wheat. 116, "a silent possession, unaccompanied with any acts which amount to an ouster, or giving notice to the cotenant that his possession is adverse, cannot be construed into an adverse possession." It is held that the mere receipt of profits and the payment of taxes is not such an ouster. These principles seem to be thoroughly well established in this court. See *Rowe v. Bentley*, 29 Grat. 760; *Purcell v. Wilson*, 4 Grat. 16; *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157; *Creekmur v. Creekmur*, 75 Va. 436. We are therefore of opinion that the claim of adverse possession relied upon by the plaintiff in error is not, under the circumstances of this case, sustained. We are therefore of opinion that the judgment complained of must be affirmed.

(91 Va. 509)

**LIGHTFOOT'S ADM'R v. GREEN'S
ADM'X.¹**

(Supreme Court of Appeals of Virginia. June 13, 1895.)

**LIMITATION OF ACTION — ASSIGNMENT OF BOND—
RIGHT OF RECOURSE AGAINST ASSIGNOR—
PRESUMPTION OF PAYMENT.**

1. There is a recognized distinction between the statute of limitations, and the presumption of payment from the lapse of time, the condition of the parties, and their relations to each other. In the former case the bar is absolute. In the latter it is denominated "natural presumption of payment," and may be rebutted.

2. In July, 1875, G. assigned to L. the bond of W., but retained possession thereof, and agreed to remain bound to L., as assignor of the bond, and to collect the same without charge, and to account for the same, reserving the right to take such steps as he thought proper to enforce it. The bond was dated October 21, 1872, and was secured by real estate. L. died June, 1882; and G., April, 1884. *Held*, that the statute of limitations did not run against L., or his personal representatives, in favor of G., as long as the bond of W. was not barred by the statute, and G. lived, and was capable of performing the duties assumed by him under the assignment.

3. The lot upon which said bond was secured was sold in August, 1881, and purchased by G.; but it was not shown that L., who was old, infirm, and confined to his house, 12 miles from the place of sale, knew anything about the sale. *Held*, that G. occupied the position of trustee for L., and the statute did not begin to run from the time of said sale.

4. Prior to G.'s death, his son went into his office, and remained there until his death. The son testified that it was not probable that his father paid L. the amount of said bond after he (the son) went into the office; that after his father's death he undertook to arrange his papers, and file the receipts alphabetically; and that after the office was burned he found two receipts from L. to G., but neither referred to said bond. It appeared that G. was a careful lawyer, preserving all his receipts, and would hardly have paid said bond without taking a receipt. There was in evidence a copy of a general settlement between G. and L. in July, 1881, covering all transactions from 1860; but the bond was not mentioned, nor did G. list the bond for taxation as his assets. *Held*, that there was no presumption from said facts that G. had ever paid the bond.

Appeal from circuit court, Culpeper county.

Edward Lightfoot's administrator appeals from a decree against him and in favor of James W. Green's administratrix. Reversed.

Rixey & Barbour, for appellant. G. D. Gray, R. T. Green, and Jas. W. Green, for appellee.

CARDWELL, J. Edward Lightfoot held a debt against the estate of F. F. Henry, deceased, which debt on the 16th day of July, 1875, amounted to the sum of \$1,101, and for the accommodation of James W. Green, executor of F. F. Henry, deceased, took in settlement of his claim an assignment of a bond of Bettie M. Wevv to Green, dated the 21st day of October, 1872, for the sum of \$900, with interest from the date thereof at 8 per cent.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

per annum until paid, and payable one year after its date. This bond was secured, as stated in the assignment, by a lien on real estate and otherwise; the lien on the real estate consisting of a vendor's lien reserved and a deed of trust on a house and lot in the town of Culpeper conveyed by James W. Green to Bettie M. Wevv's trustee, and the other security spoken of appears to have been an assignment of Bettie M. Wevv's interest in some property or estate in the county of Fauquier, and the assignment referred to is in the following words, to wit: "For value received, I assign to Edward Lightfoot the bond of Bettie M. Wevv to myself, dated 2nd day of October, 1872, for nine hundred dollars (\$900.00), payable one year after date with interest from date, until paid, at the rate of eight per centum per annum, which bond is secured by a lien on real estate, and otherwise; and I agree to continue bound as assignor of said bond, to said Lightfoot, without his taking any steps to enforce the payment thereof; he leaving the said bond in my possession for collection in such manner as I think proper, and I agreeing to collect the same without fee, commission, or other charge, and to account to him for the whole amount of said bond; said Lightfoot, through John Lightfoot, having accepted of said assignment for my accommodation, in payment of his debts against the estate of F. F. Henry, deceased, of which I am the executor. James W. Green." Edward Lightfoot died about June, 1882, leaving a will appointing John T. Lightfoot, his son, his executor, and his wife, Ann V. Lightfoot, his executrix, but John T. Lightfoot alone qualified under the appointment. James W. Green died April 1, 1884, leaving a will appointing his wife, Ann S. Green, his executrix, and who duly qualified as such. After the death of Green, and in February, 1889, James L. Kemper, who had qualified as administrator d. b. n. c. t. a. of Edward Lightfoot, deceased, in the place and stead of John T. Lightfoot, who had been permitted to resign as executor, filed his bill of complaint, on behalf of himself and all other creditors of James W. Green, deceased, in the circuit court for the county of Culpeper, seeking to recover of Green's estate the amount due on the Bettie M. Wevv bond, assigned by Green to Edward Lightfoot, the assignment having been found by Gen. Kemper among Lightfoot's papers; but, before the hearing of this suit, Gen. Kemper was permitted to resign his office as administrator d. b. n. c. t. a. of Edward Lightfoot, deceased, on account of ill health, and R. P. Lake qualified as such, in his place and stead, and filed an amended and supplemental bill in the cause. Ann S. Green (in her own right, and as executrix of James W. Green, deceased), Bettie M. Wevv, George D. Gray (trustee for Bettie M. Wevv), and other necessary parties, were made parties defendant to both the original and amended bill; and Ann S. Green, in her own right and as executrix, demurred to and answered

both the original and amended bill, and filed her special plea of the statute of limitations, in which demurrer the plaintiff joined, and replied generally to the answer of Green's executrix, and her special plea. And the cause coming on to be heard upon these pleadings, together with the evidence for both plaintiff and defendant, the circuit court of Culpeper, by its decree entered at the September term, 1891, dismissed both the original and amended bill, with costs to the defendant Ann S. Green, in her own right and as executrix. From this decree an appeal was allowed R. P. Lake, administrator d. b. n. c. t. a. of Edward Lightfoot, deceased, to this court. The defenses relied on by the personal representative of James W. Green, deceased, are the statute of limitations, laches, and payment.

We come first to consider the plea of the statute of limitations. It will be observed that by the terms of the assignment of the Wevv bond by Green to Edward Lightfoot in payment of the debt held by Lightfoot against the estate of F. F. Henry, deceased, Green agreed to remain bound to Lightfoot, without Lightfoot's taking any steps to enforce the payment of the bond, and to collect this bond without fee, commission, or other charge, and to account to Lightfoot for the whole amount of the bond, giving as a reason for continuing to be so bound to Lightfoot, as assignor, that Lightfoot had accepted of the assignment for his (Green's) accommodation, in payment of Lightfoot's debt against the estate of F. F. Henry, deceased, of which Green was the executor; and it would therefore seem clear, from the nature of this obligation and undertaking, that the statute of limitations could not run against Lightfoot, or his personal representative, so long as the Wevv bond was not barred by the statute, and Green lived, and was capable of performing the duties assumed by him under the assignment. Assuming, then, that the statute of limitations began to run in favor of Green's estate from the date of his death, and treating the assignment as an agreement not under seal, this suit having been instituted in February, 1889, five years, the statutory limit to the right of action on such an agreement, had not elapsed. It is contended, however, that the house and lot upon which the Wevv bond was secured, situated in the town of Culpeper, having been sold under the trust deed in August, 1881, and purchased by Green, and the purchase money, \$600, paid by applying the same in part satisfaction of the Wevv bond, the statute of limitations began to run in favor of Green, to the extent, at least, of the \$600, as of that date. While it does not appear in this record that Edward Lightfoot, who was then in the eighty-second year of his age, and who was confined to his house, in the county of Madison, 12 miles from Culpeper Courthouse, knew anything of the sale of the house and lot, and its purchase by Green, we do not deem it necessary to express an opin-

ion as to whether or not the statute will begin to run in favor of an attorney collecting money for his client until the latter is in possession of knowledge of the collection, or might have acquired such knowledge, for the reason that when Green assigned the Wevv bond to Lightfoot the assignment carried with it the vendor's lien and trust deed on the house and lot securing the bond, and when Green purchased the property at the sale in August, 1881, with Lightfoot's money, he assumed the relation to his client of trustee, and held the property for Lightfoot's benefit, and continued bound to him, under the assignment, for the whole amount of the Wevv bond, as though the sale had not taken place; and the purchase of the property, the deed being to himself, could not, under the circumstances, be considered as a collection by Green as Lightfoot's attorney. Moreover, we think it is entirely reasonable to assume, from the fact that Green did not have this deed recorded, that he took this view of the transaction, and regarded this entire matter, as between him and Lightfoot, still unsettled.

As to the contention that Lightfoot and his personal representatives had been guilty of such laches as to deprive the plaintiff of the right to recover in this suit, we think this position wholly untenable. It will be observed that, by the very terms and conditions clearly expressed in the assignment and written by Green himself, there was nothing left for Lightfoot to do, as Green, his general counsel and intimate personal friend, and in whom, as this record shows, he placed implicit confidence, assumed to do everything needful to collect the Wevv bond, and to account to him (Lightfoot) for the full amount due thereon, reserving to himself the absolute control of the entire matter, and the right to exercise his own discretion as to what steps should be taken to enforce the payment of the bond. It would therefore seem clear that the equitable doctrine of laches has no application whatever to this case.

The only remaining question to be disposed of is, has this debt, due by Green to Lightfoot, by reason of this assignment, been paid? It is not asserted that the personal representative of James W. Green has made payment, but the contention is that from the condition of the parties, and their relations to each other, together with the lapse of time, the presumption of payment is raised, and is not repelled by the facts and circumstances proved in the record. There is a recognized distinction between the statute of limitations, and the presumption of payment from the lapse of time, the condition of the parties, their relations to each other, etc. In the one case the bar is absolute. In the other it is denominated "natural presumption of payment," and may be rebutted. Perkin's *Adm'r v. Hawkin's Adm'x*, 9 Grat. 656; *Hutsonpiller's Adm'r v. Stover's Adm'r*, 12

Grat. 588; *Updike's Adm'r v. Lane*, 78 Va. 136; *Booker v. Booker*, 29 Grat. 605; *Hale v. Pack's Ex'rs*, 10 W. Va. 145. There is certainly nothing in the lapse of time in this case to raise the presumption of payment, and the condition of the parties to the agreement of July 16, 1875, and their relations to each other, do not raise a presumption of payment that is not repelled by facts and circumstances proved on behalf of plaintiffs. Taking this view of the case, it is unnecessary to consider the intimation or charge of fraudulent and deceitful concealment of facts on the part of Green, but it is fair to say that we do not think that there is any evidence in the record to show that Green intended to defraud his client and friend, Edward Lightfoot, or to conceal from him any material fact affecting his interest. The fact that he failed to keep Lightfoot fully advised as to the status of the Wevv bond, and as to what was being done towards its collection, might have been, and doubtless was, due to the fact that he recognized himself as bound to Lightfoot for the whole amount of the debt, and fully understood and appreciated the relations that existed between them. As before stated, it is nowhere claimed in this record that the personal representative of Green has paid the debt asserted in this cause; and the principal witness examined on behalf of the defense is A. McD. Green, a son of James W. Green, who states that he went into his father's office in the fall of 1876, and remained with him until his death, and then frankly says that "it is possible, but scarcely probable," that the amount of this debt was paid to Edward Lightfoot after he went into his father's office, and, furthermore, that one of the first tasks that he undertook, after his father's death, was to arrange all of his papers in such manner that he could refer to them conveniently,—the receipts being filed by him for each year, together, and separated into alphabetical bundles. This was done before witness' office, in which his father's papers were, was burned, and witness did not remember having seen any paper showing settlement with Lightfoot of this Wevv bond; and while the bundle of receipts, "L," which were in the vault, were badly charred, if not totally illegible, he found after the fire, in this bundle, at least two receipts with the signature of Edward Lightfoot to them, but both referred to a general settlement between Green and Lightfoot, of July 18, 1881, and in which settlement the Wevv matter is not mentioned. This bundle of receipts, witness also says, he took with him to Gen. Kemper, and examined them, with Gen. Kemper, carefully. In the testimony of Gen. Kemper and other witnesses examined on behalf of the plaintiff, it is shown that James W. Green was a most careful and painstaking business man, and that it was highly improbable that he would have discharged this liability to Lightfoot without

taking up the assignment under which he was bound. Filed with the answer of defendant are statements made out by James W. Green, after 1875, showing for taxation his choses in action and his liabilities, and also a copy of an account showing a general settlement between Green and Lightfoot on July 29, 1881, of all transactions from 1860 to date of this settlement; and in neither of these papers is the Wevv matter mentioned, and hence they afford no aid in ascertaining whether or not this debt has been paid. If these statements and accounts can be considered as evidence at all, the account tends to show, rather than otherwise, that the debt had not been paid prior to July 29, 1881, and certainly there is no evidence of the slightest character that it was paid after that time; and from the date of the assignment, July 16, 1875, to the fall of 1876, when A. McD. Green went into his father's office, we find not even a circumstance or a transaction of any kind in proof to sustain a contention that the debt had been paid, and the only suggestion that the debt had been paid during that period is found in the deposition of A. McD. Green, in which he says that he was satisfied, upon investigation, that this assignment had been made as a mere temporary affair, and that the matter had been settled within a short time—probably within a few weeks—after the assignment was made. But he fails to give any reason for this impression. In fact, the very terms of the assignment, and the surrounding circumstances, negative at once the suggestion that it was made as a temporary affair. For the foregoing reasons, we are of opinion that there is error in the decree complained of; and it must be reversed, and the cause remanded to the circuit court of Culpeper county for such further proceedings therein as may appear necessary and proper, in accordance with this opinion.

(44 S. C. 324)

STATE v. OWENS.

(Supreme Court of South Carolina. June 22, 1895.)

HOMICIDE—VERDICT—INSTRUCTIONS—WAIVER.

1. An instruction that if the jury should find defendant guilty of murder they should write in their verdict the word, "Guilty"; if guilty of manslaughter, "Guilty of manslaughter,"—is correct. *State v. Faile* (S. C.) 20 S. E. 800, followed.

2. Where the prisoner's counsel informed the court that it was only necessary to charge on the crime of murder, and after the charge stated that the same was satisfactory, objection cannot be made on appeal that the court failed to charge that a special verdict might be found recommending defendant to the mercy of the court. *State v. Dodson*, 16 S. C. 463, followed.

Appeal from general sessions circuit court, Laurens county; James Aldrich, Judge.

Wash Owens was convicted of murder, and appeals. Affirmed.

N. B. Dial and Johnson & Richey, for appellant. O. L. Schumpert, for the State.

POPE, J. The appellant was convicted of murder at the February term, 1895, of the court of general sessions for Laurens county, in this state, and after judgment of death had been duly passed, he appealed to this court upon two grounds: (1) Because his honor erred in charging the jury: "You will write your verdict, Mr. Foreman, if you should find the defendant guilty of murder, just the one word, 'Guilty'; if guilty of manslaughter, 'Guilty of manslaughter.'" (2) Because his honor erred, after he determined to go on and charge the jury fully, in not charging the jury the law as to the punishment for murder, viz. that the jury may find a special verdict recommending the prisoner to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the penitentiary with hard labor during the whole lifetime of the prisoner.

From the record we learn that, just before beginning his charge to the jury, the circuit judge was assured by prisoner's counsel that it was only necessary in his charge to set forth the crime of murder, and at the conclusion of his charge prisoner's counsel assured him that his charge was satisfactory, except that such counsel desired the circuit judge to more fully explain what is meant in the law by a reasonable doubt. This was done by the circuit judge. It seems to us that the first ground must be dismissed under the ruling of this court in the recent case of *State v. Falle* (S. C.) 20 S. E. 800, 801. The second ground is ruled by the case of *State v. Dodson*, 16 S. C. 463, and must be dismissed.

It is the judgment of this court that the judgment of the circuit court be affirmed, and that the case be remanded to the circuit court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed. Let the remittitur herein be sent down forthwith.

(95 Ga. 87)

POPE et al. v. POPE (two cases).

(Supreme Court of Georgia. Nov. 26, 1894.)

WILLS—EFFECT OF CODICIL—CONTEST—WITNESS—EVIDENCE—INSTRUCTIONS.

1. If a paper, purporting on its face to be a codicil to an existing will which the testator had previously signed, refers to the will by date, and also, by mentioning certain of its provisions, unequivocally identifies it as the instrument to which the paper in question is intended as a codicil, it will be presumed that the testator, at the time of executing the codicil, knew the contents of the original will, and the due execution of the codicil will, under such circumstances, amount to a republication of the will, although the codicil is not actually attached to the will itself.

2. The validity of a paper purporting to be a deed and of a paper purporting to be a will, both of which had been signed by the same person, being the main question in issue, an assignment of error alleging that the court erred in allowing certain named witnesses "to testify with refer-

ence to the statements made by the testator with reference to the execution of the deed and the execution of the will," over a general objection that these witnesses were incompetent to testify "either as to what the testator said with reference to making the will or the deed," they being beneficiaries under the will, grantees in the deed, and parties to the case, and the party who executed these papers being dead, is too vague and indefinite for consideration and determination by this court.

3. It does not affirmatively appear that the court erred in admitting in evidence the bottle and the note, or the evidence as to the finding of the same. This evidence may have had some bearing on the questions in issue, and its probative force was for the jury.

4. Although, in charging on the law of duress, the judge read certain sections of the Code relating to this subject, and also to fraud and undue influence, not strictly pertinent or applicable, this was not in this case reversible error, it not being at all probable that the jury was thereby misled as to the real issues of fact presented for their determination.

5. The evidence in each case was sufficient to warrant the verdict rendered, and, as substantial justice has been done and the result has been approved by the trial judge, his refusal to set these verdicts aside will not be reversed.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

To the petition of Charles W. Pope, for the probate of the will of Thomas T. Pope, deceased, Martha J. Pope and others filed a contest. From an order admitting the will to probate, contestants appealed to the superior court, where the contest was tried with an action brought by contestants against petitioner by testator. From the judgment rendered, contestants in the former case and defendants in the latter case each bring error. Affirmed.

The following is the official report:

Charles W. Pope, as executor, offered for probate the will of Thomas T. Pope. Mrs. Martha J. Pope, widow of the deceased, T. U. Vaughn and others, children of a deceased daughter of T. T. Pope, and G. Y. Pierce and others, children of another deceased daughter of T. T. Pope, caveated the will, upon the grounds that he was non compos mentis; that the will was procured by C. W., J. T., and Neal Q. Pope, three of the sons of T. T. Pope, when T. T. Pope was very ill, and knew nothing about what was going on around him; and that C. W., J. T., and Neal Q. Pope were not satisfied with the will, but on July 1, 1891, prepared a deed, and procured the signature of T. T. Pope to it while he was still very sick and knew but little, if anything, of what was going on around him, in which deed it was endeavored to convey all of the real estate belonging to T. T. Pope to C. W., J. T., and Neal Q. Pope and certain others of their favorite brothers and sisters. By amendment, the grounds of caveat as to the mental and physical condition of T. T. Pope, and as to his signature not being of his free will, were added. The will gave to Mrs. Martha Pope, in lieu of dower, \$800; to the children of Mrs. Vaughn, \$500; and to the children

of Mrs. Pierce, \$500; and devised all the balance of testator's estate to C. W., J. T., and Neal Q. Pope, Lou Redding, Mamie Evans, and Mittie Mayson, testator's children, and Killie Mauldin, his grandchild. The will was dated May 15, 1891. By a codicil dated May 25, 1891, Mrs. Redding having died, \$25 were bequeathed to her representative for her burial expenses; and the share which would have gone to her under the will was bequeathed to C. W., J. T., and Neal Q. Pope, Mamie Evans, and Mittie Mayson. The ordinary found in favor of the proponent, and the caveators entered an appeal to the superior court.

By their petition to the superior court Mrs. Pope, the children of Mrs. Vaughn, and the children of Mrs. Pierce alleged: T. T. Pope died about July 23, 1891, the owner of 202½ acres of land,—lot 156 in the Seventeenth district of Fulton county, less about five acres previously sold off,—worth about \$20,000. He had several other heirs at law, to wit, C. W., J. T., and N. Q. Pope, Mrs. Redding, Mrs. Evans, Mrs. Mayson, and Killie Mauldin. He was more than 71 years old when he died. Before his last sickness he was healthy and strong in body and mind. He was taken sick early in April, 1891, his health became very much impaired in a very short time, and, about May 14, he was taken so dangerously sick that physicians to alleviate his sufferings administered from time to time a great deal of morphine or other opiates, under the influence of which to a greater or less extent he was kept from the time he was taken sick until his death. From the influence of the opiates and his suffering so much pain, his mind became and was from the time he became sick, and especially from the time he was taken so seriously sick, until his death, greatly impaired, and he was unable physically or mentally to attend to any kind of business. These facts were well known to his children, but, notwithstanding, C. W., J. T., and N. Q. Pope had a will prepared, dated May 15, 1891, while he was very ill and knew nothing about what was going on around him, and procured his signature to it. The substance of the will was then stated. The procurement of this will was a fraud upon T. T. Pope, and was not his act, but was a scheme upon the part of defendants to get the bulk of his property. At that time he was not expected to live more than a day or two, but, as it happened, he continued to live several weeks, during which time defendants, not being satisfied with the will, but preferring to get hold of the property without any charges against it, prepared and procured his signature to a deed, in which his entire real estate was conveyed to defendants. This deed was procured from him while he was very sick, and while his mind was so impaired that he was incapable of attending to any business and did not realize what he was doing. His personal estate

is not worth more than seven or eight hundred dollars, and he left no other realty, and petitioners are cut entirely out of participation in his estate by reason of the deed, unless it can be annulled and set aside. The defendants named were said other heirs of T. T. Pope, and C. W. Pope, as his executor, he having proved the will in common form and qualified as executor. The prayer was that the deed be set aside. From the copy deed attached it appears that it was executed July 1, 1891, upon an expressed consideration of \$10 and love and affection to the grantees. By amendment petitioners alleged: At the time T. T. Pope signed the deed, if he did sign it, he had been sick about six or eight weeks. On May 15, 1891, he was taken very seriously sick and from that time to his death, July 20, 1891, his strength gradually gave way, and on July 1, 1891, he was exceedingly feeble both in body and mind. From May 15 until his death his three eldest sons, C. W., J. T., and N. Q. Pope, remained with him the greater portion of the time, and exercised great influence and control over him, and were able to and did influence him to do whatever they desired him to do. They confederated to obtain from him the deed, and did fraudulently procure it from him, while his mind was thus weak, and while his sickness was of the severest type; and thereby defrauded him out of the land. There was no consideration passing from the vendees to him; but, if they did pay him the \$10, the price was totally inadequate, the property being worth at least \$20,000. By agreement, the issues on the caveat and the deed were tried together. Separate verdicts were rendered, the jury finding that the deed be canceled, but finding in favor of the will. The caveators moved for a new trial in the appeal case upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in charging: "If, on May 25, 1891, T. T. Pope, deceased, executed a codicil to his will of May 15, 1891, and in this codicil referred to and recognized the previous will as his will, this will amounts to a republication of the original will, and would render such original will valid, provided the codicil was executed voluntarily by the testator and he had a sound, disposing mind, and the codicil was not itself invalid under some of the principles of law given you in charge of the court." Alleged to be error, because there was no evidence which established that T. T. Pope, at the time of executing the codicil, knew what was in the will of May 15, 1891, or that the same was read over to him on that occasion. Further, because the codicil was not actually attached to the will, and was never attached to it, as shown by the evidence, until after the first trial of the case in the superior court. It appears that in the codicil express reference is made to the will of May 15, 1891, and to the fact that since said will

Mrs. Redding had died. Also, because the court erred in allowing C. W., N. Q., and John Pope to testify with reference to statements made by T. T. Pope with reference to the execution of the deed and of the will; counsel for Mrs. Martha Pope having made a general objection to the competency of said witnesses to testify, either as to what the testator said with reference to making the will or the deed, upon the ground that they were beneficiaries under the will, executors of the will, and parties to the suit to probate the will, and vendees in the deed and parties to the suit to set aside the deed, the other parties to the contract being dead. The court ruled that these witnesses were not rendered incompetent by reason of the death of T. T. Pope. This motion was overruled, and to this ruling said movants excepted.

Defendants in the petition to set aside the deed moved for a new trial in that case upon the general grounds that the verdict was contrary to law, evidence, etc.; also, because the court erred in refusing on motion of defendants to rule out the evidence relating to a certain bottle and note, hereinafter mentioned, defendants having objected to this evidence as it came in, and the court having allowed them to reserve their right of objection and move to rule out all the evidence relating to the bottle and note, in case it was not subsequently rendered admissible. The evidence to which the motion of defendants related was that of Garmon, to the effect that between the 10th and 15th of July, 1891, he found in the road, about a quarter of a mile this side of T. T. Pope's house, the bottle and note. The evidence of Garmon is set out also at length in the brief of evidence, "and reference is hereby had to the same." This evidence was objected to as irrelevant and incompetent, as having no connection with the case, and because nowhere in the evidence, as movants contend, were the bottle and note connected with parties to the case, nor was it shown that T. T. Pope had knowledge thereof, nor was it shown that the bottle and note were found previous to the making of the will or deed. Error in failing to rule out, under the same circumstances as set forth in the ground last above, the testimony of Mrs. Golden to the effect that at the time and place Garmon found the bottle and note she was on the wagon with him; the objection being on the grounds stated in the last ground of the motion. Error in admitting a bottle with an inscription of skull and crossbones, and the word "poison" labeled thereon, the bottle being half full of white powder, and in admitting in connection with said bottle a note, "a copy of which is attached to the brief of evidence," and also a facsimile of the bottle. Defendants objected to the bottle as irrelevant, because there was no proof that either the note or the bottle had been exhibited to T. T. Pope, because there was no proof connecting any of the parties to the case with

either the note or the bottle, and because the only witness who testified as to any statement of T. T. Pope relating to the poison also swore that such statement was made after the execution of the deed. "Defendants say said bottle and note were inadmissible, for the reasons stated in the objection at the trial." In a note to this ground the court states: "It will be found from the evidence that different witnesses vary as to the time when the so-called poison bottle was first heard of, and the dates are somewhat uncertain,"—and there was a considerable amount of evidence touching the question of the connection of the idea of poison with the testator and other parties in interest, as the court thought; and he held that there was enough to authorize the admission of the evidence.

It appears from the record that the label on the bottle, in addition to having upon it the skull and crossbones, had also the words, "8th ounce strychnine, sulph. crystals. Poison." The note (which is in the record in the case of Martha J. Pope et al. v. C. W. Pope et al., and is not in the record in the case of C. W. Pope et al. v. Martha J. Pope et al., the bottle being also attached to the record in the former case and not in the latter) was as follows: "Noller, Mr. T. T. P.; $\frac{1}{4}$ of this bottle will kill the old devil. Don't put in his eggs, as you did before; put it in his coffee. Watch Mr. O. & I. I will come out Sunday again. L. J. M." There was some evidence that this note had been changed since it was found by Garmon. After it was found it was for a time in possession of one or more of the caveators, and for a time in the possession of Dr. Sterling, one of the main witnesses for the propounder. Mrs. Golden testified that the letters "O. & I." had been changed from "C. & J."; that the initials to it at the bottom were "C. W."; that at the top of the note the word "give" has been rubbed out; that at the top of the note there was a change,—the first name "Mattie"; witness thought it was Mattie. This witness was uncertain whether the note she examined on the trial was the note which was found by Garmon, and further testified that, when Garmon found the note, he gave it to her, and she gave it to Thomas Vaughn the same day; that she could not give a reason why,—she just happened to take it to Vaughn; that she did not think it had anything to do with Pope; that she supposed Mattie was Pope's wife; that it was addressed to Mattie; that her husband is the nephew of Felix Vaughn; that the note was found a half mile from Pope's on a well-traveled road in front of the house of one Lamb; that there were a good many houses nearer than Pope's where the bottle was found; and that it was found some time in July, but she didn't remember the day of the month. Garmon testified that the phial and note were found about a quarter of a mile this side of Pope's house, lying in a public road, somewhere between the 10th and

15th of July, 1891, but he was not positive about the date; that it was found a few days before the old man died,—it may be some eight or ten days, somewhere about that; that the paper exhibited to him looked very much like the note, but he did not remember what was in the note, whom it was addressed to, nor whom it was signed by; that, as well as he remembered, there was a piece of newspaper torn off and wrapped around it; that he was just driving along in his wagon and happened to notice it, took it for a spool of thread and got out and picked it up, and Mrs. Golden unwrapped it and saw what it was. T. U. Vaughn testified that he thought the initials in the signature at the bottom of the note were originally C. W.; that he did not know whom that had reference to,—not for certain; that the wife of Mr. Woodward, the brother of Mrs. Pope, was named Mrs. Clara Woodward; that he thought the note was addressed originally to Martha; that the bottom signature now looks like L. J. M., and that, instead of the O. & I., he thought it was C. & J. There was other evidence as to changes having been made in this note, but no testimony as to who made them. Dr. Sterling analyzed the contents of the bottle, and found that they were harmless,—composed of flour and starch, and perhaps a little talc. Most of the evidence touching any knowledge by the testator of the bottle and note, or of their having been found, was that he knew nothing about it. Sterling testified that they were found two or three weeks before testator's death. Pierce, one of the caveators, testified that he thought it was in May or June when he first heard of the bottle, and that he thought he first saw the bottle and note in June. He was of the opinion that the note was in the handwriting of Dr. N. Q. Pope, with whose handwriting he was familiar and whose prescriptions he had filled; and that he thought the intention was to create the impression that somebody had been trying to poison the old man. F. A. Vaughn testified that he saw the note that was found; that it spoke about Mr. Pope and John; that T. T. P. had reference to T. T. Pope; that that note had reference to his wife and Mr. Woodward's wife; that it was signed by, it seemed, Mr. Woodward's wife, but witness did not know her initials; that her initials were M. J. It seems that the note exhibited in court did not resemble the note that was found; that the note was found three weeks before the old man's death; it was not a great while before he died,—he could not tell exactly how long; he supposed some four or five weeks. C. W. Pope testified that he thought the bottle was found between the 10th and 15th of July, some eight or ten days after the deed was made; and that the old man never knew anything about the bottle. Dr. N. Q. Pope testified that he did not write the note nor have anything to do with it, did not know whose writing it was, and

did not put the bottle in the road. Mrs. Woodward, the sister-in-law of Mrs. Pope, testified that her initials are C. I.; that T. T. Pope, about eight or ten days, she thought, before his death, called to her husband as he was leaving, and caught him by the hand, and said to him that he wanted to talk to him a little, that he had to die and leave his wife, and he was afraid they were not going to treat her right, that he wanted her provided for, that he had broken her up in town and carried her out there, and they had come, and were telling him about a bottle of poison being found near the mill; that she thought he was delirious, and called to her husband to let's go; that, when this statement was made about his going to die, John Pope was present, did not say anything, but merely dropped his head, and witness thought it was mortifying to him to know that his father was delirious; that witness had been talking to T. T. Pope that evening, but not a great deal; that she did not discover him delirious in talking to her about anything else, but always thought he did not know what he was talking about when he spoke of poison, as she did not know anything about this bottle of poison, and knew there had never been any poison given to him,—that is, she did not believe so, that is, she had never heard of any; that she never saw the note except when it was exhibited in court on the previous trial; and that she did not know whose handwriting it was, and she did not do it. Her husband testified that about a week or ten days before T. T. Pope's death he took hold of witness' hand, and said to witness, very cool and deliberate, that he was afraid they were not going to do right about Martha and Lena,—“they come telling me a great rigmarole about some poison being found near the knitting mills”; that the knitting mills were down on the creek, this side of the house, between a quarter and a half a mile; that Pope started to tell him something more, but witness' wife beckoned to him to come, and he told Pope he would see him again, that he hoped it would be all right; that at the time witness thought he was delirious; that neither witness' wife nor sisters write anything like the writing of the note with the bottle; that Lena is Mrs. Pope's daughter. There was further evidence tending to show that T. T. Pope for some time, possibly several weeks, before his death, seemed disinclined to eat food that his wife prepared for him, and would make her taste medicine that was to be given him. F. A. Vaughn further testified that on one occasion during the old man Pope's sickness he (Pope) said “they” were trying to poison him, and he would not eat anything; that his wife would bring things in and he would complain of them, would not eat them and the others would bring things in and he would refuse them; that witness went several times and fixed things, or would go in and tell Mrs. Pope to fix them,

and bring them and tell the old man he fixed them, and the old man would then eat; that the old man seemed to allude, when he said they had poisoned him, to John or his wife or Dr. Sterling,—that is, witness took it that way, Pope never said it; and witness told him he knew they would not, that Dr. Sterling was his physician, and had treated him a long time, and they wouldn't give him any poison. There was much conflicting testimony as to the nature of the relation between T. T. Pope and his wife, and as to her treatment of him. It appeared that she was a widow about 35 years old, and he a widower about 70 years old, when they were married. They had been married not quite a year when he died.

Error in charging: "The free assent of the parties being essential to a valid contract, duress, either by imprisonment or by threats, or other arts by which the free will of a party is restrained and his consent induced, will void the contract." Movants contend that this charge is error because it has no application to the facts of the case; that there was no evidence of duress, either of imprisonment or by threats or other arts, nor was there any evidence that the free will of T. T. Pope was restrained, nor was there any proof of any kind of duress or persuasions on the part of either of the defendants.

Error in charging: "Duress consists in any illegal imprisonment or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." Alleged to be error because inapplicable to the facts, and because there was no evidence of any duress by any illegal imprisonment of T. T. Pope, or by any of the other methods mentioned by the court.

Error in charging: "If, therefore, you should believe from the evidence that the deceased, Mr. Pope, when he executed the deed, had his mind so enfeebled by sickness and suffering and the use of opiates that he did not have mental capacity adequate to the purpose, as explained to you, or that he was then in a state of great bodily and mental weakness, and that Chas. W. Pope, J. T. Pope, and N. Q. Pope, or either of them, took advantage of his condition and procured from him the deed by any means which coerced his will, and actually induced him to make the deed contrary to his free will, then you should find that the deed be canceled." This charge is error, as movants contend, because inapplicable to the facts of the case, and because there was no proof that at the time this deed was executed the mind of T. T. Pope was so enfeebled by sickness and suffering and the use of opiates that he did not have mental capacity to make a deed, nor was there any proof that he was then in a state of mental weakness; that Chas. W. Pope, J. T. Pope, and N. Q. Pope, or either of

them, took advantage of his condition, and procured from him a deed by means of coercion, and actually induced him to make the deed contrary to his free will; and it was particularly error to charge as to Chas. W. Pope and J. T. Pope using such means, there being nothing from which an inference could be drawn that the two persons named took advantage of T. T. Pope's condition, and coerced his will. This charge was further error in stating that, if the said three persons used "any means," the deed was void, as this is not a correct statement of the law, and is consistent with the use by such persons of legitimate means, which would not invalidate the deed. In a note the court states that the words "any means" were not alone, but connected with the words following,—"which coerced his will, and actually induced him to make the deed contrary to his free will."

Error in charging: "Fraud may be actual or constructive. Actual fraud consists in any kind of artifice by which another is deceived; constructive fraud consists in any act of omission or commission contrary to legal or equitable duty, trust, or confidence, justly reposed, which is contrary to good conscience, and operates to the injury of another. The former implies moral guilt; the latter may be consistent with innocence." Alleged to be error because there was no evidence of either actual or constructive fraud; and particularly erroneous in alluding to constructive fraud, as there was no proof whatever of any such constructive fraud, nor any claim of such fraud, nor was the issue of such fraud made either by the pleadings or evidence; and the effect of such charge tended to confuse the jury, and to impress upon their minds that the fraud claimed and proved by the plaintiff was not restricted to actual fraud, which implied moral guilt, but that the deed could be set aside for constructive fraud, which was consistent with innocence.

Error in charging: "A gift by any person just arriving at majority, or otherwise peculiarly subject to be affected by such influences to his parent, guardian, trustee, or attorney, or other person standing in a similar relationship of confidence, shall be scrutinized with great jealousy, and, upon the slightest evidence of persuasion or influence towards this object, shall be declared void at the instance of the donor or his legal representative, at any time within five years after the making of such gift." Alleged to be error because inapplicable to the facts, there being no proof of any persuasion or influence exerted by any of the defendants.

In the order overruling this motion for new trial the court below states that he thought a fair view of the charge and rulings, as a whole, would show that no injustice was done by the court; that if in illustrating and explaining to the jury what was meant by

duress, fraud, etc., the court read certain sections of the Code to the jury in their entirety, he did not believe it was error, and at least did not require a new trial. To the overruling of their motion the movants excepted.

Arnold & Arnold, for petitioners. Simmons & Corrigan, for contestants.

SIMMONS, C. J. T. T. Pope died July 20, 1891, leaving an estate consisting mainly of realty, valued at upwards of \$20,000. By a will dated May 14, 1891, he gave \$800 to his wife, Martha J. Pope, in lieu of dower, \$500 to the children of his deceased daughter, Mrs. Vaughn, and \$500 to the children of another deceased daughter, Mrs. Pierce, and the residue of his estate was to be divided equally between his surviving sons and daughters and one grandchild. By a codicil dated May 25, 1891, the share of one of his daughters, who had died subsequently to the date of the will, was given to his other children. Afterwards he made a deed, dated July 1, 1891, conveying his real estate to the same persons to whom his property had been devised, except his wife and the grandchildren first mentioned, the consideration expressed in the deed being \$10, and love and affection to the grantees. When the will was offered for probate, the widow and these grandchildren filed a caveat, on the ground that at the time of its execution the testator was non compos mentis, and that the same was obtained by the exercise of undue influence on the part of his sons, C. W., J. T., and N. V. Pope. A petition to set aside the deed was filed by the same parties upon similar grounds, which are set out in the reporter's statement. The effect of this deed, it was alleged, was to cut the plaintiffs entirely out of participation in the grantor's estate, his personality not being worth more than \$700 or \$800. The ordinary found in favor of the will, and the caveators entered an appeal to the superior court. In that court both cases were tried together, and the jury found in favor of the will and against the deed; whereupon a motion for a new trial was made in each case by the losing parties. In addition to the general ground that the verdict was contrary to law and the evidence, the motion in the will case was based upon the grounds hereafter set out in the first and second divisions of this opinion, and the motion in the deed case upon the grounds dealt with in other parts of the opinion.

1. It was complained that the court erred in charging the jury as follows: "If on May 25, 1891, T. T. Pope, deceased, executed a codicil to his will of May 15, 1891, and in this codicil referred to and recognized the previous will as his will, this would amount to a republication of the original will, and would render such original will valid, provided the codicil was executed voluntarily by the testator, and he had a sound and disposing mind, and the codicil was not itself invalid under some of

the principles of law given you in charge by the court." This was alleged to be error because there was no evidence which established that T. T. Pope, at the time of making the codicil, knew what was in the will of May 15, 1891, and no evidence that the same was read over to him on that occasion; and, further, because the codicil was not attached to the will. The court did not err in the charge complained of. The codicil expressly refers to the will as follows: "I, T. T. Pope, * * * do make the following codicil to my will of May 15th, 1891, as since said will my daughter, Lutisha Redding, has departed this life. * * * The share of my estate * * * that under the provisions of my said last will would have gone to my deceased daughter Lutisha * * * is to be diverted from her, her estate or heirs, * * * and turned over to my surviving children," etc. This sufficiently identified the will, and rendered it unnecessary that the codicil should be attached to it. "The annexation need not be physical, provided the language of the codicil is sufficiently clear to identify the will referred to." 3 Am. & Eng. Enc. Law, tit. "Codicil," p. 292; Beach, Wills, § 81, and authorities cited. Nor was it necessary that the original will should be read over to the testator at the time of executing the codicil. The will having been properly identified, it will be presumed that the testator knew its contents, and the due execution of the codicil amounted to a ratification and republication of the will. Code, § 2478; Jones v. Shewmake, 35 Ga. 151, 154; Burge v. Hamilton, 72 Ga. 568.

2. It was complained that "the court erred in allowing C. W., N. V., and John Pope to testify with reference to statements made by T. T. Pope with reference to the execution of the deed and of the will; counsel for Mrs. Martha Pope having made a general objection to the competency of said witnesses to testify, either as to what the testator said with reference to making the will or the deed, upon the ground that they were beneficiaries under the will, executor of the will, and parties to the suit to probate the will, and vendees in the deed and parties to the suit to set aside the deed, the other parties to the contract being dead." This assignment of error is too vague and indefinite for consideration and determination by this court. Where the admission of testimony is assigned as error, the bill of exceptions or the motion for a new trial should set out the testimony objected to, or the substance of it. It is not enough that the testimony may be found in the brief of evidence. As was said in a former decision of this court: "Whether it might be ascertained by looking out of the motion and exploring the brief of evidence we are not called upon to say, inasmuch as our dealings are only with errors plainly and distinctly assigned." Sweat v. State, 90 Ga. 325, 17 S. E. 273. Even if these witnesses were not competent to testify as to anything at all said by the testator upon the subject

mentioned in the assignment of error, the illegal testimony may not have been so far material or prejudicial as to require a new trial, and in order to determine as to this it would be necessary to know what the testimony was.

3. One of the grounds of the motion for a new trial in the deed case was that the court admitted in evidence, over the objection of the defendant that the same was irrelevant, a bottle containing a white powder and bearing a label with the inscription "Poison" and the picture of a skull and crossbones thereon; also, a note; and the testimony of certain witnesses as to the finding of the bottle and the note. There was evidence that the note when found read as follows: "Martha (or Mattie): Give Mr. T. T. P.; $\frac{1}{4}$ of this bottle will kill the old devil; don't put in his eggs as you did before; put it in his coffee; watch Mr. C. & J. I will come out Sunday again. O. W." Mrs. Pope, the plaintiff, was named Martha, and was also called Mattie, and C. W. were the initials of Mrs. Woodward, her brother's wife, who frequently came to see her at the grantor's house during his last illness, and usually came on Sunday. The theory of the plaintiffs was that certain of the defendants, in order to induce the grantor to make the deed and exclude his wife from participation in the property conveyed, had caused him to believe that she intended or had attempted to poison him. There was some evidence tending to show that the note in question was in the handwriting of one of the grantees, a son of the grantor, who was with him frequently about the time the deed purported to have been made; and the plaintiffs sought to make it appear that the writer of the note had thereby attempted to create the impression upon the mind of the grantor that some other person, probably Mrs. Woodward, had written the note to Mrs. Pope, and knew of an attempt on her part to poison him. It was objected that there was no evidence that the grantor's attention had been called to the bottle and note prior to the execution of the deed. It is true the weight of the evidence is to the effect that the bottle and note were not found until after the date of the deed, but there was some evidence tending to show that they were found before that time; and there was evidence that prior to that date, about a month or six weeks before his death, he had expressed fears of poison, and required his wife to taste his food and medicine before he would take it. There was no evidence, outside of the deed itself, showing that the deed was actually delivered at the time it purported to have been made, or as to when it was actually delivered. That something had been said to the grantor about this bottle, and his wife in connection therewith, could be inferred from a statement which appears to have been made by him to her brother, soon after the bottle and note

were found, that he was afraid "they" were not going to do right by her, that they had been telling him something about a bottle of poison, and had been telling him "a rigma-role about poison being found near the knitting mills." It appears that the bottle and note offered in evidence were found near the knitting mills, a short distance from the grantor's house. There was evidence as to bad feeling towards Mrs. Pope prior to the date of the deed on the part of the grantee who was supposed to have written the note, and other grantees therein. These grantees were children of a former wife of the grantor, and had opposed his marriage to the plaintiff. If the note was written by this grantee, it tended, in connection with the statement of the grantor above referred to, to show the existence of a scheme to prejudice the grantor against his wife, which may have antedated the delivery of the deed and operated to induce the same. Even if the parties concerned in this scheme did not bring the note and bottle to the grantor's attention until after the deed was made, we cannot say that the evidence in question is wholly without significance as to their motives and conduct previously. Its probative force was for the jury.

4. Certain sections of the Code, and parts of other sections read by the court to the jury in charging them as to the law of duress and as to fraud and undue influence, were not strictly pertinent or applicable to the facts of the case. This, however, was not, in this case, reversible error, it not being at all probable that the jury were thereby misled as to the real issues of fact presented for their determination.

5. There was sufficient evidence in each case to warrant the verdict rendered therein; and it appearing that substantial justice has been done, and the result having been approved by the trial judge, his refusal to set these verdicts aside will not be reversed. Judgment affirmed in both cases.

(95 Ga. 236)

GEORGIA RAILROAD & BANKING CO. v. JETT.

(Supreme Court of Georgia. Dec. 21, 1894.)

ACTION AGAINST CARRIER — INJURIES TO PASSENGER — MEASURE OF DAMAGES — INSTRUCTIONS — HARMLESS ERROR.

1. The evidence making no cause for a recovery by the plaintiff of actual damages on account of loss of time or for expenses incurred, and her right to recover being entirely for injuries to her peace, happiness, or feelings, a charge that "in all cases where a tort has been committed the damages are left to the enlightened conscience of an impartial jury," though not strictly correct, was harmless to the defendant.

2. There was no error, after instructing the jury, in substance, that the only measure of damages which are incapable of being estimated in money was the enlightened conscience of impartial jurors, in repeating a similar instruction as to the measure of damages while charging upon the law as to vindictive or punitive damages.

3. The verdict in this case being out of all reason and conscientious proportion to the injury, and so large in amount as to give reason to suspect bias or prejudice on the part of the jury, the ends of justice require a new trial.

(Syllabus by the Court.)

Error from superior court, De Kalb county; Richard H. Clark, Judge.

Action by Callie Jett, by her next friend, against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Reversed.

The following is the official report:

The complaint alleged that about October 28, 1891, she, being then 15 years old, was on defendant's accommodation train as a passenger desiring to get off at Jett's Crossing, a point where the train usually stopped, and where she lived, and to which she had paid her fare. Of this desire she informed the conductor, and just before reaching the crossing went upon the platform to be ready to get off, and was told by him in a very rude manner to go back and take her seat, and he would tell her when to get off. The train did not stop at Jett's, and the conductor would not stop until he got to another crossing, about a mile from Jett's, where he wished to put her off in charge of some young men who were strangers to her. It was then after dark, and she refused, and was taken to Stone Mountain by friends who were on the train. The next morning she took the same train at Stone Mountain in order to go back home, in company with a party of ladies. The conductor refused to let her stay with the party in the ladies' car, and compelled her to ride in the baggage car with men who were strangers to her, and sit upon a trunk. He treated her with great rudeness. The conduct of defendant was a breach of its duty to her, and by reason of the facts above stated she was subjected to great humiliation and mortification in the presence of other passengers by the rudeness of defendant. The action of defendant constituted a breach of public duty it owed her, and this action on the case is brought for damages on account of the wrongful violation of said defendant's duty. There was a verdict for plaintiff for \$758, and defendant's motion for new trial being overruled, it excepted.

The motion for new trial contained the grounds that the verdict was contrary to law, evidence, etc., and that the amount of damages found was excessive. Also, because the court erred in charging on the measure of damages: "In respect to the first ground of the action, or the first tort alleged to have been committed, it is conceded by the defendant's counsel that she is entitled to a compensation therefor. Now, what amount she should have for that as compensation is for you to determine. These things, as you will readily see yourselves, cannot be measured in dollars and cents. There is no criterion by which you can apply dollars and cents to it, to see what is the exact worth of it, but in-

asmuch as a tort has been committed, or is ever committed, in all cases where a tort has been committed, it is entitled to some compensation in dollars and cents, and that is left, in the language of the law, to the enlightened conscience of an impartial jury." Alleged to be error, because the jury was instructed that "in all cases where a tort has been committed, the damages are left to the enlightened conscience of an impartial jury." Further, because this measure of damages was declared to be applicable to the case admitted by defendant's counsel, which admission was that plaintiff was taken by her station by the negligent act of defendant, without any intention to commit a tort, and without any admixture of malice or aggravating circumstances in the act or intention. Further, because the charge ignored all consideration of the money value of loss of time and expense as elements of damage, and left the whole case to be decided by the enlightened conscience of an impartial jury. Further, because it ignored the question of nominal damages, and of damages susceptible of money valuation, and fixed the enlightened conscience of an impartial jury as the one rule of damages in the most favorable aspect of the case for defendant.

Error in charging: "Now, I have charged you in respect to the law as to the amount of damage this young lady should receive for these acts, simply the acts themselves, without regard to whether there were aggravating circumstances attending it or not. When a tort is committed, as I have charged you, and it is clearly made out to the satisfaction of the jury, by the law the person is entitled to such compensation as the jury from their enlightened consciences may adjudge, and it will stand right there at what they find it to be, unless they find that there are aggravating circumstances attending it, that there is more wrong done the plaintiff than the mere acts which I have narrated to you. But we have a law for our guide on that subject, and it says in every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. Now, before you can increase your damages, you must believe from the evidence that there was, in regard to one or both of these torts, aggravating circumstances. If you should judge that there were not aggravating circumstances, either as to one or to both, why then you would stop at what you assess her damages to be up to the point that I have charged you upon heretofore. Now, should you believe there were aggravating circumstances, either in one or both of these acts, then it is your duty to increase your finding to such sum as you think will be sufficient to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff, either

or both." Alleged to be error, because the court, having instructed the jury to measure the damages by their enlightened consciences, which measure is applied only to those things which cannot be computed in money, as wounded feelings, pain and suffering, and aggravating circumstances, erred in charging them that they could find still other damages, additional to those arrived at by their enlightened consciences. If the damages for wounded feelings, which were the only actual damages over and above the nominal damages claimed by plaintiff, were fixed by the enlightened consciences of the jury, it was error to instruct them that they could go further, and find damages over and above those fixed by their enlightened consciences. Moreover, the court stated the law too strongly and erroneously against defendant, in charging that it was the duty of the jury to increase their finding.

Error in allowing plaintiff's father, A. B. Jett, to testify, over defendant's objections, to alleged altercations between him and Boyd, the conductor, the same being irrelevant, but at the same time having a tendency to prejudice and inflame the jury, such testimony being especially irrelevant in view of the fact that it was not shown that Boyd knew who the plaintiff was at the time of the alleged indignity, and, therefore, could not have been influenced in his conduct to her by any feeling towards her father. It was not stated in this ground what objection was made to this evidence when offered, nor was the evidence objected to set out in the motion.

Error in charging: "The next is the allegation that she was placed in the baggage car. There is no concession upon the part of the defendant as to that being a ground of action. Indeed, it is denied, and issue is joined with the plaintiff upon that, and hence you are to come to your conclusion as to whether, under the circumstances, which you are to learn from the evidence, that was an act of negligence on the part of the conductor. In order to arrive at a conclusion upon that, you are to look, as you look upon the other, at the surroundings, and as to what the nature of the baggage car was, as to what was in there, and as to who was in there, and from all come to your conclusion as to what she should receive for damages or compensation for that, if you should believe that the case is made out from the evidence and according to the law I have given you in charge." Alleged to be error in this: That the jury is instructed that the defendant being placed in the baggage car is a sufficient ground of action in the case, and an act of negligence on the part of the conductor for which the plaintiff is entitled to recover. It left the jury to infer that the putting the plaintiff in the baggage car, without inquiry as to the manner in which it was done, or whether contrary to and without her consent, was sufficient to authorize a recovery in the case.

Jos. B. & Bryan Cumming and Candler & Thompson, for plaintiff in error. Smith & Pendleton and John S. Candler, for defendant in error.

LUMPKIN, J. The plaintiff, Miss Callie Jett, brought an action against the Georgia Railroad & Banking Company for two alleged torts. One was, carrying her past the station to which she had paid her fare; and the other was, compelling her to ride in the baggage car on the following morning when she was returning to her home. We have directed the reporter to state the material facts developed by the evidence. The defendant admitted liability as to the first of the above-mentioned matters, and as to this ground of complaint the only question at issue was what should properly be the amount of the recovery. As to the second ground of complaint, the defendant denied liability, insisting that inviting the young lady to ride in the baggage car for the short distance she had to go was but an act of courtesy and kindness, intended to relieve her of the inconvenience of riding in a passenger car which was very greatly overcrowded, and in which she could not have found a seat. The legal questions involved in the case are free from difficulty.

1. The plaintiff's evidence made no case at all for the recovery of any actual damages sustained by reason of loss of time or of expenses incurred. Her right to recover, under the proof submitted, was entirely for injury to her peace, happiness, or feelings. Therefore, in this case, the damages were to be arrived at solely by reference to the enlightened consciences of impartial jurors. The judge charged as indicated in the first headnote. It is obvious at a glance that this charge, as an abstract proposition, is not strictly correct, for there are certain kinds of damages in most cases of tort which are capable of being accurately estimated in money. Nevertheless, in its application to the facts of the present case, we do not think this charge could have resulted in any harm to the defendant.

2. The plaintiff sought to recover damages, not only for injury to her peace, happiness, and feelings, but also vindictive or punitive damages, because, as she insisted, there were aggravating circumstances attending the infliction of the wrongs upon her. The court charged as to both these kinds of damages, and in each instance instructed the jury that the only measure of damages was the enlightened consciences of impartial jurors. There was no error in this, for the rule stated was the correct one for ascertaining the amount to be awarded in both kinds of the damages referred to, and there was no impropriety in repeating it in connection with the instructions given the jury as to the second kind, although the court had previously stated this rule in charging the jury as to the first kind.

3. We grant a new trial in this case because we think the verdict was too large, and out of all just and reasonable proportion to the injury done to the plaintiff. We cannot help feeling that the amount is so great as to give reason to suspect bias or prejudice on the part of the jury. An examination of the evidence will show that no physical pain was inflicted upon the plaintiff, no indignity offered her, and that she endured no mental suffering or anxiety. The actual inconvenience to which she was subjected was very slight indeed, and yet the relatively large sum of \$750 was awarded to her. The evidence as to the alleged "aggravating circumstances" was, in our opinion, very weak indeed. It seems there had been some slight grudge between the conductor and the father of the young lady, but it is not, in our opinion, in the least degree probable that the former was at all influenced by it. The evidence of the conductor is not entirely clear and satisfactory. It would, perhaps, not be unfair or unjust to say that he evidenced stupidity, both as to his conduct in the transaction under investigation and as to the account of it given by him on the stand. We do not think, however, this constitutes any good reason for inflicting such a penalty upon the railroad company as the jury have seen proper to impose. It is with great reluctance that we ever interfere with the verdicts of juries on the ground that they are excessive, but this is one of the cases in which we feel constrained to do so. In this connection, see *Railroad Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, where a verdict of the same amount, under circumstances probably more strongly justifying its rendition, was set aside by this court. It was not, it is true, distinctly ruled that the damages were excessive, but Chief Justice Bleckley expressed the view of the entire court when he said: "We are strongly inclined to the opinion that the amount is out of reasonable and conscientious proportion with the magnitude of the injury." See, also, *Railroad Co. v. Lyon*, 89 Ga. 16, 15 S. E. 24, and note, especially the language of the opinion on pages 20 and 21, 89 Ga., and page 24, 15 S. E. Upon the sole ground that the verdict is excessive, a new trial is ordered. Judgment reversed.

(95 Va. 243)

BOWDEN et al. v. ACHOR.

(Supreme Court of Georgia. Jan. 14, 1895.)

CANCELLATION OF DEED—PLEADING—CONSIDERATION—CAPACITY OF GRANTOR—EVIDENCE—INSTRUCTIONS—EXAMINATION OF WITNESS.

1. An equitable petition alleging that the plaintiff had been defrauded of certain described lots of land, or the value thereof, by a series of fraudulent and unconscionable acts, perpetrated upon her by various persons named as defendants, the petition setting forth in detail a history of these acts, and thereby showing that each and all of the defendants had more or less connection with the same, and in effect charging

that the wrongs done her in the premises were the result of a conspiracy among the defendants, in which they all to a greater or less extent participated, and praying for appropriate relief as to each, was not demurrable for multifariousness, or for misjoinder of parties, or for misjoinder of causes of action.

2. One of the alleged grounds of fraud being that the consideration for which the plaintiff had been induced to part with and convey land was grossly inadequate, evidence of the value of the land at the time of the trial, which occurred years after the alleged fraud had been committed, was irrelevant, especially where it appeared that all lands in that vicinity had, because of the building of a town, very greatly enhanced in value.

3. It is not admissible for a witness who is not an expert in such matters to testify to his opinion with reference to the mental capacity of another, without stating the facts upon which that opinion is based.

4. It is not only the right, but the duty, of the presiding judge in the trial of an action to ask questions of the witnesses whenever necessary to bring out the full truth of the case; but in so doing he should not himself intimate any opinion upon the facts, or use any expression calculated to prejudice the rights of either party.

5. Where it appears that a material paper is outside this state, and therefore beyond the jurisdiction of its courts, a witness may, in the absence of better secondary evidence, be allowed to testify to its contents.

6. The charges being fraud and conspiracy, deeds or other evidence which may throw some light on the transactions under investigation are admissible, the value of the evidence being for the jury to determine. In admitting such evidence, it was not improper for the judge to remark, in substance, that he thought it "applicable," and that, if it had no relation to the question at issue, it would do no harm.

7. The declarations of one in disparagement of the title he had once held to land, made after he had parted with the title, and when he was not in possession, are inadmissible to affect those holding under him.

8. Where, plainly and beyond all controversy, there is one main, controlling issue in a case, the court may inform the jury that such is the fact; but, if there are two or more important issues, and there is any doubt as to which is the main one, or that any one of them is such, the court should not single out a particular issue, and present it as the controlling one in the case.

9. Where the court, in its charge, appropriately recited, by way of hypothesis, various facts illustrative of a want of mental capacity to contract, it was certainly not erroneous, as against the defendants, to add that, if the jury believed such was the plaintiff's mental condition, and if they were thus convinced she did not have sufficient mental capacity to make a contract when she executed certain deeds, the same were not binding upon her.

10. It was error to charge that if the plaintiff, at the time of making certain deeds, had the mental capacity to contract, and there was no change in her mind for the worse when she afterwards made a certain other deed (the latter being a deed which, if binding upon her, would defeat her action), that deed would be no bar to her recovery. So manifest an error could have resulted only from inadvertence.

11. When the evidence consisted of answers to interrogatories and various documents, as well as the oral testimony of witnesses, the court should not have instructed the jury, "The evidence is what the witnesses swear before you on the stand."

12. Where the court stated to the jury three contentions of a party, it may have been misleading to add that so and so would result if "both of these positions are true," without specifying to which two of them the word "both" applied.

13. When the court has been duly requested to give its entire charge in writing, and the jury, after deliberating awhile on the case, ask for additional instructions, which the court undertakes to give, these instructions must also be reduced to writing, and read to the jury. If the court fails to do this, and gives the additional charge orally, it is reversible error. Section 244 of the Code was not repealed by the act providing for the appointment of official court reporters.

14. Where one who has received money in consideration of land sold and conveyed seeks to rescind the sale on the ground of fraud, it is incumbent on the seller, before instituting legal proceedings for that purpose, to return, or offer to return, the consideration received. Even if, in a given case, there should exist equitable reasons for a failure to make restoration, or a tender thereof, which could be held sufficient to dispense with the same as a condition precedent to the right of action, certainly, in a case like the present, where the plaintiff received money for her land, and there is in her declaration no allegation that it was paid or tendered back, nor any offer therein of restoration, or its equivalent, and no evidence whatever either of payment or tender, a recovery by her of the land in question cannot be sustained.

15. Such of the 57 grounds of the motion for a new trial as are not covered by the foregoing notes are not of sufficient importance to require special notice. Many of them are exceedingly trivial; others are entirely without merit. Some of them contain objections to evidence tediously and unnecessarily spun out into lengthy colloquies between court and counsel, when they might easily have been clearly and concisely stated; others relate to alleged improper conduct of counsel in talking irrelevantly, and too much, and the refusal of the court to interfere; and so on almost ad infinitum. It may be that some slight errors were committed which have not been noticed. In so complicated and protracted a trial it would be surprising were it otherwise. On the whole, the controlling questions made by the record have been dealt with, and the rules of law applicable have been announced.

(Syllabus by the Court.)

Error from superior court, Clayton county; Richard H. Clark, Judge.

Action by Lou Achor against Robert Bowden and others. Plaintiff had judgment, and defendants bring error. Reversed.

The following is the official report:

The petition of Lou Achor alleged: She is the daughter of Nancy Wright, who, before her death, owned lots 8, 9, and 24 in the Thirteenth district of Clayton county, under deeds recorded October 16, 1886, each deed conveying one of the lots, and each being on a consideration of \$2,000. On September 28, 1887, Nancy Wright, by will, devised these three lots to petitioner, her only child. On October 18, 1887, two deeds were claimed to have been made by Nancy Wright,—one to J. W. Turner, to lot No. 8, and the other to J. W. Wright, to lot No. 9. The consideration mentioned therein was love and affection, but the grantees were worse than strangers in sympathy for the grantor in her afflictions. These two deeds are forgeries, and were made for the sole purpose of defrauding petitioner. About the time of the making of said two deeds Nancy Wright was in feeble health, and without mental capacity to make a deed. Just after Nancy

Wright's death, petitioner was desirous of recovering lots 8 and 9, and, acting upon the advice of J. M. Walker, who had gained her confidence, she employed as her counsel S. N. Connally, contracting with him to give him one-half of lots 8 and 9 for his services in recovering the property, and agreeing to sign a deed to one of said lots conveying to him the title thereto. Through the false and fraudulent representations of Walker, who was Connally's agent in the matter, she was induced to sign a deed conveying to Connally lot 24, which was not in litigation in any manner, but was left her free of any incumbrance by her mother. This is a fraud upon her, she being ignorant, and unable to read and write or to understand what she was signing. She had all confidence in Connally, and relied upon him to protect her from the numerous unscrupulous persons who were doing all in their power to obtain by fraud and violence the property left her by her mother. By this fraud Connally secured, without any contingency, \$2,000 for his services in recovering lots 8 and 9, whereas, according to the terms of the contract between them, he was to get a contingent fee of one-half of the recovery. Soon after petitioner employed Connally, he, as her attorney, filed two suits in ejectment to the spring term, 1887, of the superior court of Clayton county against Turner and Wright. During 1888, and before the trial of these cases, she was, by and through the false representations of Walker, who was acting for and by the advice of Connally, and who represented to her that she was about to be convicted and sentenced for larceny in Clayton county, forced, through fear of criminal prosecution to leave that county, and even the state of Georgia. She was never guilty of any crime as she was then charged with, but this was only a trick resorted to by Connally and Walker, who, with J. T. Spence, were in collusion to defraud her of her property, to remove her beyond the limits of Georgia, so they could with more ease accomplish their designs upon her, with her spirited away beyond hearing of said cases. Walker and Connally were largely indebted to Spence for assistance in their work of frightening away petitioner. Spence was indebted to petitioner for some favors theretofore granted, and she had every reason to believe he was her friend. Walker received a valuable consideration for his services in said matter from the proceeds of the sale of lot 24 as hereafter set out. Spence received as his part of the plunder from said robbery a house and lot in Jonesboro, Clayton county, as the ultimate result of said transaction. After petitioner had been thus spirited away, Connally, without instructions from her, against her known wish, and against her interest in the matter, dismissed the ejectment suits, and did not even notify her of his actions in the premises, nor of the dis-

position of the cases, nor communicate with her in any manner concerning them, although she had requested him, through Walker, to do so. She did not learn of the dismissal of the suits until more than six months had elapsed after they were dismissed. If they had not been dismissed and had been faithfully represented by Connally, as was his duty, she would have recovered the lots sued for. Their dismissal was only a part of the scheme entered into by Walker, Spence, and Connally to defraud her out of her property. Connally acted in collusion with the opposite parties in said cases, and dismissed the cases in their interests and in his own, abusing the trust she reposed in him as her counselor, to perpetrate a fraud upon her. Since the dismissal of the suits by Connally, he has made a deed of lot 24 to L. A. Kuglar, who has since died, and Samps Morris is his administrator. The consideration of this deed is expressed as \$1,000. Kuglar bought with notice of the fraud above mentioned; and Spence was Kuglar's agent and legal adviser in said transaction, and he knew all of the fraud in connection with it, and the rotten condition of the title to lot 24. Spence, taking advantage of the great confidence reposed in him as her friend, had her to sign a deed to Kuglar to the west half of lot 24, dated December 20, 1888 (the deed from Connally to Kuglar was dated March 6, 1889), on an expressed consideration of \$700, but really without consideration, she not having received a cent for the same. Spence represented to her that it would be greatly to her interest to sign the deed, and that the consideration should be turned over to her upon the delivery of the land to Kuglar. Spence received the consideration to himself and family in the shape of a house and lot in Jonesboro, as above mentioned. Spence was Kuglar's agent and legal adviser in this transaction, and Kuglar knew of the fraudulent and false representations and conduct of Spence to and with petitioner, and acted with all the light before him. The deed of petitioner to Connally to lot 24 was known to Kuglar, and there was never any conflict between Connally and Kuglar, which is a badge of fraud; and Kuglar knew Connally to be petitioner's then counselor. On August 26, 1889, Kuglar made to Robert Bowden a deed to lot 24, for a consideration of \$3,000. Bowden had notice of the fraud upon petitioner by Connally, Walker, and others above mentioned, and the sale was made for the purpose of putting the title ostensibly in some one not affected with the notice of a fraud upon petitioner; but said transfer and deed is a fraud upon her, for Bowden knew the title should rightfully be in her. She was induced to sign an instrument on November 9, 1891, which was represented to her to carry no title out of her, and in no way to lessen her right or title to lot 24, and that she had no interest in the

property that could in any way be affected by said instrument, but in fact it was a quitclaim, and confirmed the deeds made by her to Connally and Kuglar above mentioned. This quitclaim was executed in Alabama, the consideration mentioned in it being \$100. Said consideration is not sufficient to support it. She was induced to sign it by said fraudulent representations of W. J. Albert, Samps Morris, with and by the aid of Spence, legal counsel and adviser of Kuglar's estate, and who even now has a very great influence over the mind of petitioner. It was represented to her by said parties that her attorneys, whom she had long before employed to sue for this property, and who bring this petition, were not taking any steps in the matter to aid her in recovering the property, and that she could never recover it, as she had no title to it. She was induced to sign the instrument under a misapprehension of her rights as to this property. The fact that she had already employed counsel to look after her interest in the property, and to recover it for her, was well known to the parties who induced her to sign the instrument by their fraudulent representations above mentioned. She was at that time in very feeble health, and of very weak mental capacity, so as not to be able to tell or be conscious of her rights in the matter, or to understand the nature of the instrument she was signing. She is ignorant and weak-minded, and has always been so. Because of this, and her feeble condition, she was easily imposed upon, and is not of sufficient mental capacity to make a deed. Because of the dismissal of the ejectment suit for lots 8 and 9, and more than six months having elapsed before she could have instituted or reinstated her case, she is barred from suing for the recovery of those lots, and Connally, Walker, and Spence are responsible to her for the value of said lots. Connally and Walker are liable to her for the value of lot 24, if the same should be held by an innocent purchaser, ignorant of the fraud committed upon her by Connally and Walker. Lots 8 and 9 contain 202½ acres each, worth from \$40 to \$60 per acre, and lot 24 contains 202½ acres, worth the same. Connally's failure to prosecute, and his dismissal of the ejectment cases have resulted in injury to her in a sum equal to the value of lots 8 and 9, and he has injured her in a sum equal to the value of lot 24, because of the fraud committed upon her by him and Walker, his agent and confederate, in securing her signature to the deed to Connally conveying that lot, in the event said lands should be in the hands of an innocent purchaser.

She prayed that Connally, Walker, Spence, Bowden, and Morris, as administrator of Kuglar, be made parties defendant; that her deed to Connally, her deed to Kuglar, her deed of relinquishment to Bowden, Connally's deed to Kuglar, and Kuglar's deed to

Bowden be each set aside and canceled; that title to lot 24 be decreed in her; that she recover from Connally, Walker, and Spence, all or either of them, the value of lots 8 and 9; that she recover of Connally and Walker the value of lot 24, if that lot be found in the hands of innocent purchasers; and for general relief. Attached as exhibits to her petition were copies of the instruments therein referred to. By amendment she alleged: Morris has in his own individual right come into possession of lot 24, and now holds and claims it as his own. He refuses to deliver it to her, or pay her the yearly profits thereof; it being worth for rent \$250 per year. Kuglar was a party to the fraud by which she was deprived of the land. About the time when she was fraudulently ousted from the possession of her heritage, Kuglar, with his friend and legal adviser, Spence, lurked in the vicinity of her land and home, and by fraudulent means contributed largely to the scheme of getting her out of Georgia and into Alabama. Kuglar furnished the money and hired the conveyances which moved her goods to Atlanta, and, at the instance of Spence, furnished the money with which to pay freight on her goods and her railroad fare out of Georgia. It was a part of the scheme concocted by Kuglar and Spence that Spence was to see to it that she was to be moved out of Georgia, and to the remote mountain regions of Alabama. As an additional circumstance to charge Kuglar with notice and participation in this fraud subsequent to her removal from Georgia, although he then had a deed to the land, as he claimed, he was dissatisfied; and thinking, perhaps, to more completely cover up his fraud, he sought out Connally, and accepted from him a quitclaim deed on a consideration less than the value of the land. This circumstance also seems to fasten knowledge of the fraud upon Connally, who well knew that he obtained his pretended deed in the manner charged in the original petition. Bowden was never a bona fide purchaser of lot 24, but the pretended conveyance by Kuglar to him was only a part of the scheme between him, Kuglar, and Spence whereby they hoped to get an innocent purchaser between them and their fraudulent conduct. The whole scheme was understood, acquiesced in, and indorsed by Bowden, and this view is sustained by the fact that about November 9, 1891, Morris, with his attorney, Albert, visited petitioner's home in Alabama, and, after securing the services and influence of J. M. Phillips, who was known by them to be the friend and adviser of petitioner, falsely and fraudulently represented to her that her attorneys could do nothing for her, and by all kinds of misrepresentations and fraudulent practices induced her to sign some kind of paper, she did not know what, except that the same was without consideration save the paltry sum of \$100, conveying the land. She has been informed and believes that the \$100 was paid by them to Phillips as the price of his influence with

her to induce her to sign a paper of their own drawing. She is now informed that this last-mentioned paper is claimed to be a deed to Bowden, but he was not present, and, she believes, knew nothing about it, and has never even seen the paper. At the time of the pretended sale by Kuglar to Bowden, Bowden already owed Kuglar some seven or eight hundred dollars,—much more than he could pay,—and could not well refuse to pose as an innocent purchaser from him in this crisis. A man of Kuglar's well-known closeness in business would hardly have sold land to Bowden and made him a deed had there not been some private understanding that Bowden was merely the go-between of the parties. Morris has procured to himself individually a reconveyance from Bowden of lot 24, hoping thereby to add another name to the list of so-called "innocent purchasers," but Morris had full knowledge of all these matters, and took the land together with the fraud, and became a participant therein. Morris was made party defendant as an individual, and petitioner prayed for a decree against him for recovery of lot 24 and mesne profits.

When the case was called for trial, defendants moved to dismiss the petition because it was multifarious, because there was a misjoinder of causes of action, and because there was misjoinder of parties. This motion was overruled. Defendants then demurred (the amendment above mentioned having been filed at the same term) on the grounds: (1) The petition is multifarious, in that it contains separate causes of action, to wit, to recover lot 24 from Bowden and Morris; to recover damages of Connally, Walker, and Spence, all or either of them, for lots 8 and 9, and because Connally, it is alleged, dismissed the suits against Turner and Wright for said lots, and negligently failed to recover the land. (2) and (3) Misjoinder of causes of action and misjoinder of parties. (4) Because plaintiff seeks to recover for several distinct matters against several defendants who have several distinct interests, and in some instances one or more of defendants have no common interest. The demurrer was overruled, the order overruling it stating that it was overruled because made and presented after the motion to dismiss was argued and determined, and because made at the third term of the "bill," "and not ordered because of the amendment stated." To the overruling the motion to dismiss and the demurrer defendants excepted *pendente lite*, and as to these rulings assign error in their final bill of exceptions. The jury found for plaintiff land lot 24, placing a lien on said lot for \$350 to satisfy fees due Connally; further, that the \$100 paid to Phillips be refunded to Morris; and further, for plaintiff, \$50 per annum rent. Bowden and Morris moved for a new trial, and, their motion for new trial being overruled, excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in

refusing to give in charge to the jury the following written requests: "Weakness of mind and illiteracy do not render one incapable of making a contract. It does not require a high degree of mental power to make a binding agreement. One who has strength of mind and reason equal to a clear and full understanding of the nature and consequences of his act in making a deed is to be considered sane, one who lacks this capacity is to be held insane. If you believe that on November 9, 1891, Lou Achor executed a deed to Robert Bowden, and if you further believe that Munroe Phillips was in that transaction acting as her agent, and if the money was paid to Phillips, by her direction, and if she was capable of contracting, then she cannot recover lot of land No. 24, or any part thereof. If you believe from the evidence that Kuglar paid Lou Achor, the plaintiff, four hundred dollars in person, or that he paid to Mr. Spence for her, by her consent, and took a deed to west half of lot of land sued for, you are instructed that Kuglar would have a good title to the land thus bought and paid for, and you should find this issue for the defendant, unless plaintiff satisfies you by evidence that she did not at the time have mental capacity to make a contract. And if you should believe from the evidence that at the time said contract of sale and purchase was made, by which Kuglar got a deed to the land in dispute, that plaintiff did not have sufficient mental capacity to make said contract, then, before she can recover, she must have paid back or have tendered back to Kuglar, or his administrator, four hundred dollars, received or paid Spence by her consent, before filing this suit or pending the trial of the same. If you believe from the evidence in this case that Mr. Bowden, or any one for him, after purchasing the land sued for, went to Alabama, and paid the plaintiff, or her agent for her, one hundred dollars, and took from her a deed confirming her former deeds to this land, I charge you that before plaintiff could set aside the deed thus made she would be obliged to pay back the one hundred dollars paid her or her agent, or tender the same back; and if she has neither paid nor tendered the same back before bringing this suit, she cannot recover in this action, and you should find for the defendants. If you believe from the evidence that Morris went to Alabama, and was present and saw plaintiff, Lou Achor, execute a deed to Bowden, confirming and ratifying deeds previously made to said land, for a consideration of one hundred dollars, at which time, and in connection with said transaction, she assured Morris that the title she then made was all right, and that there would be no further trouble or dispute as to the same, and that Morris acted upon said representations and acts of plaintiff, and afterwards bought said land of Bowden, then plaintiff would be estopped from setting up title to said land and you would be authorized to find for the defendants."

Error in charging: "The most important question you have to determine from the evidence in this case, is the mental capacity of the plaintiff at the time she made the deed to Connally and at the time she made the deed to Kuglar. If she had the requisite mental capacity to make those deeds, so far as that is an element in this case, the plaintiff would fall in her case; but, if she had not sufficient mental capacity to make them, and the deeds of ratification to Morris, she would be entitled to recover, for every deed she made would be void." Alleged to be error, because it misled the jury into thinking that if either of the three deeds named were void, all were void. Because it was misleading and confusing, for there was no evidence of a deed of ratification made to Morris. And because it excluded from the jury the question as to whether plaintiff was mentally capacitated to contract when she made the deed to Bowden November 9, 1891.

Error in charging: "The most important question you have to determine from the evidence in this case is the mental capacity of the plaintiff at the time she made the deed to Connally and the time she made the deed to Kuglar." Alleged to be error, because, on a trial involving a number of issues, one should not be magnified by the charge as the most important; it being equivalent to saying to the jury they need attach but little or no importance to the other issues. And because it was misleading, and calculated to lead the jury to think that, though plaintiff was mentally capacitated at the time one of the deeds was executed, then she ought to recover all the property in dispute.

Error in charging: "Section 2408 of our Code says: 'Eccentricity of habit or thought does not deprive a person of the power of making a will. Old age, and weakness of intellect resulting therefrom, does not of itself, constitute incapacity. If that weakness amounts to imbecility, the testamentary capacity is gone. In cases of doubt as to the extent of this weakness, the reasonable or unreasonable disposition of his estate should have much weight in the decision of the question.'" Alleged to be error, because this is the law applicable to wills, and not contracts. The testamentary capacity of plaintiff was not in issue, and it was calculated to confuse the jury in putting them to drawing the distinction between the capacity to contract or to make a will. And because plaintiff was not of old age, nor did she have a weak intellect, resulting therefrom.

Error in charging: "Section 2409 adds that: 'An incapacity to contract may coexist with a capacity to make a will. The amount of intellect necessary to constitute testamentary capacity is that which is necessary to enable the party to have a decided and rational desire as to the disposition of his property.'" Alleged to be error, because there was no such question in the case as to the law of the capacity to make a will.

Error in charging: "You will observe that imbecility of mind incapacitates one either to make a will or a contract. What is meant by imbecility of mind is weakness of mind, and weakness to an extent that the person in question has substantially no mind at all. The consequence is the same as that of insanity; and imbecility, like insanity, may be total or partial. If you should believe from the evidence that the plaintiff was wholly imbecile, as I said, any deed she would make, in that condition, would be void." Alleged to be error, because there was no evidence to justify the charge as to total imbecility.

Error in charging: "If you should not believe her wholly imbecile, but that she had a defect in her mind that rendered her partially imbecile, and that partial imbecility consisted in her mental inability to understand the value of her property; to be in such a state of mind as that she would do what any friend would request her to do in respect to the disposition of her property; that she did not understand her rights; that she was mentally unable to protect herself in her negotiations with others in respect to her property; that she did not understand the value of money; that she did not know one coin from another, or one bill of currency from another." Alleged to be error, because stating what partial imbecility consisted in, or what facts constituted it, and that, if any one or more of the following ingredients thereof was proved, the plaintiff would be incapable of contracting: (1) In her mental capacity to understand the value of her property; (2) to be in such state of mind as that she would do what any friend would request her to do in respect to the disposition of her property; (3) if she did not understand her rights; (4) if she was mentally unable to protect herself in her negotiations with others in respect to her property; (5) if she did not know one bill of currency from another; (6) if she did not understand the value of money, and did not know one coin from another. Error further, because, instead of charging that these recitals constituted imbecility, the court should have charged that, if these recitals were proved to be true, the jury should consider them, with all the other proved facts and circumstances tending to establish the condition of her mind, in determining whether she was or was not capable of contracting; and should not have confined his recitals to circumstances relied on by the plaintiff, but should have included such as were relied on by defendant.

Error in charging: "If you should not believe her wholly imbecile, but that she had a defect in her mind that rendered her partially imbecile, and that that partial imbecility consisted in her mental inability to understand the value of her property, to be in such a state of mind as that she would do what any friend would request her to do in respect to the disposition of her property, that she did not understand her rights, that she was mentally unable to protect herself in her negotia-

tions with others in respect to her property, that she did not understand the value of money, and that she did not know one coin from another, or one bill of currency from another; if you should believe from the evidence that that was her mental condition, and that convinces you she did not have sufficient mental capacity to make a contract, and if you believe this was her mental condition when she made the deeds to Kuglar and Connally,—neither of these deeds would stand in the way of the plaintiff's recovery." Alleged to be error, because there was no evidence that plaintiff was in such a state of mind that she would do what any friend would request her to do in respect to the disposition of her property; and no evidence that she was mentally unable to protect herself in her negotiations with others in respect to her property. Further, because the charge told the jury that if either of the enumerated things existed "when she made the deeds to Kuglar and Connally, neither of these deeds would stand in the way of plaintiff's recovery"; it being possible for a person to be in the position of several of the enumerated things, and yet be competent to contract. Further, because the charge put before the jury everything that plaintiff relied on to prove her incapacity, and nothing upon which defendants relied to prove her capacity to contract. And because it was calculated to make the jury think that, if either of the enumerated things existed, they could find plaintiff unable to contract.

Error in charging, immediately following the portion of the charge last above mentioned: "If you should believe from the evidence that that was her mental condition, and it convinces you she did not have sufficient mental capacity to make a contract, and if you believe this was her mental condition when she made the deeds to Kuglar and Connally, neither of these deeds would stand in the way of plaintiff's recovery. But if you do not believe from the evidence she was imbecile as described, these deeds, up to this point, would bar her recovery." Error, because twice distinctly requiring the jury to be controlled by the recitals as to what constituted imbecility and incapacity, as set out in the charge mentioned in the ground last above, instead of deciding that question from all the evidence; and because it threw the jury upon the things mentioned in the portion of the charge set out in the ground last above for their guide as to plaintiff's capacity, and excluded from their consideration all other things showing her mental capacity.

Error in charging: "This brings me to charge you upon the deed she made to Bowden in Alabama, that was intended to ratify the deeds she had previously made. If you should believe that when she made the deeds to Kuglar and Connally she had the mental capacity to make those deeds, and there is no evidence of any change in her mind for the worse at that time, then that deed would be

no bar to her recovery." Error, because instructing that, if plaintiff had capacity to make the deeds to Kuglar and Connally, and had the same capacity when she made the deed to Bowden, it would still be no bar to her recovery. Also because it required her to have contracting capacity when the first deed was made, and second. "If she had contracting capacity when she made the deed to Bowden, and was then fully informed of the former deeds, and ratified them, then she would in law be bound by the ratification." Also because the deed to Bowden is not only one of ratification, but one of purchase of any interest plaintiff may have then had in lot 24, and the court erred in limiting it to the act of ratification.

Error in charging: "Now, what you believe upon this issue will depend upon what you believe from the evidence is the truth of the case. The evidence is what the witnesses swear before you on the stand." Error, because excluding from the jury the written and documentary evidence.

Error in charging: "To set aside the deed from Kuglar to Bowden, or, rather, for plaintiff to recover against Bowden, notice of the facts necessary to maintain the position to Bowden should be proven before his purchase. Upon this point knowledge by Bowden before he received his deed is sufficient to put him upon inquiry, and is in law equivalent to notice. Therefore look to the evidence, and see if he had knowledge, or knew enough, to put him upon inquiry. If he had neither, he would not be affected." Error, because not sufficiently definite on the subject referred to. Further, because the expression, "notice of the facts necessary to maintain the position to Bowden should be proven before his purchase," are meaningless, and left the jury without a guide upon the question of notice to Bowden, but confused them. Further, because that portion of the charge as follows: "Upon this point, knowledge by Bowden before he received his deed is sufficient to put him upon inquiry, and is in law equivalent to notice. Therefore look to the evidence, and see if he had knowledge or knew enough to put him on inquiry,"—says to the jury, if Bowden was possessed of "knowledge"; was a man of "knowledge"; knowledge of any matter or thing whatever connected with the case or not,—if he had such before he got his deed, that "knowledge" alone was "sufficient to put him on inquiry, and is in law equivalent to notice." It is not "knowledge" nor is it how much he knows, that puts him upon inquiry under the law, but what he knew or could have known about this particular matter in litigation. This was only calculated to mislead the jury, and could not have done otherwise than confuse, or direct them against the defendant. Further, because there was no evidence to authorize the charge as to putting Bowden upon inquiry, and the jury should simply have been told that it was incumbent upon plaintiff to show,

before she could recover against Bowden, that he had notice of the things charged against Connally and Kuglar in reference to the procurement of their deed from her, before or at the time of taking his deed; and, unless the proof showed this, the verdict should be for the defendant for the premises in dispute. And because the charge is so confused that it either misled the jury, and caused them to find for the plaintiff, or else was so confusing to them they did not know how to consider this branch of the subject.

Error in charging: "Counsel for the plaintiff take the position that, although the state of her mind might not have been such as to incapacitate her from making a contract, yet she was a person of weak mind, and she sold her land for a grossly inadequate price, and that there was a great disparity of intellect between her and the persons who took her deeds. If you should believe from the evidence that both of these positions are true, then you would be authorized to set aside these deeds to Kuglar and Connally; but, if you do not believe both, you would not be so authorized." Error, because an improper statement of the rule of law upon the subject. Further, because confused as to which two of the three positions the court referred to in telling the jury they would be authorized to set aside the deeds to Kuglar and Connally "if both of these positions are true" on having enumerated three things; and it was calculated to have the jury find against defendants if they thought plaintiff was weak-minded, and the persons who took her deeds were strong-minded, or if they thought either one of those two things, and further thought that she sold the land for a grossly inadequate price. Error, also, because there was no evidence to authorize this charge as to the Kuglar deed or Kuglar.

Error in charging: "Counsel for the plaintiff takes the position that, although the state of her mind might not have been such as to incapacitate her from making a contract, yet she was a person of weak mind, and she sold her land for a grossly inadequate price, and that there was a great disparity of intellect between her and the persons who took her deeds." Error, because calculated to make the jury believe that the idea of the court was that the plaintiff was a total imbecile; following, as it did, the court's charge upon total imbecility; the inference being that there was but little doubt as to the state of plaintiff's mind being "such as to incapacitate her from making a contract."

Error in charging: "Mr. Connally would be entitled to recover whatever he reasonably deserved to have for the professional services he rendered, and for that amount he would be entitled to a lien upon the land in question. You have heard the evidence upon this point, and you are to consider the evidence upon both sides, and you are to find that said amount shall be a lien upon the land, which will inure to the benefit of the

defendant who holds under Connally. Also, should you find in favor of the defendants, the one hundred dollars paid plaintiff for the ratification deed." Error, because not justified by the pleadings, nor had such a thing been insisted upon by either side before the court and jury. Error further, because, if the charge was proper, the court erred in confining the money to be paid back by plaintiff to Connally's fee, and the one hundred dollars paid for the ratification deed, but should have included the amount paid plaintiff by Kuglar on December 20, 1888, for the purchase of the west half of lot 24. Error further, because the court sprung the point in the charge, and defendant had no opportunity to argue it.

(47) Error in charging: "If you find for plaintiff, you write: 'We, the jury, find for the plaintiff the premises in dispute, with so much rent and costs of suit; and also we find the deeds to Kuglar and Connally and to Bowden are void, and shall be delivered up to be canceled. We also find blank sum against the plaintiff for Connally's services, and one hundred dollars for the land, paid plaintiff on account of Bowden, and that these sums must be paid before a writ of possession shall issue.'" Error, because requiring the jury to find the deeds to Kuglar, Connally, and Bowden void in the event they made any finding for plaintiff, which is wrong, as the jury might have found one of the deeds void, and not the others, and might have found for the plaintiff a portion of the premises, but not all. Error further, because, if correct to instruct the jury to find against plaintiff the amount of Connally's fee, and the one hundred dollars paid plaintiff on account of Bowden, it was error to not include as a sum to be found against plaintiff the amount paid her by Kuglar for the west half of lot 24. Error further, because there were no pleadings to authorize the charge as to the amount they should find against plaintiff.

Because, after the jury had been charged, and were considering the case, they requested to be brought back, and asked to be recharged "as to the effect of setting aside one deed. Part of the jury don't understand that. They think that your charge was that, if one of the deeds were set aside,—say the Connally deed,—that that necessarily sets aside all the deeds,—Kuglar's, and the other deeds." It is alleged that the court erred in not telling the jury, when asked by them to do so, whether they necessarily had to set aside all the deeds if they set aside one of them. Error further, in not charging the jury directly upon the point as to which instructions were asked. Error further, because, when the question was put to the court by the jury, the court again charged the jury substantially as set out in the forty-seventh ground above, but more strongly for plaintiff than there stated, as will appear from the next ground.

Because, when the jury came back to be recharged, the court read them a portion of his written charge, and then proceeded to charge them, not in writing; and the following is taken from the stenographer's report as being what the court then said, which was not reduced to writing by the court: "Does what I read answer your question, or is it on some other point? You see I charge you that if she was incapacitated—mentally incapacitated—you believe that when she made the deeds to Kuglar and Connally, and that mental incapacity remained and was in existence when she made the title to Bowden, that then that could not be set up either; that could be set aside." A juror said: "We would like to get you charge us as to the lien, as to Mr. Connally's fee." The court then read the following from his written charge: "Yes, but should you find, for the plaintiff, then you would find that she did not have enough mental capacity to make a contract, and, so finding, the deed she made to Connally would be void; but, although void, Mr. Connally would be entitled to recover whatever he reasonably deserved to have for the professional services he rendered, and for that amount he would be entitled to a lien upon the land in question." The court then again proceeded to charge the jury orally, and did not reduce it to writing, and read it to the jury, as he had been requested by defendants' counsel in writing to do, as follows: "The meaning of that is that, inasmuch as he rendered these services, although the deed he had as security might be void, still he would be entitled to be paid for what you reasonably find for his services. If any one renders services for another, although the person may be imbecile, yet, properly rendered, he is entitled to compensation for his services; and the evidence is before you as to what those services were worth, and as much as you find they were worth you would make them a lien upon the land, which would result to the benefit of the tenant in possession, who is Morris, who holds under Bowden, because Mr. Connally has got his pay out of the land. Do you understand? And therefore it would be inequitable to find for the plaintiff, and not find for Mr. Connally what he ought to have for his services which he rendered. Do you get that? Now, if you find for the plaintiff, I charge you that as to the form of your verdict you would say: 'We, the jury, find for the plaintiff lot number 24 of the 13th district of Clayton county (I think that is the number, I have got it in here), the premises in dispute, but, as there are three lots involved in the matter, I think it would be better to make it distinct, and with so much lien as you may find, and costs of suit; and also find that the deeds to Kuglar and Connally and Bowden are void, and shall be delivered to be canceled. We also find blank sum against the plaintiff for Connally's services, and one hundred dollars for amount

paid plaintiff on account of Bowden.' That is, if you find for the plaintiff, you ought to find whatever you find Mr. Connally earned, and also ought to find for the one hundred dollars that Mr. Morris paid Munroe Phillips for this woman, Munroe Phillips being her agent, and that those sums must be paid before writ of possession shall issue. Upon the subject of rent, look to the evidence, and see how much is proven. Gentlemen, I will answer any questions that either of you may ask." (No question.) "Well, if you do not want to ask any more questions, retire, and further consider your verdict." After being out but a few minutes, the jury was recalled, when the following occurred: "The Court: Of course, you understand that that is only the form of the verdict in case you find for the plaintiff,—that is, this Lou Achor; but, of course, if you find for the defendant, all you have to do is to simply say, 'We, the jury, find for the defendant.' You may retire now. I suppose you understand that. I want to make it clear." Defendants' counsel did, before the evidence closed, submit to the court a written request for the court to put his charge in writing, and read it to the jury. The allegations of error are that the court, if he saw proper to charge the jury outside of his written charge, should have reduced the additional charge to writing before delivering it to the jury; and that the court should not have charged partly orally when defendants' counsel had, in writing, requested that the charge be put in writing.

Error in admitting, over defendants' objection, the answer of plaintiff to an interrogatory as follows: "Do you remember to have signed a deed or paper before Judge John Hart, at the request of Matt. Walker, which you was told would be necessary to close up trade between you and your lawyer in connection with the lawsuit you got him to bring for you for the recovery of lots of land 8 and 9? Did they or not read it over to you? Who carried you in a top buggy or closed carriage to Judge John Hart's to have the paper witnessed? Was it Matt. Walker or S. N. Connally? If you say it was Matt. Walker, please tell whether Judge Hart read the paper over to you, and explained it to you? If he did not, why did he not? Was it or not because Matt. Walker told him not to do it?" Witness answered: "I do not remember to have signed any such deed as the one referred to in this question. Matt. Walker carried me one night in a top carriage to Judge John Hart's, but I don't remember having any paper witnessed before him while there. Judge Hart did not read over or explain any paper to me, as I recollect. I do not recollect why he did not read over any paper to me." Plaintiff objected: "First, each sentence in the interrogatory being leading; second, interrogatory assumes that plaintiff was taken in a top buggy by one of two men to get the deed made; third, it is leading, in that it

assumes and suggests who it was that closed up the trade. All this should have been left for the witness to answer, and not for counsel to state as a fact in this leading and suggestive way." The above objections were filed at the time of filing the cross interrogatories. The interrogatory in question evidently referred to the deed from plaintiff to Connally of February 13, 1888, conveying lot 24.

Error in admitting, over objection of defendants, that part of plaintiff's answer to a cross interrogatory as follows: "I wrote to Spence to know where Connally was, and he answered he did not know where he was." The question was in the following words: "You never did write, or have any one write for you, to Mr. Connally, did you, about the suits since you left Georgia?" This answer was objected to by defendants' counsel because it was not responsive to the question, and, second, because said answer gives the contents of letters not produced or accounted for, and which letters were to and from a person not inquired about in the interrogatory.

Error in admitting answer of J. J. Hart to a direct interrogatory, over objection of defendants, as follows: "I remember at one time Jack Mitchell, the husband of the plaintiff, was brought before me as a magistrate on a criminal charge, and he, Mitchell offered to turn over to me twenty dollars in gold, but I refused to handle or to take the same. Mitchell then offered it to the sheriff, and he likewise refused to take it. I do not know of my own knowledge who took or offered to take the money." It was objected to on the ground that same was irrelevant, did not illustrate any issue in this case, and did not connect any of the defendants with the transaction referred to, and that the arrest and imprisonment of Jack Mitchell was irrelevant. Plaintiff had testified that her husband had been arrested for stealing before they went to Alabama; that he was arrested by Jeff Lee, and put in jail; that she got him out, and left Georgia with him; that she did not know who furnished the money to get some one to go on his bond; that Spence gave her the money to get away, and to pay the freight on her things; and that Connally never told her she would be convicted of any crime if she stayed in Clayton county. One Morrow testified for plaintiff that he remembered when Jack Mitchell (plaintiff's then husband) got in jail in Clayton county; that he was applied to by Matt. Walker to go on Mitchell's bond; that Walker deposited \$100 with Mitchell to indemnify him; that the bond afterwards was relieved, at least they brought the bond to witness, and told him it was all settled, but the witness could not recollect who brought it; that he thought it was Walker, and gave Walker the money back; that he thought somebody else was present, but could not tell who it was; that it seemed to him that Mr. Hutch-

inson was there, and he thought plaintiff was; that Walker may have given the money to plaintiff, but witness gave it to Walker. Walker was a witness to the deed from plaintiff to Connally, and plaintiff testified that she had known Walker, since she was a child, by sight; that he pretended to be a great friend of hers after her grandfather died, visited and advised her as to what was best to do, and she placed great confidence in him; and he advised her to employ Connally, of whom she had never heard until Walker told her to employ him. Walker testified, among other things, that he never had anything to do with plaintiff in his life; that she commenced talking about wanting a lawyer, but he did not tell her then whom to employ, and in a few days afterwards she sent for him, and she said she wanted to employ a lawyer, and he told her Connally would be as good lawyer as she could get; that he knew Connally, and Connally would take care of the case; that he signed the deed as a witness simply as an act of kindness, having no interest in the world in the fee; that Connally very often helped him out; that he accepted some money from plaintiff for a bond for her husband, whom Lee Hutch had arrested for stealing something, witness did not remember what; that witness had started to Atlanta, and got as far as Mr. Hart's, and saw a crowd standing around a fire, and Hutch came out and said that he had Jack Mitchell arrested for stealing something; that witness hitched his horse, and got out, and had the trial, and bound Mitchell over; that Mitchell pulled out \$100, and offered it to Hart, and he would not take it, and offered it to Hutch, and he would not take it, and then asked if anybody would take it, and go his bond; that witness took it, and came to Jonesboro, and gave it to Morrow, who went on the bond; that afterwards witness had no connection with it; that Morrow gave it to plaintiff; that witness had no knowledge of plaintiff going away previous to her going, gave her no advice about it, did not render her, Spence, or Kuglar any assistance about getting away; and that witness and Connally had no understanding or combination on that subject, etc.

Error in excluding the following question, propounded to Kimsey, a lawyer: "If a suit was brought, and the plaintiff was gone, counsel being unable to hear anything of her, wouldn't it be the proper course for him to dismiss the suit, instead of going to trial without her, and let judgment go against her? Wouldn't that be the safest thing to do, when she had gone, and he couldn't hear anything from her? Wouldn't that be the only thing that could be done, unless the counsel had evidence to sustain the case?"—on objection of plaintiff's counsel. Witness would have answered, if allowed, that the proper thing for counsel to have done under such circumstances would have been to dis-

miss the suits. Movants contend that the evidence was admissible as expert testimony.

Error in admitting, over defendants' objection, evidence of Henry Hart as to the present value of the land, to the effect that the land is worth more now than it was "then," and he supposed was as good as the land that sold from \$30 to \$50; and that the building of Manchester had increased the value of some property in that neighborhood from three to five times what it was. Defendants objected, on the ground that it threw no light on the case to prove its present value.

Error in the admission of evidence of T. M. Blalock as to the present value of the land; the evidence being admitted over similar objections. Blalock's evidence indicated that he thought the land was worth from \$25 to \$40 per acre.

Error in admitting evidence of Robert Todd as to the present value of the land; the evidence being admitted over objection to proof of what the land is worth now. Todd's answer to the question indicated that he thought the land was worth in the neighborhood of \$50 per acre.

Error, while S. P. Dodson was being examined by plaintiff, as follows: Witness swore: "I lived where I now live,—I suppose in about a half a mile of old Biley Wright's. I lived there in his lifetime. Q. Did you know Lou? A. Well, when I saw her. Q. Do you know her mental condition? A. I wasn't particularly acquainted with her; but I wasn't about the place very much. By the Court: Let him go on, and state what facts he knows as to whether she had mental strength enough to make a contract. The Witness: That would depend upon the matter of the contract. By Defendants' Counsel: "No foundation has been laid for such testimony; they have got to show by her acts, conduct, and conversation that the witness knows the condition of her mind. By the Court: Go on. A. I have been about the house but a few times, as I have stated. I have known her almost from a child. By Mr. Doyal: Q. Now, what little fact, circumstance, or conduct of hers have you seen that would make you think she was of weak mind? A. Well, I was there a few times on business; was there as a sort of appraiser to set apart the support for old Mrs. Wright; and from her remarks generally I thought she was weak-minded. By Mr. Albert: If the court please, they have got to prove what she said or did. By the Court: Go on with the witness. I think we are on the right track now. Q. By Mr. Doyal: From this knowledge that you have gained, from what she said, her conduct and talk, what, in your opinion, would be her capacity for making a contract for from \$2,000 to \$4,000 worth of land? Do you think she was competent to make a trade? A. I think she could make a trade, but do not think she was competent to discriminate as to the value of the proper-

ty. Q. Well, taking your knowledge of the woman, and her mental capacity, how did it compare with that of Connally and Walker? A. As to making a trade or deed, I think she could make a contract, but doubted her capacity for discriminating between the values of property. By Mr. Albert: We object to the witness' answer, as he has not sworn before the jury to any word, act, or deed of plaintiff's going to show her incapacity to contract. By the Court: Mr. Dodson says she might make a trade, but he didn't think she had mind enough to discriminate as to the value of property. State whether she had mental power enough to make a contract for the sale of land in all its parts, everything necessary. The price, of course, is a part of the contract. A. I don't think she had." The evidence as above set out is what the witness testified upon the subject of incapacity up to the time defendants' counsel made the objections.

Error, while Robert Todd was being examined as a witness, as follows: "Q. By Plaintiff's Counsel: Do you remember of Lou going to your house one night, and giving the alarm, and saying something about a person being in her house? A. Yes, sir. Q. What was the object of her message? By Judge Boynton: We object to that. By the Court: "I think he can state what she said what she came there for. Witness: She came to my house to get me to go over to her house. Said there was some one there who had a pistol, and who was demanding money. I went. Mr. Albert: If the court please, I do not see how it can have any relevancy, unless connected with some of these people, and I know they cannot connect it. By the Court: He can put it in, and then verify it as affecting them. Q. You say you went? A. Yes, sir." Movants contend that this evidence was irrelevant, and that the court should have rejected it. Then defendants' counsel objected, and stated he knew it could not be connected with either of defendants, there being no statement by plaintiff's counsel of an intention to connect either of defendants with the matter testified to by witness.

Because, after Todd had testified as follows: "I held \$110 for plaintiff at one time. One night plaintiff came to my house to get me to go over to her house. Said there was some one there, who had a pistol, and was demanding money. I went. I held a portion of those funds only a very short time. Lou first came and got \$50, she next got \$40, my wife gave her the money. Lou brought the money to me. There are certain kinds of sense. I think she had ordinary sense,"—the court propounded the following questions and received the following answers: "Q. Do you think she had capacity enough, from your knowledge of her, to make a contract for the land in question? A. I don't think she had any knowledge of legal papers, sir.

Q. By the Court: That might be, but how as to her knowing the value of land, and how to take care of herself in a trade? A. Your question imports that you want my opinion in regard to her taking care of her interest. Q. By the Court: Her ability to comprehend the value of land in trading, and to take care of herself. A. Well, from the knowledge I have of her, I don't think she would have such knowledge. Q. By Mr. Hutchison: You would not consider her capable of contracting in land transactions?"—the questions being asked and answers given over objections of defendants that the witness had not testified to anything going to show want of mental capacity in plaintiff, or any fact from which the jury could have drawn such conclusions.

Because, after James Jones had testified: "I have known Lou Achor since she was a child, pretty much. She was raised under quite ordinary circumstances, as for any opportunity to know or learn anything; just a harum-scarum kind of a girl. As far as I know, didn't know one letter from another. I don't think she knew figures, or could tell anything about the amount of a bill, or could count up anything with any accuracy. She didn't know letters or figures, and never had any schooling, in my opinion,"—the following occurred, over objection of defendants' attorney: "By Plaintiff's Counsel: Now, Mr. Jones, what about the capacity of such a woman to make a deed? Do you believe she had capacity enough to make a contract for the sale of \$2,000 or \$3,000 worth of land? By Mr. Albert: I don't think there has been sufficient foundation laid for that question. By Court: I think there has. By the Witness: Well, I think, never having had any opportunity for any education, or anything of that sort, and didn't know how to tell a \$1.00 bill from a \$20.00 or \$50.00, to know its amount,—my opinion is that whites and blacks of that kind needs a guardian. Q. What about your opinion as to ability to contract? A. She might have sense enough to contract, but it might be no advantage to her. Q. Could she contract in the ordinary sense of the word? A. Well, with the sharpers in this country, and taking her capacity, I think she would stand a dull chance for a fair showing." Said evidence was objected to by defendants' counsel, "because no sufficient foundation had been laid to prove the capacity of such a woman to make a deed, or to contract for the sale of \$2,000 to \$3,000 worth of land, as witness had not testified to any fact or thing sufficient for the jury to draw an inference of plaintiff's capacity or incapacity to contract. Also the court erred in allowing witness to answer the following question: "What about your opinion as to her ability to contract?"—same having been objected to,—"because there was no sufficient foundation laid for such a question, witness not having testified to any sufficient acts,

facts or circumstances connected with plaintiff tending to show her mental incapacity to contract." The above contains all that witness has said about plaintiff or her capacity, up to the time the objections were made.

Error in asking the same witness the following question, over objection of defendants, and admitting the answer thereto: "Q. By the Court: Did she [plaintiff] have knowledge or mind enough to know the value of land? A. I don't think she did. Possibly, for herself, she wouldn't know whether she was making a good trade or a bad one,"—the question being asked immediately following the matter set out in the ground last above. It is not stated in this ground what objection was made to this question and answer at the time.

Error in connection with the following, that transpired while Jones was being cross-examined by defendants. Witness answered: "She made mistakes. I was there the day she bought them things,—the time the \$20.00 was given. Q. By Defendants' Counsel: Do you know how she came to make the mistake? A. No, sir. Q. You didn't talk with her? A. No, sir. Q. Haven't you done the same thing in your life,—made a mistake in changing money? A. I don't recollect; I may have. Q. By the Court: Did you ever make a mistake in buying \$2.00 worth of goods and paying \$20.00 for them? A. No, sir. Never have been that green." Movants allege that the question propounded by the court was error, coming as it did in the cross-examination, and being expressed as it was, being calculated to injuriously affect defendants' case, and lead the jury to believe that the court thought such a thing could not have been done by a sane person as handing a \$20 to a clerk for a \$2. Also, because the question was virtually an expression of the court's opinion that if plaintiff had bought \$2 worth of goods and handed the clerk a \$20 bill in payment therefor, she was mentally incapacitated for transacting business, the witness Hill having previously testified that plaintiff traded with him in a store to the amount of \$2, dropped down a \$20 bill, and started away; that he asked her if she didn't want her change, and she replied she didn't know any was coming; and the witness Jones having just spoken of plaintiff having made that mistake. Also because there was no evidence that plaintiff bought \$2 worth of goods and paid \$20 for them, and the question was likely to lead the jury to think that the court thought that the plaintiff had paid \$20 for \$2 worth of goods because she didn't know any better.

Because, while A. M. Bass was being examined by plaintiff, her counsel presented to him a paper, and asked questions as follows: "Q. It is dated on the 12th of December, 1888. That was the warrant sworn out for who? A. Jack Mitchell. Q. And sworn out by you? A. Yes, sir; for three bushels of

potatoes, some corn, and 2 or 3 pounds of tobacco. Q. Was Jack put under bond? By Judge Boynton: We object to that. By the Court: Go on. I think you have the right to get what you can out of this." Movants allege the remarks of the court in making said ruling as error—First. Because the language used by the court indicated and intimated (in the presence and hearing of the jury) that there was something difficult to arrive at in connection with the arrest of Jack Mitchell on the occasion about which witness was asked; and that counsel was entitled to what he could get of that something, and (taken in connection with the allegations in plaintiff's declaration, that she and her husband, Jack Mitchell, both left Georgia under threat of criminal prosecution) was strongly calculated to prejudice the jury against the defendants' side of the case. Error, second: The remarks of the court were an intimation that there was something of value to plaintiff's side of the case; that witness or defendants' counsel knew what that something was, but did not wish to divulge it; but that plaintiff's counsel could question the witness, and get what he could out of him.

Error in refusing to allow W. J. Albert to testify: "That the power of attorney showed witness by Munroe Phillips on November 9, 1891, was from plaintiff, giving said Phillips authority to bring suit for the land in dispute, or to compromise whatever right plaintiff might have in said land, but the right to sign conveyances being retained in plaintiff. That Munroe Phillips was, on November 9, 1891, and ever since has been, a citizen of Alabama." Said things would have been testified to by Albert. The court excluded the evidence on the ground that the power of attorney was the best evidence, defendants' counsel contending that as the paper was out of the jurisdiction of the court its contents could be proved by witness.

Error in admitting, over objection of defendants, evidence of Henry Barber as follows: "I don't recollect exactly about the date, but Col. Spence approached me, and wanted to know if I didn't want to make some money. I told him that it depended on circumstances; that I generally struck at such things in my reach. I asked him what it was, and he said it was some land in the upper part of this county, that we could make one or two thousand dollars. I said that Spence approached me, and asked me to buy some land, wanted me to go in with him, and we would furnish the money and go halvers on it. He said we could make \$1,000 or \$2,000 on it, sometimes he said \$1,000 and sometimes he said \$2,000. If I refused, he said, he would get Mr. Kuglar to go into it. I understood him to say it was the Wright land, in the upper part of this county. I was never there and don't know where it is. Q. By Plaintiff's Counsel: This

land in litigation? A. If it was then, I expect it is the same land. I don't know that. Am not able to answer." The objection was to any statement of Spence, unless made during the pendency of the alleged negotiations between Kuglar and Spence, or Kuglar, Spence, and Bowden; and also because the evidence was irrelevant.

Error in admitting a deed executed by Mrs. B. C. C. Spence to Kuglar on January 28, 1887, conveying to Kuglar a tract of land in Jonesboro, Clayton county, described. The objection to the admission of the deed was that it was irrelevant, being a contract between different parties, and not appearing to have any relation to the issue on trial; and that it was not germane to the case, being a mere declaration of Mrs. Spence to Kuglar, not connected in any manner, by date or otherwise, with the subject-matter of the suit, or the property connected with it.

The court overruled defendants' objection to this deed, and remarked in the hearing of the jury: "Well, I think it applicable. The effect of it is another question. If it is not in relation, it will, of course, do no harm." Movants allege that the court erred in making this remark in the hearing of the jury, because it told the jury that the evidence was applicable to the case, and, by admitting the paper under the remark, said it was in relation to the case.

Error in admitting deed of Kuglar to Mrs. B. C. C. Spence, dated January 18, 1889, conveying a house and lot in Jonesboro, described. Defendants' objection was that the evidence was irrelevant, and not germane to any issue in the case, there being no relation or connection shown between the transaction between Kuglar and Mrs. Spence and any issue in the case on trial.

Error in allowing plaintiff's counsel to prove by S. A. Morris, over objection of defendants' counsel, the value of the estate of L. A. Kuglar. Witness answered that, after payment of debts, Kuglar's estate would turn out to be worth about \$8,000. Plaintiff's counsel, in the cross interrogatories, asked Robert Bowden as follows: "Q. What did you want with a second deed, if your first was good, and why was not L. A. Kuglar's warranty a good deed? A. I was not certain as to whether the Kuglar estate was solvent or not. I was told it might not be, if it failed to get the money out of the Clarke factory, which failed on it." The court admitted said evidence of Morris to contradict Bowden's said answer. Defendant objected, because Bowden's answer was brought out by plaintiff's cross interrogatory, and was immaterial, and could not be contradicted by this evidence. That the evidence could not be introduced to contradict Bowden on this collateral question, especially Bowden's answer being in the qualified manner it is. That said evidence of the value of Kuglar's estate in no way could aid

the jury in arriving at a proper conclusion, but was calculated to bias them against defendants' case by showing it to be an estate of some money.

Error in allowing witness T. J. Byers, who had testified that he had known plaintiff for six or seven years since she had lived in Alabama, to answer question, "How was she fixed in the house?" that "she has not got anything hardly in her house"; the testimony being objected to by defendants on the point of irrelevancy.

Error in allowing J. B. McConnell to testify: "Well, I was out to my father's, in Cullman, Ala., about three weeks ago, and went up to my brother's, near where Bowden lived. He came down to where I was, and asked after me, and lit into talking about this Wright property. I never saw Mr. Bowden before in my life. He stated that he had some sort of a claim on this Wright property, and then he went on to say that a man by the name of Kuglar or Spence had taken this negro Lou's husband, and run him off, and made her give him the deeds. He talked two or three hours about it, I reckoned. He said something to me to the effect that Spence and Kuglar had been down to Lou's house buying this land. He said the whole thing was a fraud." This evidence was admitted before defendants had introduced any evidence, over objection of defendants, because the title had passed out of Bowden nearly two years before the alleged conversation, and no disparaging statement of Bowden could affect the title after he had parted with it.

Error in permitting the same witness to testify to the alleged conversation between him and Bowden, said by the witness in his testimony to have taken place about three weeks before the trial of this case at the house of witness' brother in Alabama, "the same being the evidence of witness as set out in the brief of evidence in this case." The evidence was objected to on the ground that title to the property had passed out of Bowden nearly two years before the alleged conversation.

Error, when R. W. C. Green testified, in answer to the question by plaintiff's counsel, "Could plaintiff read?" "I don't know whether she could or not. From what they said, I don't suppose she could,"—in not excluding the evidence on motion of defendant, made upon the ground that it was hearsay.

Because, when J. F. Lambert testified as follows: "I think she [plaintiff] has as much sense as ordinary, but I think this about it, if you want to know: I think she was susceptible of being biased. She was one of those persons that, if she confided in you, confided with her whole soul, mind and body. If she thought you were a friend, she thought you were a sure-enough friend, and trusted every thing you said." Q. By Defendants' Counsel: "That is the way with most ne-

groes, isn't it? A. I think if she thought you were her enemy she wouldn't believe anything you said." This evidence was in answer to last questions put by defendants' counsel to witness, and when witness so answered, Mr. Doyal, plaintiff's counsel, remarked (in the presence and hearing of the jury): "Put that down, Mr. Reporter. Don't forget to get that down. Come down, Mr. Lambert." When defendants' counsel addressed the court as follows: "If the court please, we think counsel's remarks improper, and we insist that the court stop plaintiff's counsel from making such remarks." The court did not reprimand plaintiff's counsel, but replied to defendants' counsel: "Oh, let him talk. I can't do anything with him. He will talk. Shall I fine him?" To which defendants' counsel replied: "There are certain rules by which the court is to be governed. I am willing to abide by them, and ask that counsel on the other side do the same thing." Movants allege that it was error not to correct plaintiff's counsel for such remarks. Also that the court's reply to defendants' counsel was calculated to disrobe the jury of the solemnity with which they should have been clothed in passing upon such important property rights.

Because when J. M. Walker was being examined the following occurred: When Mr. Doyal, plaintiff's counsel, asked the witness: "Q. Mr. Walker, I will get you to say how much first, last, and all the time, from the beginning of this connection between you and Connally, or from the time you commenced to have him employed at Lou's suggestion, until his final sell-out to Spence and Kuglar, how much money did you get for that work? Judge Boynton: We object to that as improper. The Court: You asked him how much he gave him, and he has already stated it." Alleged to be error, because it was improper for counsel to have made the remark that Connally had sold out to Spence and Kuglar, because the court should have corrected counsel in such reckless remarks, and because the court should have ruled upon defendants' objection.

Because, when the same witness was being examined, the following occurred: "Q. By Plaintiff's Attorney: Didn't you state that after this transaction there about the deeds, that Greene and Landrum went before a magistrate, and made an affidavit? A. No, sir, I did not. The Court: I do not see that that is connected. The only reason I admitted that first question was upon the line of a conspiracy." The question referred to by the court as having been "admitted" was as follows: "Q. By Plaintiff's Counsel: Didn't you state that when Landrum and R. W. C. Greene met there for the purpose of executing a set of interrogatories, when she went to sign what she thought were the interrogatories, they slipped the papers in, and she signed her name to the deeds instead of the interrogatories? A. I said that that was

what a negro said. I heard a negro tell that thing." The deeds here inquired about being those made by plaintiff's mother to J. W. Wright and J. W. Turner to lots 8 and 9. Alleged to be error, because the remark of the court as to "line of conspiracy" was calculated to injure defendants' cause before the jury, and the court should not have given his reason in the presence of the jury, as he did, it being calculated to make the jury believe that the court thought there had been a conspiracy. Also because there was no evidence that Landrum or Greene had ever had any connection with any of the defendants, nor were there such things in the pleadings.

Because, when A. M. Bass testified that Jack Mitchell was at one time arrested for stealing some corn, potatoes, and tobacco from witness, the warrant was sworn out by witness, plaintiff's counsel asked witness what would three bushels of potatoes weigh, to which question defendants' counsel objected, when plaintiff's counsel said: "We want to show that this was part of the scheme to have him arrested and get him out of the way; to show that the negro did not steal the goods, and that it was a hatched-up arrest." Defendants' counsel objected to plaintiff's counsel making such a remark before the jury, or to him, stating the object of his question, when the court remarked: "I can't do anything with him. He will talk. Let him go on. The jury are sensible men." Alleged to be error, because the remarks of plaintiff's counsel as to what was the alleged "scheme," and as to his intention to prove that the negro did not steal the goods, when counsel knew that nothing of the kind could be proved, was improper, and should have been corrected by the court. Also because the reply of the court to the objection of defendants was calculated to mislead the jury into considering as in the case what plaintiff's counsel had said. Further, because the court should have controlled the counsel.

Because, when W. T. Kimsey was being examined, the following occurred, over objection of defendants' counsel: "What would be a reasonable fee to bring a couple of simple suits in ejectment for the two lots of land? Judge Boynton: We object to this evidence. By the Court: I consider it in the scope of the case, as I understand it. It is alleged here as to the strength of this woman's mind to make a contract of any sort, and if the jury should determine that she was too weak-minded to make a contract, or that there was any advantage taken of her, it would then become necessary to know what Mr. Connally's services were worth, or reasonably worth, because he is entitled to a specific fee. By Defendants' Counsel: There is no allegation in the pleadings that puts us on notice of that. By the Court: I think it sufficient, and will let in the evidence." Alleged to be error, because there was no allegation that plaintiff was unable to make "a contract of any sort," nothing of the kind being in the pleadings

relative to the making of the deed by her to Connally. Further, because there was nothing in the pleadings asking that Connally be paid a reasonable fee in the event it was found that plaintiff was incapacitated to contract. Further, because the remarks of the court in the presence of the jury were likely to mislead them, and divert their minds from the issue as to whether plaintiff was weak-minded or not. Also because the evidence could not illustrate an issue made by the pleadings.

Because, when S. P. Dodson was being examined, the following occurred: Plaintiff's counsel asked: "Q. Well, taking your knowledge of the woman and her mental capacity, how does it compare with that of Connally and Walker? Witness answers: As to making a trade or deed, I think she could make a contract, but doubted her capacity for discriminating between the values of property." Defendants' counsel objected to the witness' answer, "as witness had not sworn before the jury to a word, act, or deed of plaintiff's going to show her incapacity to contract." By the Court: "Mr. Dodson says she might make a trade, but he don't think she had mind enough to discriminate as to the value of property." Alleged to be error, because the court erroneously stated the facts testified to by the witness, the witness not saying that she "might make a trade, but I think she could make a contract"; nor did he say that he did not think "she had mind enough" to discriminate as to the value of property, but said he "doubted her capacity for discriminating between the values of property." Also because the court's remark was an erroneous statement as to what witness had sworn, made in the presence of the jury, and calculated to imbue them with the court's erroneous impression.

Because, after the jury had been impaneled to try said case, counsel for defendants called attention of the court to the fact that defendants had objections to some interrogatories sued out by plaintiff, and that question had better be settled then, if the case was to be continued in the event the interrogatories were ruled out. Plaintiff's counsel, Mr. Doyal, remarked (in the presence of the jury): "We are not wanting any continuances. It is the other side that wants that. They have some mighty good evidence in them, but, if they are ruled out, we are going on with the trial. We have got plenty more just like that in the interrogatories. The woods is full of it. Plenty to beat you fellows." Defendants' counsel addressed the court, and objected to plaintiff's counsel's remarks as improper, and asked the court to prevent a repetition of such, and the court replied: "I can't keep him from talking. The jury know him." Movant alleges that the court should have controlled plaintiff's counsel.

Because, while Edward Barber was being examined, the following took place: Witness swore: "Spence approached me, and asked

me to buy some land. Wanted me to go in with him. That we would furnish the money, and go halvers on it. Q. If you refused, what did he say he would do? A. He said he would get Mr. Kuglar to go into it. The Court: You did not push your investigation as to what land it was? Mr. Hutchison: It was this land we are suing for in this case. Mr. Albert: If the court please, we think that the counsel's remark as to what land it was is improper, and ask your honor to instruct the jury that counsel's remark is not in evidence, and they cannot consider it. Mr. Hutchison: I ask your honor to confine counsel on the other side to the rule. He has been telling your honor all through this case what to instruct the jury. I think your honor knows. Mr. Albert: Let the witness answer in his own way. I don't want counsel to tell him. The Court: Mr. Albert, you are not trying this case. I am the judge, and you have no right to instruct me as to what I shall do, and you have got to stop it. You have been objecting all through this case when there was no use in it. Mr. Albert: If the court please, I thought when I was admitted to the bar, and took the oath, that it was my duty to protect my client's interests. The Court: You have been telling the court what to do, and trying to control the court all through this case. Mr. Albert: If your honor please, I meant nothing in the world but what was right, and I didn't want my brother to answer for the witness. The Court: If I commit any error against you, you have your remedy. Please state what land you understood him to say it was. A. The Wright land, in the upper part of this county. I was never there, and don't know where it is. Q. This land in litigation? A. I expect it is the same land. I don't know that. Am not able to answer." Movant alleged that this was error, because the court should have instructed the jury as requested by Mr. Albert. Further, because the court should not have addressed the defendant's counsel as he did, the attack of the court being unwarranted by the facts and the law, and being calculated to impress and impressing the jury that the objections raised by Mr. Albert, both as to the evidence and the remarks of plaintiff's counsel, were out of order. Further, because the remarks of the court were calculated to and did prejudice the jury against Mr. Albert, who was a stranger to the jury, and against defendants' case, which he represented, on the idea that counsel was not conducting himself as he should in reference to the case. Further, because the court erred in so addressing defendants' counsel, and should have corrected plaintiff's counsel.

Because of newly-discovered evidence. In support of this ground the movant produced the affidavit of W. P. Clayton, as follows: "I was at the house of L. G. McConnell, in Cullam county, Alabama, in August, 1893, when the conversation was had between Bowden, James and L. G. McConnell and my-

self. Bowden and I went over to L. G. McConnell's, and found J. B. McConnell there, who was introduced to us by L. G. McConnell, his brother, who said, "This is the man who used to own some of the Wright land over there in Clayton county." J. B. asked Bowden if he were not in the lawsuit about it, and Bowden said he was. J. B. continued to ask Bowden questions about it. Bowden said they had sued him with others, and had stated in the suit that Kuglar and Spence had gotten plaintiff's husband out of jail, and scared them off, and took a deed to the land. I understood from Bowden's conversation that he had never heard anything about the things alleged as to Kuglar and Spence taking the negro out of jail, until he was sued in the case. Bowden said he bought the land from Kuglar, and had subsequently sold it to Morrow. He did not state that he had any interest in the land, but said that he had sold it. Nor did he state that he was to get a thousand dollars, or any other sum, from Morris, or any one, in the event defendants won the suit; nor did he say anything of the kind. He did not then state nor have I ever heard him state that Spence had anything to do with the land, but claimed that Spence had not. He did not say that Kuglar and Spence or any one ran plaintiff out of Georgia, and made her give them the deed to the land. He did not say the whole thing was a fraud, nor that any body who wanted a deed had one, nor that he did not have any title, but said he had once owned the land, and that he believed his title was as good as any in Georgia. This was the only time within my knowledge that J. B. McConnell had any opportunity to talk with Bowden at the time J. B. was in Alabama. Bowden did not say the titles to the land were rotten, nor that it was generally understood and everybody told him that the title was rotten. The conversation lasted about an hour or less, and was mainly on other subjects. L. G. McConnell's wife was not present during this conversation, which took place out in the yard at L. G. McConnell's." In connection with this affidavit, the record showed that J. B. McConnell was a witness for plaintiff, and that this affidavit is directly contradictory of what was testified by him.

Also the affidavit of Robert Bowden, substantially to the same effect as the affidavit of Clayton, and also containing the following: "Hutchison & Key [counsel for plaintiff] told me that Kuglar and Spence got plaintiff's husband out of jail, and frightened plaintiff and her husband away from Georgia. This was in 1891, and was the first I ever heard of it. They did not tell me all of what they had set out in their suit as served on me. They told me, if I was sued, to give up the land, and sue the Kuglar estate on the warranty of title, and that they would get the money for me out of the estate, with damages; and this is what I told

in the conversation with Clayton and J. B. McConnell. I told McConnell in that conversation that I bought the property from Kuglar, that the title, in my judgment, was good; and that I believed that Hutchison had worked up the lawsuit, as he told me in the summer of 1891 [the declaration was filed in November, 1891] that he would straighten out my title for \$100; and that I had given him my note for that amount, and afterwards he advised me to give up the land and sue Kuglar's estate. Neither Hutchison nor Key have paid me, and I did not tell McConnell so. They sent the note 'out here' to a lawyer a long while ago, who saw me, and I informed him of the situation, and he declined to have anything more to do with it. I have no claim on the Wright land, and did not so state to McConnell, or in his presence. I did not tell McConnell that I knew Kuglar and Spence took the negro out of jail. I did not, and do not know such a thing, and am informed that they did not take him out, but it was done by other parties, with which they had no connection. I stated in the conversation that I had sold the land to Morris, and that he paid me \$3,600 for it. I never stated to John Bowden at any time that Spence had anything to do with the land, or had anything to say about Kuglar and my trade. The time John Bowden testified about he and I going to Talley's office was in 1891, after I had been talking with Hutchison & Key, they having told me that Matt Walker said the titles were not good. I had the land in the hands of some real-estate agents for sale, and was informed by them that they had sent some parties down to look at the land, and some one down there had told them that plaintiff had never made any deed to it, and I supposed it was Matt Walker, from what Hutchison & Key had told me he had said; but I have since been informed that he had made no such statement. The negotiations between Kuglar and myself in reference to the purchase of the land did not last over a week, and I am sure I did not see John Bowden during that time, and I had no conversation with him about purchasing the land. I had nothing to do with Spence in purchasing the land, and, if he had anything in the world to do with it or any interest in it, I never heard of it. I never had any conversation with John Bowden in 1890 about the land, and we were living at that time about fifteen miles apart. The trade was made between Kuglar and myself in the latter part of August, 1889. I am informed that John Bowden swore that I told him that I would have made a splendid good trade with Kuglar if Spence had not interfered, and got Kuglar to believe the land was worth more than what he first expected. I would get the land for. I told him no such thing. I am informed he says that I talked with him a good deal about my land trade with Kuglar. He is equally mistaken in this, for he knew nothing about it until the

trade was over with. I was served with this suit a few days before I left Georgia, and John Bowden knew all about it before I left. Hutchison & Key did have the land for sale in 1891, and both told me they had it in the hands of real-estate agents. I never at one time stated to Key that Kuglar's estate or anybody else kept a tenant on the land after I bought it, nor did I tell him that I wanted him to get possession of the place for me, for I took possession of it immediately upon the purchase of it in 1889, and the tenants who were on it after I had bought it were mine. I had full control of all of them, and I collected the rents from them up to the time I sold it. I did not employ Hutchison & Key to resist the mortgage due Kuglar's estate; on the contrary, they were trying to sell the land, so that I could pay off the mortgage. I had no grounds for resisting the mortgage, and Key knows I never asked him or consented for him to do such a thing, but knows he tried to get me to do it, and I declined." In connection with this affidavit, it appears from the record that John Bowden, brother of Robert Bowden, and Key were witnesses for the plaintiff upon the trial, and that, as indicated by the affidavit, said affidavit contradicts their evidence in material particulars. The interrogatories of Robert Bowden were introduced in evidence upon the trial by defendants. In those interrogatories he testified as to a number of things about which statements are made in his affidavit, especially as to the good faith in which he bought the land; that he paid \$3,000 to Kuglar for it, giving Kuglar a farm valued at \$1,600, and his notes secured by mortgage for \$1,400; and as to transactions between him, witness, and Hutchison & Key.

Also affidavit of L. G. McConnell, corroborating the affidavit of Robert Bowden and of Clayton, as to what occurred in the conversation at L. G. McConnell's, but stating, in addition, that affiant heard Robert Bowden say that Kuglar said he (Kuglar) stood bond for a negro, got the negro out of jail; and that affiant did not hear Bowden say that he had any interest in the land at that time. Also affidavit of the clerk of the circuit court and of another that they are personally acquainted with Clayton and L. G. McConnell; that both are gentlemen of honor, and worthy of belief. No affidavits of defendants or their counsel (except that of Robert Bowden) appear in the record.

In a note to the bill of exceptions the judge below states: "I deem it justice to myself to explain why I did not grant the motion for new trial on the ground of giving the jury, at their request, a verbal explanation of the parts of the written charge. I did not consider it other and further charge, because confined to the same point as contained in the written charge. Not to have done so would have been to send the jury back without the light they sought. No harm could possibly come to defendant from this alone,

because the verbal explanation was taken down stenographically, written out, and is contained in the whole charge as made; and, if in error in substance, can be corrected. But I ask the court to review the former rulings upon this point, to consider if the intention and use of stenography and the appointment of a court stenographer subsequent to that law does not substantially repeal that law where there is a court stenographer present and prepared to take the charge of the court down word for word. As it seems to me, it comes under the maxim that, 'where the reason for the rule ceases, the rule ceases.' Why should counsel put the court to the great labor of writing his charge out in full, when the protection intended by this is full and complete by having the charge taken down stenographically? This 'writing out' has to be done by the court while the argument is going on. He has to listen to that and write at the same time, and to have it completed by the time the argument ceases. It is unfavorable to the correct administration of the case, which is of paramount importance, as the judge's mind should not be perturbed in this way at the most critical period in the trial of a case. It took seven days to try this case, and I had to write out in full, while the argument was going on, a charge to meet every material point; while there sat the stenographer, to take down every word as it fell from the judge. I do not make this explanation, of course, as any part of the bill of exceptions, but as the only means I have of getting before the supreme court my view of the law in this respect, for counsel arguing to sustain the judgment cannot so well present it as the judge himself."

Jas. S. Boynton and W. J. Albert, for plaintiff in error. Hutchison & Key and Doyal & Doyal, for defendants in error.

LUMPKIN, J. We have directed the reporter to prepare a condensed statement of so much of the record as may be necessary to an understanding of our rulings in this case. The facts are somewhat complicated, and the pleadings are voluminous, but none of the legal questions presented are very difficult. Indeed, many of the propositions announced in the headnotes are axiomatic. The chief trouble we have encountered in dealing with the case has been to master the record, which, by reason of much tedious and unnecessary detail, and the raising by counsel of many small and frivolous questions, has required the exercise of much patience and the consumption of much precious time.

1. An examination of the plaintiff's petition will show that she claims to have been defrauded of her property by a series of transactions which involved her in a complete network of fraud, in which all the defendants were more or less concerned. All

of them did not participate directly in all of the alleged fraudulent acts, but the acts of each were so connected with the acts of the others as to make them all necessary parties to a proceeding to undo the consequences of all the frauds alleged to have been committed, and render complete justice and relief to the plaintiff. The prayers of the petition were sufficient to accomplish this end, appropriate relief having been asked as to each wrongdoer. It must be understood that we are now dealing with the demurrer, for which purpose the allegations of the petition are taken as true, we not undertaking, of course, to say that they are so in fact. We think the demurrer, on the grounds taken, and which are indicated in the first headnote, was properly overruled. A somewhat analogous case is that of *Cohen v. Wolff*, 92 Ga. 199, 17 S. E. 1029. There it was held that a number of plaintiffs, each having a separate interest in his own claim, but all having a common interest in defeating alleged fraudulent mortgages executed by a common debtor, should have been permitted to join in one action against that debtor, and each to obtain the relief to which he was severally entitled. Here the plaintiff brings together several defendants who have combined to defraud her, each, however, having his own separate interest in the fruits of the fraud they had perpetrated; and we think she should be allowed to sift the matter out to its legitimate legal and equitable consequences, and obtain from each of the conspirators the relief she ought to have against him.

2. A purchase of land, so far as the consideration is concerned, may be perfectly fair to the seller at the time of the sale, and yet the same land may, within a few years, or even less time, become very much more valuable. This is a matter of common knowledge. Consequently, the value of the land at the time of a trial to rescind a sale for alleged inadequacy of consideration cannot fairly throw light on the question of its value years before, especially where there has been a very great and rapid enhancement in the values of all lands in that vicinity because of the building of a town. Evidence of this kind is not only irrelevant, but may very seriously and unjustly injure the defendant by arousing against him a prejudice in the minds of the jury.

3. The rule announced in the third headnote is too well established to require any discussion at our hands.

4. We deem it unnecessary to apply to the special facts of this case the rule stated in the fourth headnote. It seems that numerous instances occurred during the trial when the presiding judge exercised his right to ask questions of the witnesses. In so doing there was, of course, no impropriety, unless he so framed his questions as to intimate an opinion of his own upon the facts, or used some expression calculated to prejudice the

rights of either party. It would be unprofitable to scrutinize closely the various colloquies occurring between the judge and the witnesses at the trial under review for the purpose of determining with absolute precision whether he erred in the manner indicated or not. If he did, we are perfectly sure that this eminent and upright jurist did not do so intentionally, and it is not in the least probable that the occurrences of that trial will be repeated at the next. Indeed, such a thing is hardly within the range of possibility.

5. Where a paper of any kind is material as bearing upon the issue under investigation, the paper itself is generally the best evidence of its contents. Secondary evidence may be resorted to when the original is inaccessible. The courts of this state have no power to compel the production of a paper in the possession, custody, or control of a person in another state, when such person is not a party to the cause. In such an instance, the paper may well be said to be inaccessible. If it were a duly-recorded paper, of which a legally certified copy could be obtained, it might be incumbent on the party desiring the benefit of this evidence to produce such copy; but where no such secondary evidence is obtainable, a witness may be permitted to testify to the contents of the original, if within his personal knowledge, and he is competent to do so. In this connection see *Lunday v. Thomas*, 26 Ga. 537.

6. The charges of fraud and conspiracy in this case were very wide and sweeping. Certain deeds and other evidence were offered, but objected to as irrelevant. At first glance, the objection would seem to be good; and, at best, the evidence in question was, apparently, of but little value in throwing light upon the transactions under investigation. We are not, however, after a study of all the evidence, prepared to say that which we are now considering was totally irrelevant, and therefore think it was properly admitted, it being for the jury, of course, to determine what weight to give it. In admitting the evidence referred to, the judge remarked he thought it was "applicable." Exception to this remark was taken, it being alleged that this amounted to the expression of an opinion by the judge upon the evidence. This complaint, we think, is rather hypercritical, for it is evident that the word quoted was used in a sense synonymous with "admissible," for the judge immediately added that, if the evidence had no relation to the question at issue, it would do no harm.

7. A party who has once had a title to land, and who has sold and conveyed the property, and gone out of possession, will not be permitted to "talk away" the title of another holding under him or his vendee. Consequently, declarations of such a party, made after his connection with the title has ceased, and at a time when he is not even in possession, in disparagement of the title under which he formerly claimed, are inadmissible

to affect his successors. This is another well-settled rule which will be recognized without argument.

8. In charging the jury the court stated that the most important question they had to determine from the evidence in the case was the mental condition of the plaintiff at the time she made certain deeds. We are inclined to think that this was undoubtedly true; but, as there were a number of important issues involved in the trial, it would, perhaps, have been better for the court not to have said this. Indeed, the judge should never single out and present to the jury, as the main or controlling question in the case, a particular issue, unless, beyond all doubt or controversy, it is such in fact.

9. The court instructed the jury that if the plaintiff was partially imbecile in mind, and if "this partial imbecility consisted in her mental inability to understand the value of her property; to be in such a state of mind as that she would do what any friend would request her to do in respect to the disposition of her property; that she did not understand her rights; that she was mentally unable to protect herself in her negotiations with others in respect to her property; that she did not understand the value of money, and that she did not know one coin from another, or one bill of currency from another"; and if they believed from the evidence this was her mental condition, and were thereby convinced she did not have sufficient mental capacity to make a contract,—she would not be bound by certain deeds she had executed, and they would not stand in the way of a recovery by her. We see no error in this charge, as against the defendants. It hypothetically stated facts which, if true, would show a want of mental capacity to contract, and then, in effect, instructed the jury that if they were convinced of such want of capacity, the fact of having executed the deeds in question would not defeat her action. The use of the word "convinced" might have operated a little too strongly against the plaintiff, but there was nothing in the charge of which the defendants could properly complain.

10. The error pointed out in the tenth headnote is so obvious that it will appear at a mere glance. The words "no bar," in the phrase "that deed would be no bar to her recovery," should evidently read "a bar." Were it not that this phrase appears precisely the same both in the copy of the motion for a new trial and the copy of the charge of the court, we would be strongly inclined to think a clerical error had been committed. As it is, we are quite certain the error was the result of mere inadvertence.

11. In this case some of the evidence consisted of answers to interrogatories. Various documents were introduced, and quite a number of witnesses were examined on the stand. It was therefore error for the judge to instruct the jury that "the evidence is what the witnesses swear before you on the

stand." See *McLean v. Clark*, 47 Ga. 26, twelfth headnote.

12. The court charged, among other things, as follows: "Counsel for the plaintiff take the position that, although the state of her mind might not have been such as to incapacitate her from making a contract, yet she was a person of weak mind, and she sold the land for a grossly inadequate price, and that there was a great disparity of intellect between her and the persons who took her deeds. If you should believe from the evidence that both of these positions are true, then you would be authorized to set aside the deeds; * * * but, if you do not believe both, you would not be so authorized." His honor was evidently attempting to give in charge to the jury the substance of section 3179 of the Code; but, as the instruction quoted was capable of being construed into a statement of three contentions by counsel for the plaintiff, the phrase "both of these positions" may have been misleading.

13. In support of the ruling announced in the thirteenth headnote, it is only necessary to cite the case of *Harris v. McArthur*, 90 Ga. 216, 15 S. E. 758, which follows a long line of previous adjudications by this court to the same effect. The law providing for the appointment of official court reporters may offer good reason for a repeal of section 244 of the Code, but as matter of fact that section has never yet been repealed by the legislature.

14. In the fourteenth headnote we have carefully endeavored to state the well-known rule requiring one who seeks the rescission of a contract on the ground of fraud to restore, or offer to restore, the consideration received, as a condition precedent to bringing the action. In *Strodger v. Granite Co.*, 94 Ga. 626, 19 S. E. 1022, it was cautiously intimated, but not decided, that there might be an exception to this general rule, resulting from inability, by reason of poverty, to restore. We do not mean to now decide whether or not an exception to the rule announced may exist for such a reason as that above indicated, or for any other, because no such question is now presented for adjudication. But we do hold without hesitation that, under the pleadings and evidence in the case before us, the verdict in the plaintiff's favor was, for the reasons stated in the headnote, absolutely without legal justification.

15. In the last headnote we have indulged in a modest protest against the manner in which this case was tried, and the motion for a new trial prepared. What we say there is by no means exhaustive of the objections we might have stated to this manner of trying and bringing up cases. In all seriousness, counsel might have spared themselves much worry and annoyance, and have saved this court much unnecessary labor, by pursuing a different course. The writer once heard one of the most distinguished and su-

cessful lawyers who ever lived in Georgia facetiously remark that the questions in a noted case were divisible into "pints" and "pintees." We would be very much obliged if our professional brethren would hereafter omit the "pintees," or at least the most trivial and unimportant ones. Judgment reversed.

(96 Ga. 769)

CENTRAL RAILROAD & BANKING CO. v. CHAPMAN.

(Supreme Court of Georgia. April 29, 1895.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—PERSONAL INJURIES.

It plainly appearing from the plaintiff's own testimony as a witness that he voluntarily, and without being so ordered by any superior, undertook to operate a dangerous machine, with which he was unfamiliar, and that it was entirely outside of the scope of his regular employment so to do, and there being no emergency which would justify a departure by him from his ordinary line of duty, he was not entitled to recover from his master, the defendant, for injuries thus occasioned, although, in point of fact, the machine was at the time in a defective condition.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by W. D. Chapman against the Central Railroad & Banking Company to recover damages for personal injuries. Brought forward from last term. Code, §§ 4271a, 4271c. There was a judgment for plaintiff, and defendant brings error. Reversed.

Lawton & Cunningham, for plaintiff in error. Little, Wimblish & Little and J. E. Chapman, for defendant in error.

PER CURIAM. Judgment reversed.

(95 Ga. 466)

WRYE v. STATE.

(Supreme Court of Georgia. Oct. 8, 1894.)

CRIMINAL LAW—COMPETENCY OF WITNESS—STATEMENT BY ACCUSED—INSTRUCTIONS.

1. It being shown by evidence that the accused had a lawful wife, who was still alive, when he married another woman, the second marriage was void, and did not render this woman incompetent to testify against him as a witness in a criminal case.

2. The statement of the accused to the court and jury, if true, making a case of manslaughter, and he being indicted and on trial for murder, it was error, after charging correctly on the statement, to add: "If the statement is a statement in your judgment which demonstrates his innocence, and you believe that statement to be the truth of the case, as I have just stated to you, you have the privilege, and it would be your duty, in that case to acquit him upon it. On the other hand, if you do not believe that statement to be such a statement as demonstrates his innocence, or if you believe that statement to be untrue, then you may accept the sworn testimony in place of it."

(Syllabus by the Court.)

Error from superior court, Tattnall county; R. L. Gamble, Judge.

v.22s.E.no.4—18

W. W. Wrye was convicted of murder, and brings error. Reversed.

Garrard, Meldrim & Newman, Hines & Felder, Lee & Giles, and A. H. Davis, for plaintiff in error. B. D. Evans, Jr., Sol. Gen., J. M. Terrell, Atty. Gen., and Harrison & Peeples, for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 504)

SAVANNAH, F. & W. RY. CO. v. McMILLAN.

(Supreme Court of Georgia. Oct. 22, 1894.)

JUSTICE COURT—RIGHT TO APPEAL TO JURY—CERTIORARI.

A decision in a justice's court, made by the presiding justice, to the effect that the plaintiff's evidence is insufficient to uphold the action, though the judgment be one dismissing the suit, is an adjudication upon the merits as to the matter of fact involved in the trial, and the plaintiff is entitled, by virtue of section 4157a of the Code, to appeal to a jury in that court from the judgment so rendered. There was no error in refusing to sanction the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Pierce county; J. L. Sweat, Judge.

Action by W. L. McMillan against the Savannah, Florida & Western Railway Company. From a judgment of dismissal, plaintiff appealed to a jury. From an order refusing sanction to a writ of certiorari presented by defendant after denial of its motion to dismiss the appeal, defendant brings error. Affirmed.

Code, § 4157a, referred to in the syllabus, reads: "In any civil case in a justice's court either party dissatisfied with the judgment of the justice may as of right enter an appeal to a jury in said court under the same rules as now regulate appeals to the superior court, provided that by consent of parties such a case may be passed to the appeal before a judgment of a justice without giving bond for the eventual condemnation money."

The following is the official report:

In a magistrate's court, McMillan sued the railway company for damages from the killing of his cow. Upon the trial of the case, after plaintiff closed his evidence, the suit was dismissed by the magistrate, upon the ground that plaintiff failed to prove the killing of the property. Thereupon plaintiff appealed to a jury. Upon the appeal trial, defendant moved to dismiss the appeal, upon the ground that an appeal will not lie to review errors of law committed by a justice court. This motion was overruled, and plaintiff obtained a verdict. Defendant presented to the judge of the superior court its petition for certiorari, alleging error in the refusal to dismiss the appeal. Sanction of the petition was refused, to which ruling defendant excepted. The petition for certiorari is not in the bill of exceptions, but is specified

as part of the record material to be transmitted to this court, and was transmitted as part of the record.

Erwin, Du Bignon & Chisholm and Hitch & Myers, for plaintiff in error. S. W. Sturges, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 567)

HINSON v. GUCKENHEIMER et al.

(Supreme Court of Georgia. Oct. 22, 1894.)

TRIAL—APPROVAL OF BRIEF OF EVIDENCE—DISCRETION OF TRIAL JUDGE.

Though it be in the power of the trial judge, in the exercise of his discretion, to approve a brief of evidence after the term, and after the time fixed by order for filing it has expired, yet he will not be reversed for refusing to approve it where the brief has not been presented to him for approval until after the expiration of such time, and more than 12 months in addition.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Action by S. Guckenheimer & Son against W. C. Hinson, in which J. F. Hinson was summoned as garnishee. Plaintiffs had judgment. From an order denying a motion for a new trial, garnishee brings error. Affirmed.

The following is the official report:

In the matter of Guckenheimer & Son against W. C. Hinson and J. F. Hinson, garnishee, there was a verdict against the garnishee at the March term, 1893, of Appling superior court. During the term said Hinson moved for a new trial, and a rule nisi was issued, returnable the second Monday of June, 1893. The judge also passed an order allowing movant until said date to make out and file a brief of the testimony, without prejudice. The motion was continued from time to time until the March term, 1894, when a consent order was granted, providing that the motion be heard in vacation, at such time and place as might be fixed by the court, upon notice to the parties or their counsel. Under this order, on July 2, 1894, the motion coming on to be heard, it was dismissed, upon the ground that the brief of evidence filed by movant had not been approved by the court within the time prescribed by the order granted by the court allowing movant time to make out and file a brief of evidence. Before the motion to dismiss was granted, movant tendered to the judge, for approval, a brief of the evidence, upon which appeared an agreement, signed by the plaintiffs' attorney, dated May 19, 1893, that it be filed subject to the approval of the court, and an entry of filing in office the same date. In addition to this, movant's counsel stated, in the presence of plaintiffs' counsel, that he had prepared the brief of evidence, and delivered it to plaintiffs' counsel, during the time specified in the

order; that plaintiffs' counsel had made certain corrections and interlineations in the brief, and signed the agreement indorsed thereon; and that he (movant's counsel) had filed the brief in the clerk's office on the day stated in the entry. This statement was not denied by plaintiffs' counsel. The judge refused to approve the brief because it was not presented to him for approval within the time specified in the order. To the refusal to approve the brief, and to the dismissal of the motion, Hinson excepted.

E. P. Padgett, for plaintiff in error. J. G. Holton & Son, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 496)

BOWMAN v. STATE.

(Supreme Court of Georgia. Nov. 26, 1894.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

The evidence to sustain the verdict not being altogether satisfactory, there being some evidence of an alibi, and the newly-discovered evidence consisting in part of the affidavit of one who deposed, after his own conviction, and after the trial of the accused, that deponent and another person, not the accused, committed the crime, that the accused was not present when it was committed, and had not participated in it, and these facts not having been disclosed by the deponent until after the accused had been convicted and sentenced, a new trial should have been granted.

(Syllabus by the Court.)

Error from superior court, Elbert county; Seaborn Reese, Judge.

Jule J. Bowman was convicted of assault with intent to murder, and brings error. Reversed.

The following is the official report:

The indictment is not in the record, but it may be gathered from the latter that Bowman was indicted for assault with intent to murder Walter Oglesby. There was a verdict of guilty, and, defendant's motion for new trial being overruled, he excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, that a new trial should be granted because of newly-discovered evidence. In support of the latter ground, movant produced the affidavit of Churchman Jones. Having been convicted himself of the offense of assault with intent to murder Walter Oglesby, and being in full possession of all the facts in the entire transaction, and desiring to do justice to innocent parties who have also been convicted of the same offense, he most solemnly swears to the following facts as a true statement of the whole affair: He and Luther Tate alone were present and shot Oglesby on the night of May 10, 1894. Neither Jule Bowman nor Will Harper was present when the shooting was done, nor knew anything of it, so far as deponent knows; and neither was engaged in any plot or conspiracy to shoot

Oglesby, no one being responsible for any part of the transaction but Tate and deponent. Deponent did not make this confession until after the trial of Bowman and Harper. This affidavit was not made through favor, affection, or persuasion, reward or the hope thereof, deponent's only purpose being to do justice to those he knows to be innocent of the crime for which he has been convicted and for no other purpose. Also the affidavit of Bowman as to his ignorance of the facts stated in the affidavit of Jones until after his conviction as a participant in the crime; that, after his arrest, he has been confined in jail with Jones, and has frequently urged him and the others charged with him to divulge the truth, if they knew anything, that the innocent might escape, and the guilty alone be punished, but Jones protested his own innocence until after the conviction of himself and affiant, and then voluntarily sent for W. O. Jones and others to come to the jail, where he voluntarily made the confession contained in his affidavit, which establishes affiant's innocence, and implicates the proper person; that affiant is innocent of any complicity in the crime, and has no knowledge of his own that will place the guilt on any one. Also the affidavit of counsel for Bowman as to their ignorance of the facts stated by Churchman Jones in his affidavit until after the conviction of Bowman and Harper, and as to their diligence in getting up testimony, and that they are satisfied that their clients, Bowman and Harper, knew nothing of the facts until after their conviction. Also the affidavit of W. O. Jones that he was present, with Tabor and others, at the jail, and heard the confession of Churchman Jones as to the shooting of Oglesby; that he has seen the affidavit of Churchman Jones, and it contains in substance the confession made by Churchman Jones in affiant's presence in the jail; that he has seen the affidavit made by Charles Martin, and believes the statements therein made to be the truth, and does not believe that Bowman was present, and engaged in the crime of shooting Oglesby. Also similar affidavit of Tabor, except as to Martin's affidavit; and further stating that affiant believes the statement of Churchman Jones to be the truth of the whole matter, so far as Bowman is concerned, and does not believe that Bowman had any part in the commission of the crime. Also similar affidavit of Brown, which affidavit stated further: Affiant was mayor of Elberton when Oglesby was shot, and took considerable interest in ferreting out the perpetrators of the crime, and has as much knowledge of the facts as could be gathered by an industrious investigation of the matter; that affiant has seen the affidavit of Martin, and, in his opinion, it contains facts of importance going to establish the innocence of Bowman; that he has known Martin long, and knows him to

be worthy of belief, believes his statement made in the affidavit is the truth, and would believe any statement he would make in the case; and that from information affiant has received since the trial of Bowman he has doubts as to Bowman's guilt, and thinks the ends of justice would best be met by another investigation of the matter. Also the affidavit of Martin: On Friday or Saturday morning after the shooting of Oglesby, Lindsey Johnson voluntarily came to him, and told him that on the night Oglesby was shot, he (Johnson) was talking to Churchman Jones, and while he and Jones were talking J. A. Sanders passed them, with a gun, going in the direction of Oglesby's house, and named nobody else as having passed with a gun; and that, after Johnson had told deponent this fact, and after deponent had been subpoenaed to appear before the committal court on the trial of Bowman, Harper, and Jones for shooting Oglesby, Johnson came to deponent, and told him not to divulge what he had told him about the man that had the gun; and that deponent did not tell Bowman nor his counsel of these things before Bowman's trial. Also affidavit of Bowman as to his ignorance of the facts stated in the affidavit of Martin until after his trial, and as to his diligence in getting testimony, and that he is satisfied neither of his attorneys knew of the existence of said testimony until since his trial. Also similar affidavit of his attorneys. Also affidavit of W. O. Jones, strongly commending the character for veracity of Martin, and similar affidavits of others. Also the affidavits of seven of the jurors who tried the case, to the effect that the verdict was largely based upon the testimony of Lindsey Johnson, and but for that testimony six of the affiants did not think they would have rendered a verdict of guilty, and the other did not believe the jury would have found a verdict of guilty. The evidence introduced by the state strongly tended to show that Bowman was one of the parties who did the shooting. Lindsey Johnson testified, among other things, that on the night of the shooting, between 8 and 9 o'clock (the shooting occurred between 9 and 10 o'clock), he was standing at the corner of Willis Blackwell's garden, talking to Churchman Jones; that he thinks one or two persons passed while they were talking; that at the time they were talking Bowman passed, going out the way witness goes home; that it was Jule Bowman, and witness took it he had a gun; that he did not speak as he passed; that witness will not say right positive it was Jule Bowman, but the man walked right between witness and Churchman, and he was a man about witness' height; that Churchman eyed him pretty close, and some one passed, and asked Churchman some question, and he kept on; that he was not going exactly in that direction, but the road he was going led to

Oglesby's house; that he did not say where he was going; that after this man passed, and had gone about 15 yards, Churchman passed on, not in exactly the same direction, but in the same general direction, and in the direction of Oglesby's house; that witness does not pretend to swear point blank it was Bowman; it was a man about witness' height and color, and walked like Bowman, and it was witness' best opinion it was Bowman. The defense was an alibi. Churchman Jones testified that it was not true that Bowman, Harper, and others shot Oglesby; and that Bowman was not there with him, and he was not there with Bowman. Will Harper testified similarly.

I. C. Van Duzer and W. D. Tutt, for plaintiff in error. Wm. M. Howard, Sol. Gen., and Harrison & Peeples, for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 497)

HARPER v. STATE.

(Supreme Court of Georgia. Nov. 26, 1894.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

The headnote in the case of Bowman v. State (decided this day) 22 S. E. 274, is precisely applicable to this case.

(Syllabus by the Court.)

Error from superior court, Elbert county; Seaborn Reese, Judge.

William Harper was convicted of assault with intent to kill, and brings error. Reversed.

The following is the official report:

This case is similar to the case of Bowman v. State, 22 S. E. 274. Harper appears to have been indicted with Bowman and Jones for assault with intent to murder Oglesby. He was found guilty, and his motion for new trial was overruled, to which ruling he excepted. His motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also that a new trial should be granted because of newly-discovered testimony. In support of the last-named grounds, movant produced the affidavit of Churchman Jones, of himself, of his attorneys, of Tabor, of W. O. Jones, and of John C. Brown, similar to the affidavits of the same persons and of Bowman in the case of Bowman v. State, touching a confession of Churchman Jones. Movant also produced the affidavit of Ross Durrett that the portion of Oglesby's testimony in the case of State v. Harper, in which Oglesby swore that deponent was at Oglesby's house shortly before the shooting, and saw Will Harper pass his door with a gun, and that deponent asked Oglesby who it was, and Oglesby told deponent it was Will Harper, is totally false. No such conversation occurred. Deponent did not see Harper, nor any one else, pass Oglesby's house with a gun, and was not in or near Oglesby's house the night of the shooting,

until after Oglesby was shot. Also the affidavit of movant as to his ignorance of the facts stated in the affidavit of Durrett until after his conviction, and as to his diligence in getting up testimony. Also similar affidavit of his counsel, and that they are satisfied that their client knew nothing of said facts until after his trial. The defense in this case was an alibi. There was evidence for the state strongly tending to show that Harper was one of the persons engaged in the shooting.

I. C. Van Duzer and W. D. Tutt, for plaintiff in error. Wm. M. Howard, Sol. Gen., and Harrison & Peeples, for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 482)

PARKER v. STATE.

(Supreme Court of Georgia. Feb. 5, 1895.)

ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF INDICTMENT—VERDICT—VALIDITY.

1. An indictment for assault with intent to murder, which charges that the accused, with a pistol,—the same being a weapon likely to produce death,—assaulted a named person, and did then and there shoot and wound that person, with the intent to kill and murder him, avers, by necessary implication, that the pistol was in fact loaded; and the omission to state, in terms, that it was loaded, is not indispensable to the sufficiency of the indictment. Consequently, there was no error in overruling a demurrer to the indictment on the ground that it did not allege that the pistol was "loaded with powder and leaden balls," nor in overruling a motion in arrest of judgment, based upon the same ground.

2. Upon the trial of an indictment for assault with intent to murder, alleged to have been committed by shooting another with a pistol, a verdict finding the accused "guilty of shooting another" is not void for uncertainty. Its reasonable intendment and meaning is that the accused was guilty of the offense of shooting at another, not in his own defense, nor under other circumstances of justification.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

George Parker was convicted of assault with intent to murder, and brings error. Affirmed.

L. J. Blalock and W. P. Wallis, for plaintiff in error. J. M. Du Pree, Sol. Gen., and Felder & Davis, for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 769)

MOYE v. WALKER.

(Supreme Court of Georgia. April 29, 1895.)

JUDGMENT BY DEFAULT—SERVICE OF SUMMONS—JUSTICES OF THE PEACE—TIME OF HOLDING COURT.

1. Where suit was brought in a justice's court, and the summons was duly served by leaving a copy thereof at the residence of the defendant, a judgment by default thereafter rendered against him was legal and valid, although, when the service of the summons was made as above stated, the defendant was temporarily absent from his home, in attendance upon a sick wife,

and never in fact received or saw the summons. *Burbage v. Bank* (Oct. Term, 1894) 20 S. E. 240, 95 Ga.—.

2. Under the decision of this court in *Brooks v. Banking Co.* (decided at the same term) 22 S. E. 55, 95 Ga. —, a notary public, who is an ex officio justice of the peace, may, in a city having a population of over 5,000, lawfully hold his court at a time different from that at which the justice of the peace of the same district holds his court; and the same is true as to place. Moreover, if the judgment rendered by a justice's court is void because the court was not lawfully in session, advantage may be taken of the fact by illegality.

3. There was no error in sustaining the demurrer to the plaintiff's equitable petition.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Brought forward from the last term. Code, § 4271a-c. Suit by C. W. Moye against Joel A. Walker for injunction. There was a judgment for defendant, and petitioner brings error. Affirmed.

The following is the official report:

The petition of Moye was demurred to, the demurrer was sustained, and to this ruling Moye excepted. The petition alleged: On June 21, 1892, Walker sued petitioner in the magistrate's court of the 668th district, G. M., of Muscogee county, on a promissory note, for a balance of \$72.37. The magistrate issued his summons, directing petitioner to appear at the July term, 1892, of the court. Service of a copy of this summons was made by a constable, by leaving the copy at the most notorious place of abode of petitioner, which at that time was 307 Tenth street, Columbus, said county, and entry of service was made, accordingly, June 21, 1892. At that time, and for six days before, petitioner, with his family, were on a visit, for the benefit of the health of his family, to a suburb of Columbus, where his wife was confined with sickness, and needed his personal attention for the time he was absent from home; and they remained there until about July 1, 1892, when they returned to his house. He did not get the summons, and did not know of the pendency of the suit until the happenings of the matters hereinafter stated. At the July term, 1892, of said court,—July 6, 1892,—the case was called in its order, and, no defense having been filed, the magistrate entered judgment by default against this petitioner, upon which judgment an execution has been issued, and levied by the constable upon petitioner's property. The first petitioner knew of the suit or of the judgment was when the levy was made. He filed his affidavit of illegality, and gave bond. The illegality was returned to the magistrate's court for trial, at which court petitioner was confronted with the entry of the officer as to service, which he could not controvert, and therefore was and is without remedy at law, and judgment was entered against him on the illegality. He did not owe Walker on the note, but had fully paid the same long before the suit was brought, and he can, if he is

allowed to do so, establish this defense. The first judgment mentioned above is void because it was rendered and entered up by Williams, N. P., and ex off. J. P. for said district, who entered up the judgment and held his regular court on the first Wednesday (the sixth day) in July, 1892, when, by law, the time fixed upon which to hold the justice court for that district was the second Saturday in July, 1892. Walker has sued petitioner and his sureties on the bond, and is threatening to have the *fi. fa.* again levied. Petitioner charges, on information and belief, that Walker has no property which could be seized under execution. The prayer was for injunction against Walker, restraining him from attempting to collect the judgment and from suing or prosecuting the suit upon the illegality bond; that the justice court judgment be perpetually enjoined, and petitioner be allowed to set up and prove his defenses to the note; for general relief and process. The demurrer was that the allegations of the petition were insufficient to warrant the relief prayed for.

Morgan McMichael and C. J. Thornton, for plaintiff in error. J. E. Chapman, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 505)

BROBSTON et al. v. DOWNING. DOWNING v. BROBSTON et al. BROBSTON et al. v. CHATHAM BANK OF SAVANNAH.

(Supreme Court of Georgia. Oct. 22, 1894.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS — ACTION BY CREDITORS — PARTIES — SUFFICIENCY OF PETITION.

1. With or without a clause in the charter restricting the personal statutory liability of stockholders to the amount of stock at its par value at the time the debt in question was created, the liability exists and continues for any debt incurred by the corporation at any time until the stockholder who claims to be exempt by reason of having sold and transferred his stock before the debt was created has given notice of such sale conformably to section 1496 of the Code. Lumpkin, J., concurring dubitante.

2. Where the personal statutory liability of the stockholders of a corporation is to be apportioned among all according to the relative amount of stock owned by each, and where the corporation is insolvent, and has no assets applicable to the payment of its unsecured creditors, one or more of these creditors may bring suit in behalf of themselves and all others who may choose to come in and be made parties, against all of the stockholders, to enforce their statutory liability, and apportion the amount which each should contribute to discharge the claims of the various creditors. That some of the stockholders are dead, and their estates unrepresented, and some cannot be found within the jurisdiction of the court, is a sufficient reason for omitting them from the suit as parties defendant.

3. On the facts alleged in the petition, the suit could be maintained without first reducing the claims of the creditors to judgment against the corporation, there being no corporate assets in excess of the claims in favor of secured

or preferred creditors. And the fact that the assets have been seized in another suit, which is still pending, and are in the hands of a receiver, is no obstacle to the present proceeding.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Brobston & Co. and others against C. Downing, the Chatham Bank of Savannah, Ga., and others. There was a judgment rendered, and plaintiffs and defendant Downing bring error. Reversed as to plaintiffs, and affirmed as to said defendant.

The following is the official report:

Brobston & Co. and several others named, suing as depositors and as creditors of the Brunswick State Bank, for themselves and all other creditors of said bank who might come in and make themselves parties to the petition, were the plaintiffs in the petition, which was brought April 9, 1894. The defendants were C. Downing, Chatham Bank of Savannah, Ga., and various others named, who were sued as stockholders of the Brunswick State Bank. The petition as amended was demurred to by Downing and others. The demurrer was sustained as to Downing upon the fifth ground of his demurrer. To this ruling plaintiffs excepted, and by cross bill of exceptions Downing excepted upon the ground that the court should have sustained his demurrer upon the other grounds thereof, as well as upon said fifth ground. The petition alleged: The Brunswick State Bank is indebted to petitioners in the sums set opposite their names upon cash deposits. As a corporation incorporated under an act of the legislature of Georgia approved October 11, 1889, it was organized and commenced the banking business in Brunswick upon a capital authorized by the act of incorporation of \$50,000, divided into shares of \$100 each, and continued said banking business from its organization to May 25, 1893, when it closed its doors, suspended business, refused payment of any and all of its indebtedness, and has from that date never resumed business, or paid any of its obligations. After the bank so closed its doors and ceased to do business, a petition was filed in the superior court by the Brunswick Terminal Company and others against it, under which injunction was granted, and a permanent receiver for the bank appointed, and since his appointment its assets have been in his possession; and at the hearing for the appointment of receiver and grant of injunction by its counsel it admitted in open court its insolvency. The record in said cause is voluminous, and the proceedings therein are only referred to for the purpose of showing the facts above stated; hence petitioners do not attach a copy of said petition as an exhibit, but pray leave of reference to said record. The total indebtedness of the bank is \$142,767.33, its nominal assets amount to \$163,208.68, and the actual value of its assets is not exceeding \$50,000. The bank is and was a state depository, the state having by law a first lien

upon all its property; and the county treasurer of Glynn county, the Louisville Banking Company, and the Brunswick Terminal Company (in the suit heretofore referred to) assert preferred claims, second only in lien to that of the state, for the entire amount of the indebtedness of the bank to them, in the sums, respectively, of \$1,500, \$3,000, and \$7,000, or other large sums, and the terminal company claims an additional sum of \$3,000, due it as a general depositor. Each of petitioners, other than the terminal company, is a general depositor, without preferred lien or claim. By the act of incorporation of the bank it is provided that the corporation shall be responsible to its creditors to the extent of its property, and the stockholders, in addition thereto, shall be individually liable, equally and ratably, and not one for another as sureties, to creditors of said corporation, for all contracts and debts of said corporation, to the extent of the amount of their stock therein at par value thereof, respectively, at the time the debt was created, in addition to the amount invested in such shares. There was issued of stock of said corporation the following amounts to the following parties. The petition then proceeded to give the names of the parties, and the number of shares of stock issued to each, among others being the name of Downing, 10 shares, and the Chatham Bank of Savannah, 20 shares. Of the persons whose names were given as having been original stockholders there were several of whom it is alleged that they are now dead, and that the administrator or executor upon whose estate is unknown to petitioners, and when discovered they pray to make such representatives parties, the total issue being 1,954 shares. The eighth paragraph of the petition was as follows: "Said issue of 1,954 shares is 1,454 shares in excess of the total capital stock authorized to be issued. Petitioners are unable, from any record of stock transactions in the bank, to discover what proportion of stock was, at the date of suspension and closing of the bank, authorized to participate in its corporate affairs as stockholders, and how many of said shares of stock had been transferred by the parties named in the last paragraph; but they aver that no one of said shares, if transferred, was transferred according to law, in such manner as to relieve any of the parties to whom such shares were issued from their liability to creditors of the bank, under the section of its charter heretofore referred to, and that each and all of said stockholders are liable under said section to its creditors to an amount equal to the par value of their shares, and were so liable when the claims of petitioners against the bank were created, and became an indebtedness of the bank, and when all the indebtedness of the bank was created." The petition further alleged: "The bank is totally insolvent. When it closed its doors, it had but \$388.05 in cash in its vault, to meet the demands of its depositors and other creditors; the deposits therein subject

to check at that time amounting to \$104,595.99. Its total assets will not realize more than enough to pay the claim of the state, which amounts to \$30,533.96, and the expenses of the litigation in the petition of the terminal company against it, above referred to. Wherefore petitioners prayed that an accounting be had in this cause, and the equal and ratable liability of each and all the stockholders named above be ascertained, and that petitioners, for themselves and all creditors of the bank, have judgment against each and all the stockholders named for the equal and ratable share of the amount due creditors of said bank, and for process against said stockholders." By amendment, petitioners alleged the date at which each of said stockholders became a shareholder, and further alleged that certain of said shareholders had not transferred their stock; that the shares of certain others were subsequently transferred, but to whom, and at what dates, the books of the bank did not show, and which was unknown to petitioners; that certain others, at dates mentioned, transferred shares of certain numbers to persons named. As to Downing, the allegation was that he became a shareholder to the extent of 10 shares on January 22, 1890, and the same were subsequently transferred to F. E. Cunningham on August 25, 1890; and, as to the Chatham Bank, that on September 3, 1891, it became the holder of 20 shares, which, on March 30, 1892, were transferred to Lloyd & Adams. Petitioners have diligently sought for information from the records of the bank, and the foregoing is the best information that can be had. In all cases where transfers are alluded to, the same were made without complying with section 1496 of the Code, and said parties are liable and remain stockholders as to third parties, and as to these creditors and all other parties who may join with them said parties are, since the date of becoming shareholders in the bank and up to this date, stockholders therein, and liable as such. Plaintiffs further amended by attaching a copy of the account of each of them with the bank, giving dates of deposit, interest, amounts deposited, amounts withdrawn, with dates of withdrawals, and balance. The demurrer of Downing et al. was upon the following grounds: (1) No proper parties plaintiff. (2) No such community of interest between the plaintiffs as would enable them to maintain a joint action against said defendants. (3) No such privity of contract between plaintiffs and defendants as would enable plaintiffs to maintain their action. (4) No such community of interest in the subject of the suit as between the several defendants as would entitle plaintiffs to join them therein; nor are all of said alleged stockholders who would be jointly liable with these defendants, according to plaintiffs' petition, made parties defendant to the suit. (5) The declaration is insufficient in law, and alleges no such facts as would entitle plaintiffs to recover. (6) It appears from the face of the declaration that said

cause of action, if any, is vested in the receiver of this court, as in the petition stated, and not in the several parties who appear as plaintiffs. (7) No action can be maintained in the premises by plaintiffs, either individually or collectively, until final decree making distribution of the assets of the corporation to such persons as may be, under such final decree, entitled thereto. (8) The declaration does not allege how, wherein, nor in what manner they are responsible to plaintiffs, or either of them, as stockholders of the corporation, nor at what time the debts of the several plaintiffs were incurred, nor what particular shares of the stock were issued to these defendants, or either of them, nor how nor wherein their possession of said shares so alleged to be held by them creates a liability as against them in favor of either of the plaintiffs. (9) Because it appears by the petition that there is another suit pending in the superior court of said county, instituted prior to the filing of said petition, to determine the liability of the bank to the petitioners and its other creditors, and the value of its assets, in which prior suit a receiver was appointed, who now has in his hands the assets of said bank, and is administering the same under the order of said court for the benefit of the creditors of the bank; and until said suit is disposed of the petition of plaintiffs will not lie against these defendants.

Goodyear & Kay, for plaintiffs in error
Brobston & Co. and others, Atkinson, Dunwoody & Atkinson, Johnson & Krauss, and Lester & Ravenel, for defendant in error
Downing.

PER CURIAM. Judgment reversed on main bill of exceptions in each case; on cross bill, affirmed.

(96 Ga. 538)

WALTON COUNTY v. FRANKLIN et al.

(Supreme Court of Georgia. Dec. 21, 1894.)

CONVICTS—POWER OF COUNTY TO HIRE OUT—ACTION ON BOND.

The county authorities have no power to hire out convicts sentenced under the provisions of section 4310 of the Code, to a private individual, whether, being so hired, they be worked in chain gangs or otherwise; and so much of the acts of the legislature embodied in sections 4814, 4815, 4820, and 4821e of the Code as authorizes such a hiring is repealed by the act of August 11, 1879 (Code, § 4310). Hence, where an ordinary hired convicts to an individual to be worked in a chain gang, and took a bond from him for the faithful performance of his contract, and the individual refused to take the convicts, in a suit for a breach of the bond, these facts being alleged in the petition, it was not error to sustain a general demurrer thereto. Notwithstanding a seeming expression to the contrary in the headnote announced in the case of *Walton Co. v. Powell*, 94 Ga. 648, 19 S. E. 989, that case is distinguishable from the present. There the written contract had been executed, and the hirers themselves recognized its legality, but sought to avoid its terms by proving a parol contract conflicting with the same.

(Syllabus by the Court.)

Error from superior court, Newton county; R. H. Clark, Judge.

Action by county of Walton against R. G. Franklin and others on a bond. From an order sustaining a demurrer to the petition, plaintiff brings error. Affirmed.

The following is the official report:

A general demurrer to the declaration in this case was sustained, to which ruling plaintiff excepted. The declaration alleged: R. G. Franklin, as principal, and A. S. Franklin, as security, are indebted to the county of Walton \$327.12, besides interest. On September 27, 1890, said county, through its ordinary, entered into a written contract for the hire of such convicts as might be sentenced to work in the chain gang by the county and superior courts of said county. R. G. Franklin represented in this contract that he maintained in Newton county a public chain gang, with suitable provision for the safe-keeping and management of such convicts as might be placed under his charge by county authorities, for the purpose of carrying out sentences of the court, which chain gang was inspected by the grand jury of Newton county, and for the purpose of carrying out the sentences imposed upon convicts by the superior and county court of Walton county, in cases where such sentences provide that said convicts shall work in the chain gang upon the public works. Petitioner, through its ordinary, agreed to deliver at its jail door to R. G. Franklin all such convicts so sentenced for the years 1891 and 1892, beginning with January 1, 1891, and ending with December 31, 1892, upon the following terms: Upon the payment of \$7 per month for all able-bodied convicts between the ages of 16 and 50, \$4 per month for all able-bodied females during the terms of their sentences, respectively, and for youths under 12, men over 50, and disabled females, such price as might be agreed upon by the parties at the time of their delivery; said Franklin being bound to take all such convicts, and maintain them without further expense to petitioner, and agreeing to promptly send proper guard for them when notified, and to pay the stipulated hire on delivery at the jail door, and to keep, guard, clothe, etc., all such convicts, and work them as provided in the sentences of the courts, respectively. Said contract is in court, ready to be shown. In accordance with this contract, R. G. Franklin, on October 9, 1890, executed and delivered to petitioner a bond, with himself as principal and A. S. Franklin as security, in the sum of \$1,000, payable to said ordinary and his successors in office, conditioned for the faithful performance of the contract,—which bond is in court, ready to be shown,—whereby A. S. Franklin; as security, became bound for the faithful performance of the contract by R. G. Franklin. Petitioner has faithfully performed its part of the contract, having given

R. G. Franklin due and timely notice for the delivery of all convicts sentenced by the superior and county court of Walton county to work in the chain gang upon the public works for 1891 and 1892, and delivering all such to him upon payment of the stipulated hire for the term of sentence at its jail door, for whom he, in response to such notice, called. But on or about August 29, 1892, upon due notice of the readiness of petitioner to turn over to him certain convicts in compliance with the contract, he refused to send for them, and afterwards refused to receive them, and continued for the balance of the time covered by the contract to refuse to send for and receive such convicts as he was bound to take by said agreement, though in each instance duly notified by petitioner of its readiness and desire to turn them over to him according to the contract. On account of his refusal to receive said convicts, they were thrown upon the hands of petitioner, and it was forced to rehire them, at a much reduced rate, to another named, who paid only \$50 per annum for able-bodied convicts between the ages of 16 and 50, and \$30 per annum for boys between 12 and 16 and able-bodied females. Petitioner appends a list of the convicts R. G. Franklin was bound to receive and refused, with the dates he was notified by petitioner to send for them, terms of sentence of each and difference in the amount he agreed to pay for their hire and that actually received respectively, all of the same being able-bodied men between 16 and 50 years of age except one, an able-bodied female. By the refusal of said Franklin to receive said convicts in accordance with the contract, he has caused petitioner to lose said difference in hire, the total sum thereof being \$301.35; and has committed a breach of his bond, whereby A. S. Franklin, his surety, has also become liable to petitioner for such loss, as well as for that hereafter shown. Some of said convicts, by reason of the refusal of R. G. Franklin to come for them after the due and reasonable notice, were obliged to remain in the jail of petitioner longer than they would have remained had he sent for them promptly according to his contract, and not obliged petitioner to seek other parties to whom such convicts could be rehired; and petitioner in this way incurred additional jail fees, amounting to \$17.80, by reason of his refusal to comply with his contract. Petitioner has incurred the further expense of \$8.27, which sum its ordinary was forced to expend in traveling and other expenses to rehire such convicts, necessitated by R. G. Franklin's refusal to receive them. Demand for payment and refusal to pay were alleged.

Sanders McDaniel, for plaintiff in error.
E. F. Edwards, for defendants in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 569)

RODGERS v. STATE.

(Supreme Court of Georgia. Feb. 18, 1895.)

MOTION FOR NEW TRIAL—DISMISSAL.

Where a motion for a new trial had been twice continued for want of papers, the absence of which was attributable either to the fault or negligence of the counsel for the movant, and where, upon the motion coming on the third time for a hearing, the papers were still absent, and no sufficient cause for their nonproduction was shown, nor any motion made for a further continuance, this court will not reverse a judgment dismissing the motion for the want of papers. Inasmuch, however, as the present case involves the imprisonment of the accused for life, direction is given that the presiding judge may, in his discretion, reinstate the motion for a new trial, and hear and determine the same upon its merits.

(Syllabus by the Court.)

Error from superior court, Washington county; R. L. Gamble, Judge.

J. M. Rodgers was convicted of murder, and brings error. Affirmed.

The following is the official report:

Rodgers was convicted of murder, with a recommendation to confinement in the penitentiary for life, at the September term, 1894, of Washington superior court. He moved for a new trial, and the motion was set for hearing November 12, 1894. By consent, the hearing of the motion was continued until November 30, 1894; and it was ordered that defendant have until that time to file, and have approved, a brief of the evidence in the case, and the right to amend the motion by inserting new grounds, up to the hearing of the motion. On November 12, 1894, movant's counsel failed to have the papers at the hearing, and because of the absence of the papers the motion was set for November 30, 1894. On November 30, 1894, counsel again failed to have the motion and brief before the court, and by consent the motion was continued until December 21, 1894, to be heard at Louisville, Ga. On December 21, 1894, counsel still failed to have the papers present, with the exception hereinafter noted, and the motion was dismissed for that reason; C. M. Tyson, one of defendant's counsel, being present at each hearing. On the last-named date, C. M. Tyson stated in his place—which statement was not denied—that he had been informed by the clerk of the court that on November 9, 1894, upon the request of Judge James K. Hines, of Atlanta, who was one of the counsel in the case, he had sent Judge Hines the indictment, motion, order, and brief of evidence. Counsel further stated that he had informed the clerk on December 1, 1894, that he (counsel) must have the papers for the hearing on December 21, 1894, and that the clerk must get them for him; that it was necessary; that on December 17, 1894, he had demanded the papers of the clerk, and was told by the clerk that he (the clerk) would write to Judge Hines for them; that on December 20, 1894, he had again demanded of the clerk the papers, and was given the ste-

nographer's report, subsequent orders continuing the motion, amendment to the motion, and two letters from Judge Hines; that it was then too late, and impossible to attempt, to get copies, and he demanded and obtained from the clerk a certificate in reference to said original papers, which certificate, as well as the papers gotten from the clerk, were exhibited to the court. The first of the letters from Judge Hines was dated Atlanta, November 8, 1894, addressed to the clerk, and asked the clerk to send by return mail or express the motion for new trial and brief of evidence in the case of *The State v. J. M. Rodgers*, and all original orders taken in connection therewith. The second was dated Atlanta, December 19, 1894, addressed to the clerk, and stated that the writer was in receipt of the clerk's letter of the day before, in which the clerk asked him to send the clerk the papers in the case; that the writer was not in possession of any of the papers in the case, except the inclosed amendment to the motion for new trial, which the clerk could turn over to the associate counsel for the defendant; and that the writer knew of no other papers that he (the writer) had in the case. The clerk's certificate was that he received the first of the letters above mentioned, and in his opinion the papers asked for therein were sent to Judge Hines by return mail, and he (the clerk) holds, as receipt for the same, said letter, and that the papers are not in the clerk's office, but that all orders, the motion for new trial, and amendment thereto, are of record in his office. To the dismissal of the motion, defendant excepted.

C. M. Tyson and Hines & Hale, for plaintiff in error. B. D. Evans, Jr., Sol. Gen., J. M. Terrell, Atty. Gen., and Harris & Rawlings, for defendant in error.

PER CURIAM. Judgment affirmed, with direction.

LUMPKIN, J., providentially absent, and not presiding.

(95 Ga. 459)

GRANTHAM v. STATE.

(Supreme Court of Georgia. Feb. 27, 1895.)

BURGLARY—POSSESSION OF GOODS—EVIDENCE TO EXPLAIN—ADMISSIBILITY.

1. Where, in a trial for burglary, it was shown that the accused had possession of goods taken from the storehouse alleged to have been broken, and he, not denying this fact, contended that he and the owner were on friendly terms, that they frequently drank and gambled with each other, and that the goods in question were won from the owner in a game of cards, all of which was denied by the latter in his testimony, and where the time of the alleged burglary was left uncertain by the evidence, it was error to refuse to allow the accused to prove that before and after the time of the burglary he and the prosecutor were seen in the latter's store, and at other places, gaming, and that the prosecutor was seen drunk at his store both before and after the alleged burglary.

2. Other than as indicated in the preceding note, there was no error requiring a new trial. (Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

A. P. Grantham was convicted of burglary, and brings error. Reversed.

Jordan & Watson, for plaintiff in error. Tom Eason, Sol. Gen., and Felder & Davis, for the State.

PER CURIAM. Judgment reversed.

(95 Ga. 557)

BLALOCK et al. v. SMITH et al.
(Supreme Court of Georgia. Feb. 27, 1895.)
CERTIORARI—FINAL JUDGMENT.

This case is controlled by that of Greenwood v. Factory, 13 S. E. 128, 86 Ga. 502. According to the principle there ruled, the court erred in dismissing the certiorari.

(Syllabus by the Court.)

Error from superior court, Houston county; C. L. Bartlett, Judge.

Action by S. T. and A. O. Blalock against Smith & Blasingame on a promissory note. There was a judgment for defendants, and plaintiffs bring error. Reversed.

The following is the official report:

S. T. and A. O. Blalock, in a magistrate's court, sued Smith & Blasingame, upon a promissory note for \$75 with interest, etc. There was a judgment for defendants. Plaintiffs took the cause by certiorari to the superior court, alleging that the magistrate erred in holding the release claimed by defendants a valid and legal release, and in entering judgments for defendants. The judge of the superior court dismissed the petition for certiorari, upon the ground that the errors complained of were not errors of law, but mixed questions of law and fact. To this ruling the plaintiffs excepted. He also refused to sustain the petition for certiorari, and render judgment thereon against defendants, to which ruling, also, plaintiffs excepted. The note sued on was dated September 5, 1890, due 60 days after date, payable to plaintiffs or bearer, and contained a mortgage upon a printing press and outfit, for which the note was given. On the trial plaintiffs introduced this note and closed. Defendants pleaded the general issue, and payment, by way of release. Smith testified that the note was one of two given for the printing press, etc.; that Wright at one time had the notes for collection, as attorney for plaintiffs, and foreclosed the mortgage; that he (Smith) was going to resist the foreclosure, but Wright agreed that, if he would file no defense to it, he would release Smith from the debt, saying that all plaintiffs wanted was the press; that some time after this he secured from Wright a written release from payment of the debt, which was signed by Wright as attorney for plaintiffs; that he did not know where this release was; had

looked in his desk for it, but failed to find it; it might be in a barrel of old papers in his office, through which he had not looked; that he did not know whether plaintiffs had ever ratified Wright's action or not; that he (Smith) was then, and still is, an attorney at law; that the press, outfit, etc., was worth the amount due on it; that it was duly sold on sale day under the mortgage foreclosure, and that it brought, to the best of his recollection, \$76, and was bought by Wright. Blasingame testified that on the day before the sale under the foreclosure he was asked by Wright not to bid on the press, etc., at the sale, Wright saying that all plaintiffs wanted was the press, and agreeing that, if witness would refrain from bidding at the sale, he would release witness from the debt; that witness then and there secured from Wright, as plaintiffs' attorney, a written release from the debt in consideration of his refraining from bidding; that, but for this agreement and release, he would have attended the sale, for the press outfit had been added to considerably, and was worth more than when defendants bought it, and fully worth the amount of the mortgage debt of \$150 which was being foreclosed, but that, having this release, he did not attend the sale; that he was at the time a practicing attorney; and that he did not know whether plaintiffs had ratified Wright's action. Plaintiffs' attorney objected to all the evidence regarding the release, on the ground of irrelevancy, there being no valid consideration shown to support a legal release; but this objection was overruled. The petition for certiorari alleged as error the admission of such evidence, in addition to the allegations of error mentioned above.

A. S. Giles and W. H. Harris, for plaintiffs in error. L. L. Brown and R. D. Smith, for defendants in error.

PER CURIAM. Judgment reversed.

(95 Ga. 559)

NEWS PUB. CO. v. BUTLER.
(Supreme Court of Georgia. Feb. 27, 1895.)
WITNESSES—RIGHT TO CROSS-EXAMINE—DISCRETION OF COURT.

1. The right of either party to a suit to subject to a thorough and sifting cross-examination the witnesses called to testify against him is distinctly declared in section 3864 of the Code. It is a substantial right, the preservation of which is essential to a proper administration of justice, and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy. Hence, where, in the progress of a trial, a party who had testified in his own behalf afterwards called a witness to support his testimony, it was error for the presiding judge to deny to his adversary the right to cross-examine such witness generally as to all matters material to the case, even though the witness was called merely to rebut testimony already introduced by the opposite party, and had not, upon his direct examination, testified as to the particular facts sought to be elicited by the cross-examination.

2. Rule 60 of the superior courts deals, not with the right of cross-examining witnesses, but with the manner in which this right is to be exercised. The manner and extent of a cross-examination are, to a certain extent, within the control and subject to the discretion of the presiding judge, but the substantial right should neither be abridged nor denied.

3. Other than as above indicated, no error was committed which requires the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

Action by R. E. Butler against the News Publishing Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

The following is the official report:

R. E. Butler sued the News Publishing Company for \$267.32 upon an account for 33 weeks' salary as business manager and book-keeper (July 9, 1892, to March 4, 1893), at \$15 per week; for \$61.56, balance of money loaned; and for \$50, due by defendant to E. T. Wade on a transfer in writing by Wade to plaintiff; less credits of cash and sundries from July 9, 1892, to March 4, 1893, amounting to \$339.34. Under the charge of the court, and upon a mass of conflicting evidence, the jury found for the plaintiff \$208.68, and defendant's motion for a new trial was overruled. The motion alleges that the verdict is contrary to law, without evidence to support it, and strongly and decidedly against the weight of the evidence. It further assigns error upon the following rulings of the court: Ripley was sworn as a witness for the plaintiff at the opening of the case. Plaintiff closed without introducing him. He had also been subpoenaed as a witness for the defendant, which offered testimony and closed its case without introducing him. Plaintiff called the witness to the stand, and proceeded to examine him in rebuttal of defendant's evidence. On cross-examination, defendant sought to prove by the witness "that the personal account of R. E. Butler, beginning with the 'Troy Laundry,' and going down to the word 'Goette,' were discovered to have been settled by Butler by crediting against the bill of the News Publishing Company his (Butler's) personal accounts; that this was discovered by Moore & Wright; and that Ripley entered them because they were so discovered in the way, and not by the consent of Butler." Defendant's counsel stated that the object of this testimony was to meet the testimony of Butler who had testified in chief that he directed Ripley to make these entries as credits upon the account. The testimony so offered was objected to by plaintiff as not being in rebuttal, and the objection was sustained; the court holding that it was not in rebuttal of anything except plaintiff's evidence in chief, and that the witness had been in the court room all the previous day, while defendant was rebutting the testimony in

chief. The court charged: "There is a rule of evidence that is invoked in this case, and that is that positive testimony shall outweigh negative testimony. Positive testimony does not mean, gentlemen, affirming a thing; and negative testimony, denying it. Positive testimony is where a person swears positively one way or the other,—that he knew a thing, or that a thing did not exist. That is positive testimony. Negative testimony is where a man simply don't know or don't remember something, or something of that kind. To illustrate, if a question is asked a man if such a thing happened, if he says no, that is positive testimony; if he says yes, that is positive testimony; if he says, 'I don't know,' or 'I don't remember,' you would consider that as negative. Now, the rule is, where a man swears positively, it should weigh more than negative testimony, if there is any conflict." Defendant claims that there was no evidence in the case that made the rule of positive and negative evidence applicable; that all the evidence apparently negative in character was in fact positive evidence; and that it was error to give in charge to the jury, at all, the doctrine of positive and negative evidence. The next sentence of the court's charge to the extract complained of was, "But you will look into all the testimony, and weigh it, and give belief to that witness that you believe is best entitled to it." Defendant further insists that the charge thus complained of does not truly and correctly state the law upon the subject of positive and negative testimony. Also, that the sentence, "Now the rule is, where a man swears positively it should weigh more than negative testimony, if there is any conflict," was calculated to mislead the jury; that, while the court doubtless intended to state the rule in a case where a witness swore positively, it failed to do so, and simply stated the rule, "where a man swears," thereby conveying the meaning, "where a witness testifies"; and that, inasmuch as defendant relied principally upon documentary evidence, this sentence was calculated to mislead by attaching undue importance to the testimony of witnesses, as against documentary evidence. The court charged: "Now, in this case, it is incumbent upon Mr. Butler to make out his case,—that is, to prove to you, by the preponderance of testimony, that these things are owing to him; but it don't matter how little the preponderance is; just enough. If he proves it by enough to turn the scales in his favor, that is what the law calls the 'preponderance of testimony.' Where the defendant claims that payment has been made, they must show you that the payments have been made, by the preponderance of testimony." It is contended that this was unfair to defendant, in this: In stating the amount of preponderance of testimony required from plaintiff to make out his case, the court

qualified the rule so as to require the least possible degree of preponderance, whereas, in charging the law applicable to the defendant making out its defense of payment, the court did so qualify the rule, but stated it so as to require of defendant the preponderance of testimony. By thus limiting the rule in plaintiff's favor, and failing to limit it in favor of defendant, the court created the impression upon the minds of the jury that there was a different rule applicable to the two sides of the case, and that more testimony was required to make out the defense of payment than was required by plaintiff to make out his account. The last charge quoted is especially assigned as error by reason of the following facts: Two of the principal issues in the case were those having reference to the loan claimed to have been made by plaintiff to defendant, and the checks of \$5.15 and \$70. The plaintiff's counsel, in his argument to the jury, contended that Butler's testimony on this issue was positive, and Moore's was negative. Counsel for plaintiff invoked the rule of positive and negative testimony. Defendant insists that it was error to give the charge aforesaid, because defendant insisted that the testimony of Moore on said issue was positive testimony.

Hill, Harris & Birch, for plaintiff in error.
Harris & Harris, for defendant in error.

PER CURIAM. Judgment reversed.

(96 Ga. 752)

DOUGHTY v. McMILLAN et al.

(Supreme Court of Georgia. April 1, 1895.)

INSTRUCTIONS—NEW TRIAL—CONFLICTING EVIDENCE.

Where the trial judge, in his charge to the jury, while giving certain instructions as to admissions, inadvertently used the name of a witness, where he intended to use the name of another person, not a witness, and granted a new trial upon the ground that the jury might have been misled by such confusion of names, this court will not control his discretion in granting a new trial, unless the verdict be demanded by the evidence. In this case, the evidence being conflicting, the discretion of the judge in granting a new trial will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action between H. J. Doughty and G. W. McMillan and others. Brought forward from the last term. Code, § 4271a-c. From the judgment rendered, Doughty brings error. Affirmed.

Mozley & Morris, for plaintiff in error. J. J. Northcutt and Clay & Blair, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 758)

GRIFFIN v. BREWER.

(Supreme Court of Georgia. April 8, 1895.)

JUDGMENT BY DEFAULT—REINSTATING CASE—ABUSE OF DISCRETION.

Where a case, apparently in default, was regularly called for trial, and the defendant stated, in effect, that he thought he had filed a plea, but, after search, he was unable to find it, and did not move to establish a copy, or ask leave to file another plea in lieu of the alleged original, and thereupon a judgment by default was rendered against him in the presence and hearing of himself and his counsel, and without objection from either, it was an improper exercise of discretion, even during the same term, to set aside the judgment and reinstate the case upon a motion filed by the defendant, alleging that a plea was in fact filed by him before the judgment was rendered, and setting forth its contents, although the defendant verified this motion by his oath; it also appearing by the undisputed evidence introduced by the plaintiff in the case on the hearing of this motion, and from the recitals in the bill of exceptions, that the judgment had been originally rendered without objection, and under the circumstances first above set forth.

(Syllabus by the Court.)

Error from superior court, Polk county; O. G. James, Judge.

Action by J. Griffin against R. H. Brewer. Brought forward from the last term. Code, § 4271a-c. From an order opening a judgment by default, plaintiff brings error. Reversed.

Irwin & Bunn, for plaintiff in error. J. M. King, for defendant in error.

PER CURIAM. Judgment reversed.

ATKINSON, J., not presiding.

(96 Ga. 501)

BUSH v. STATE.

(Supreme Court of Georgia. Feb. 18, 1895.)

CRIMINAL LAW—VOLUNTARY MANSLAUGHTER—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—MISCONDUCT OF JURY.

Several of the grounds of the motion for a new trial fail to distinctly allege error, and are too vague for consideration; the alleged newly-discovered evidence, for aught that appears, was known to at least one of the counsel for the accused before the verdict was rendered; the alleged misconduct of the jury was satisfactorily explained; the evidence fully warranted the verdict for voluntary manslaughter; and, on the whole, it does not appear that any error authorizing the granting of a new trial was committed.

(Syllabus by the Court.)

Error from superior court, Washington county; R. L. Gamble, Judge.

W. J. Bush was convicted of voluntary manslaughter, and brings error. Affirmed.

The following is the official report:

W. J. Bush was indicted for the murder of J. G. Joiner. The killing occurred on July 10, 1894. Bush was found guilty of voluntary manslaughter. His motion for new trial was overruled, and he excepted. The motion contained the general grounds that the verdict was contrary to law, evi-

dence, etc. Further, because, the state having closed its case, defendant offered no testimony, but closed, and the court then allowed the state to reopen its case, and put up witnesses to connect this defendant with the killing, because certain illegal testimony was ruled out, after the state had closed, upon motion of defendant. It does not appear in this ground of the motion what evidence the state was allowed to introduce when the case was reopened. Error in this: Defendant offered to prove the merits and particulars of a long-existing feud between deceased and defendant, which the court refused, but restricted the testimony to the bare fact that deceased had shot at defendant, and hit defendant's wife. Error in refusing to allow defendant to prove by one Clance the particulars and merits of this attempt upon defendant's life by deceased in April, 1894, but confining him to the bare proof of the fact that deceased had shot at defendant in April, 1894, and hit defendant's wife. Also because, under the same circumstances, the court rejected similar testimony of other witnesses. Because of newly-discovered evidence. Because of the fact that, at the conclusion of the testimony, permission was given the entire jury to retire from the court room a few minutes, and they did so, under charge of a bailiff, remaining out a reasonable time; and two of the jurors returned to the court room unaccompanied by any officer, and remained in the jury box five minutes, or longer, before the other ten jurors, accompanied by a bailiff, came in, which was detrimental to the defendant. In support of the grounds last mentioned, movant produced the affidavit of Lee L. Fordham that after the first difficulty, in which Mrs. Bush was wounded by a shot from the pistol of J. G. Joiner, he heard said Joiner say, "I'll have him [referring to Bush] to kill, yet, before I can get him off of my place, and would have done it before now, if I could have got him in the right place." This deponent testified on the trial as a witness for defendant, and then testified as to a threat made by deceased against defendant right after the shooting, in April, 1894, but not in the language stated in the affidavit. Also, the affidavit of Emanuel Dixon that about a week before the killing of J. G. Joiner he heard Jeffie Joiner (son of deceased) say that he had his gun loaded for W. J. Bush; that he had three pistol balls in one barrel, and a slug in the other. In his statement the defendant claimed, that at the time of the difficulty in April, deceased and his son Jeffie had both assaulted defendant, and he swore out warrants against them both, but by the intervention of friends the matter was settled, and he (defendant) wanted to live peaceably with them, as his wife was a daughter of the deceased, but that they began to worry him again; that on the morning of the killing he was warned by one of his children

that deceased and his little son were coming towards him, and he apprehended danger from deceased, and deceased advanced upon him, threatening to kill him, and put his hand in his pocket, and made a motion to draw it out, and then he (defendant) fired, etc.; that after the shooting he (defendant) circled around through the fields, and went out to the road, and looked down it, and near C. D. Wood's house, just beyond the house of deceased, saw a man whom he recognized as C. D. Wood coming towards deceased's house, who crossed the road, stooping down, and went into the jam of the fence, and Jeffie Joiner and his mother were standing in the road in front of their house, Jeffie with his gun in his hands; and that he (defendant) then went to town by a round-about way, for he heard they were going to shoot him, and surrendered to the sheriff. Also, the affidavit of Wylie Smith that Emanuel Dixon resides upon defendant's plantation in Washington county, and that, to the best of his knowledge and belief, the character of Dixon is good, and that from that character he would believe him on oath. Wylie Smith was a witness for the state on the trial. Also, the affidavit of J. T. Mills that, shortly after the shooting in April, Jeffie Joiner told him that he and his father had run Bush once, and would keep running until they had run him off the place. Mills was a witness for defendant, but did not testify anything as to matters stated in his affidavit. Also, affidavit of William Latimore that just before the killing he overheard C. D. Woods and Jeffie Joiner talking about Bush; that Woods said the best plan to kill Bush was to wait until he got away from his house, and went to feed his hogs, and that Jeffie said the best plan was to get him when he went to the lot to feed. Also, the affidavit of G. W. Peacock that Latimore resides in Washington county with deponent, and his character, so far as deponent knows, is good, and from that character deponent would believe him on oath. Also, affidavit of W. N. Jackson that after the shooting in April, 1894, Jeffie Joiner told him that he and his father would get Bush yet, and that the next time would be his last run. This deponent testified on the trial as a witness for defendant, but not as to the matter mentioned in his affidavit. Also, affidavits of Gilmore, Hardwick, and Carter, three of defendant's counsel, as to their ignorance of the above alleged newly-discovered evidence until after the trial, and that they did not know of the fact that the jury were at any time separated before a rendition of the verdict, and knew nothing of the facts contained in the affidavit of J. N. Rogers. Also, similar affidavit for defendant, whose affidavit further stated that he voluntarily surrendered himself to the sheriff the day he shot deceased; that he was confined in the county jail, and had no opportunity to communicate

with any of deponents, Fordham, Latimore, Dixon, Jackson, and Mills, all of whom live a long way from the jail, and Latimore was absolutely unknown to deponent; and that deponent had no knowledge whatever of any separation of the jury before the verdict was rendered. Also, the affidavit of J. N. Rogers that he was present in court when the evidence closed in this case; that the jury, under escort of the bailiff, were permitted to leave the court room; that, after being out a reasonable time, two of the jury returned, unaccompanied by an officer, and it was five or more minutes before the other ten jurors returned, accompanied by a bailiff. By way of counter-showing, the state introduced the affidavit of the solicitor general that James K. Hines, Esq., was the attorney of Bush at the trial of Bush for murder, conducted the examination of the witnesses, and made the concluding argument for the defense. Also, the affidavit of three of the jurors that after the jury had been sworn and impaneled there was no separation of the jury until the verdict was rendered, and that the jury was guilty of no improper conduct during the trial. Also, similar affidavits from the bailiffs who were in charge of the jury during the trial. Error in refusing to charge the following written request of defendant's counsel: "If you believe that this defendant killed deceased because he believed that his own life was in danger, and if you further believe that after taking into consideration all the facts in connection with these troubles between defendant and deceased, from their very beginning up to their termination in the death of Jesse G. Joiner, the fears under which this defendant acted were those of a reasonable man, then I charge you that this would be justifiable homicide, and it would be your duty to acquit this defendant." As to this ground, the court states: "For the reason that considerable time has elapsed since the trial of this case, and it being my invariable custom to write 'Refused' upon all written requests to charge which are refused, and the word 'Refused' not being written upon this request, and it appearing that I ordered and had filed this request, along with others, and counsel for the state representing that the charge was given, while counsel for the defendant state positively that the charge was not given, and I being unable to remember whether it was omitted, or not, but knowing it was not refused, approve this ground with this statement." Error in charging, in substance, as follows: "In viewing the case from the defendant's standpoint, you must look at the circumstances which surrounded him at the time, and find whether those circumstances were sufficient to arouse the fears of a reasonable man,"—when the charge should have been: "You are to take in consideration, in determining this question of the fears of a reasonable man, all the circumstances of this

feud, from its beginning to its end, and must decide whether these circumstances were sufficient to arouse the fears of a reasonable man."

Thos. W. Hardwick and John N. Gilmore, for plaintiff in error. B. D. Evans, Jr., Sol. Gen., and Harris & Rawlings, for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., providentially absent, and not presiding.

(96 Ga. 194)

WESTERN UNION TEL. CO. v. HOWELL.
(Supreme Court of Georgia. Dec. 21, 1894.)

CONSTITUTIONAL LAW—REGULATION OF COMMERCE
—TELEGRAPH COMPANIES—NONDELIVERY
OF MESSAGE—LIABILITY.

1. According to the principle ruled by this court in the cases of *Telegraph Co. v. James*, 16 S. E. 83, 90 Ga. 254, and *Telegraph Co. v. Michelson*, 21 S. E. 169, 94 Ga. 436, there is nothing in that provision of the constitution of the United States which confers upon congress the power to regulate commerce among the several states prohibiting the general assembly of this state from enacting a law subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of Georgia, although such acts may be committed in dealing with messages which are to be transmitted to points in other states.

2. Where a message, the charges upon which were duly paid in advance, was received by a telegraph company, at one of its offices in this state, for transmission to a point in another state, and was never delivered to the person to whom it was addressed, it is incumbent on the company, in order to escape liability for the statutory penalty for negligence in transmission from the Georgia office, to show that the message was in fact transmitted from that office with due diligence, and that the nondelivery to the sendee was due to some default or other cause arising beyond the limits of this state.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Action by J. S. Howell against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Howell sued the telegraph company for the statutory penalty, and also for special damages, because of its failure to deliver with due diligence to his brother, in Montgomery, Ala., a telegraphic message which plaintiff alleged he delivered to defendant's agent at Lithonia, Ga., for transmission to such brother, paying the full amount charged therefor, and for failure to duly forward the telegram to the relay office in Atlanta, or from Atlanta to Montgomery, Ala. Defendant demurred to that part of the declaration which claimed the statutory penalty, upon the ground that the act of the legislature giving a penalty, so far as the same may be intended to affect telegrams to be transmitted to places in another state, and

be there delivered, is repugnant to the clause of the constitution of the United States granting to the congress of the United States sole power to regulate commerce between the different states, and is therefore void. The demurrer was overruled, and to this ruling defendant excepted. There was a verdict for plaintiff for the penalty, and for \$20 special damages. The message in question was: "I am in jail. Stop over at Decatur, Ga. When come?" And the declaration alleged that the message was sent to plaintiff's brother in order that the latter might meet plaintiff at Decatur, and sign an appearance bond for plaintiff. Defendant also excepted to the refusal by the court to give in charge the following written request: "The act of the legislature of Georgia giving a penalty against telegraph companies, in so far as it attempts to visit a penalty upon not transmitting and delivering a telegram to another in Alabama, is repugnant to the clause of the constitution of the United States granting to the congress of the United States sole power to regulate commerce between the states, and is therefore void, and the plaintiff cannot recover said penalty." Defendant excepted, also, to the following portion of the charge: "If there is evidence before you, and you believe it, that the telegraph message was sent, but not delivered, then he could not recover in this state for it, as the supreme court of the United States has said that our statute upon that subject is unconstitutional, as interfering with the commerce between the states; but I hold that, if the question rests upon the non-sending of the telegram, that then the plaintiff is entitled to recover such damages as, under the law, he is entitled to." Alleged to be error because, even if the telegram was not sent, plaintiff could not recover the penalty, because of the unconstitutionality of the act of the legislature. Also to the following portion of the charge: "While a recovery could not be had for the nondelivery in the state of Alabama, yet, if you should believe that the telegraphic message was not delivered in Alabama, that is a circumstance for you to consider, in coming to a conclusion as to whether or not it was sent." Also to the following period of the charge: "If you believe the message was not sent, and that in other respects he is entitled to recover, then he would be entitled to recover at your hands the penalty which the law places upon the company for not sending the telegraphic message." Alleged to be error, defendant contending that, by reason of the conflict between the statute and the constitution of the United States, there could be no recovery of the penalty in this case.

Bigby, Reed & Berry and Dorsey, Brewster & Howell, for plaintiff in error. J. S. Candler, for defendant in error.

LUMPKIN, J. The facts appear in the reporter's statement.

1. The case at bar, so far as relates to the proposition announced in the first headnote, is not distinguishable in principle from those of *Telegraph Co. v. James*, 90 Ga. 254, 16 S. E. 83, and *Telegraph Co. v. Michelson* (decided April 30, 1894) 94 Ga. 436, 21 S. E. 169. We have therefore felt constrained to follow those cases. As no opinion was written in either of them, the writer, but for a reason which will be presently stated, would feel it incumbent upon himself to endeavor to set forth with some care the views upon which these decisions rest. It is obvious that to do so would require the consumption of much time, and the expenditure of a considerable amount of labor, as the subject is one which has but lately arisen, and is not free from doubt and difficulty. Inasmuch, however, as the general assembly of this state, four days before the present case was decided by this court, repealed the act imposing penalties upon telegraph companies (Acts 1894, p. 79, repealing both the statute of October 22, 1887, and the amendment thereto of December 20, 1892), and in consequence the question is no longer of practical importance in this state, it is not now deemed necessary to enter into an elaborate discussion of it. The time at our command can certainly be more profitably expended in preparing opinions, so far as we are able, devoted to the discussion of questions which are live issues, and are likely to arise in future litigation. We shall therefore content ourselves with citing the case of *Connell v. Telegraph Co.*, 108 Mo. 459, 18 S. W. 883, which supports the view entertained by this court, although the subject was not dealt with at any great length, nor accorded the thorough and satisfactory discussion which its importance would seem to demand. It may nevertheless be very profitably examined, for, so far as we have been able to discover, it is the only decision outside of this state which has, as yet, directly dealt with the question. Reference may also be made to the *American & English Encyclopaedia of Law* (volume 25, p. 768), where, in a note, the *Connell Case* is cited, and also to page 770 of the same volume, where, at the conclusion of note 3 (which begins on the preceding page, with the title, "Regulation of Interstate Messages"), comments and expressions in full harmony with the view of the question taken by this court will be found, together with references to cases more or less in point.

2. Counsel for the telegraph company, while not conceding its liability in any event, contended that as the plaintiff had failed to show that the omission of duty on the part of the company occurred within the limits of this state, he could not recover, even under the rulings announced in the *James* and *Michelson Cases*. We quite agree with counsel that our penalty statute could have no extraterritorial operation, but are compelled to express our dissent to the assertion that the plaintiff totally failed to make out a pri-

ma facie case of negligence on the part of the company occurring within the borders of the state. The matter simply resolves itself into a question of burden of proof, and appears to us to be free from serious difficulty. The rule as to telegraph companies seems to be the same as that applicable to railroad carriers. Proof of the delivery to a telegraph company of a message, non (or incorrect) transmission of it, and consequent damage, is all that is required to make out a prima facie case of negligence. *Thomp. Electr.* §§ 266, 275; 25 *Am. & Eng. Enc. Law*, 831; *Whart. Neg.* § 766; 3 *Suth. Dam.* (2d Ed.) § 295, p. 2140; *Gray, Com. Tel.* §§ 26, 53, 54, 77. Breach of the contract is presumed to comprehend negligence. This, as stated by *Boynton, C. J.*, in *Telegraph Co. v. Griswold*, 37 *Ohio St.* 313, for the reason that: "If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require, in many cases, an impossibility, not infrequently enabling the company to evade a just liability." In *Turner v. Telegraph Co.*, 41 *Iowa*, 458, the court dealt with the question of presumption in a case where a message delivered by one telegraph company to another, which was sued for error in transmission, was not shown by the plaintiff to have been different from the one delivered to him. *Beck, J.*, says: "Defendant's line of telegraph did not extend to Chicago, but at Grinnell it connected with another line reaching to that city, from which the market reports were obtained, and sent by defendant to different points on its line. It is insisted by defendant that plaintiff failed to show that a correct report was furnished, to be sent from Grinnell upon defendant's line. The evidence shows that the market reports were received at Grinnell on the day the incorrect one was delivered to plaintiff. Upon this evidence, we must presume that the reports received there, and delivered to defendant, were correct. The rules of evidence, in the absence of proof showing the report delivered to defendant at Grinnell to be either correct or incorrect, require us to presume it to have been correct. They are based upon the fact that men ordinarily, in the course of business, act correctly and speak truly. Errors and intentional misstatements are exceptions, and not the rule, in the affairs of business. Their application in this case is demanded by the fact that the evidence to establish error in the report furnished defendant was within its control and exclusive knowledge. Plaintiff was utterly unable, to prove the correctness of the report furnished at Grinnell, while, if it had been incorrect, defendant could have readily established the fact." Again, in *Olympe de La*

Grange v. Telegraph Co., 25 *La. Ann.* 383, it was contended that the defendant was not the first carrier or contractor, and that it was not proved that the error in the transmission occurred on defendant's line, on whose printed blank there was an express provision for nonliability for the default of other companies. But it was held "that, whether first carrier or not, it was peculiarly within their power, and was their duty, to make the proof here suggested, if necessary." Surely, the two cases last cited go further than is requisite to support our ruling in the present case; for, where a third party is also concerned, the further question is presented whether it was not in the power of the plaintiff to show that such third party, in dealing with the message, was free from negligence. In the case at bar the plaintiff showed a breach of contract, and prima facie negligence, which must have occurred on the defendant's line, either in this state or in Alabama. Undoubtedly, it was in the exclusive power of the telegraph company to show the exact point where the failure of diligence occurred, and through the negligence of what particular servant it was occasioned. It will not do to say that the servants of the company are equally at the disposal of the plaintiff to prove the facts connected with the transaction. The truth of this assertion may be demonstrated by the peculiar facts here presented. The plaintiff, it is true, did know the company's agent at Lithonia, and perhaps could have secured him as a witness at the trial. But suppose this had been done, and he had testified that he had promptly forwarded the message to the relay office at Atlanta, but had no further knowledge as to the transaction. How could the plaintiff pursue his investigation and proof? Would he have to sue out interrogatories,—for he could not compel personal presence in another county,—directed to each and every one of the numerous employes of the company stationed in the Atlanta office? Certainly, the company could not reasonably be expected to aid him by furnishing a list of all its servants, nor to keep him posted when any of them resigned, or were transferred elsewhere. It might be, and doubtless is, often convenient to the company to change the location of its employes, and it could do so in the utmost good faith; but, whatever the motive, the inconvenience to the plaintiff in reaching them as witnesses would be the same. Again, it cannot be known that the telegraph company keeps such records in writing of its business as would enable the plaintiff to show the required facts by compelling the defendant to produce its records in court. Besides, how would it be known that such records, if kept at all, were correct? If the company itself did not see to it that evidence of negligence was not recorded against it, would it not be a temptation to its employes to omit making any record of their own shortcomings which

might result in their discharge? And, at last, this would merely be a different way of compelling the company to supply evidence entirely within its own keeping. It follows from the foregoing that the default should be treated as having occurred in Georgia, the burden being on the defendant to show the contrary, and it having failed to do so. Finally, the plaintiff showed more than a mere failure to deliver. His brother, the addressee, who lived in Montgomery, testified: "I went directly to the telegraph office, as soon as I received my brother's letter, and there had been no message for me at all. The telegram was sent on Thursday. I received my brother's letter on Sunday morning, at 9:30." Therefore, it was shown that, three days after the message was handed to the agent at Lithonia, the office in Montgomery had still failed to receive it over the wire from Atlanta. This being so, it makes no difference whether the message was afterwards sent, or not. Three days' delay in Georgia, unexplained, would render the company liable to the penalty, for this would be undoubtedly, and per se, an unreasonable and inexcusable delay; and even if the office in Montgomery had afterwards received the message, and had made no attempt to deliver it to the addressee, these facts would be of no consequence whatever, with reference to the question of the company's liability for the penalty. Judgment affirmed.

(95 Ga. 549)

LANIER v. RATCLIFF.

(Supreme Court of Georgia. Jan. 14, 1895.)

CERTIORARI—FAILURE TO NOTIFY DEFENDANT—DISMISSAL.

The plaintiff in certiorari having on December 17, 1892, applied for and obtained the judge's sanction of the petition for certiorari, and having on the same day filed the petition in the clerk's office, and the certiorari having been issued in due time, and made returnable to "the next term" of the superior court, the case stood for trial at the May term, 1893, of that court; and the mere failure of the clerk to date the writ of certiorari afforded no excuse to the plaintiff in certiorari for failing to give the defendant in certiorari the notice required by law that the same was returnable to, and stood for a hearing at, the term last mentioned. Accordingly, there was no error in dismissing the certiorari for want of such notice.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Action by G. E. Ratcliff against E. C. Lanier. Plaintiff had judgment, and from an order dismissing a writ of certiorari presented by defendant he brings error. Affirmed.

The following is the official report:

Ratcliff sued Lanier in a justice's court, and obtained a verdict. Defendant obtained the writ of certiorari, and upon the hearing the same was dismissed, because notice of the sanction of the writ, and of the time and place of hearing, had not been given 10 days before the sitting of the court to which the

same was returnable. The case was tried in the justice's court on November 17, 1892. The petition for certiorari was sanctioned on December 17th, and filed in the clerk's office of the superior court of Burke county on the same day. The clerk issued the writ of certiorari, directing the magistrate to certify and send up the proceedings "to the next May term of said superior court." This writ was not dated. On the first day of the May term, 1893, the magistrate filed his answer. The case was not heard at that term. On September 23, 1893, defendant caused plaintiff to be served with written notice of the sanction of the writ and the filing of the answer, further stating that the case "will be heard and determined in vacation by H. C. Roney, judge of the superior courts of the Augusta circuit, at his office in Augusta, Ga., or at such place as he may determine, upon ten days' notice to parties litigant, or their attorneys, as provided by an order passed by the judge of the superior court presiding in said Burke county on May 24, 1893, or, if not heard in pursuance of said order, it will be heard at the courthouse of said Burke county during the December term, 1893, of the superior court of said county, or at such other time and place as said court may direct." The order of dismissal is assigned as error because (1) it did not appear from the writ that the certiorari was returnable to the May term, 1893, and the notice was given in time for the December term, 1893; (2) the answer not being filed till the May term, 1893, the case could not be heard at that term, and notice was not necessary until the time for hearing had been determined. The judge certifies that his attention was not called at the hearing to the omission of the clerk to specify to what May term the writ was returnable, nor was this point urged as a reason why the certiorari should not be dismissed.

E. H. Callaway, for plaintiff in error. Johnston & Brinson, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 463)

GREENE v. STATE.

(Supreme Court of Georgia. Jan. 28, 1895.)

LARCENY—IMPEACHING EVIDENCE—INDICTMENT AND PROOF—VARIANCE.

1. The main witness for the state upon the trial of an indictment for the larceny of a hog having testified positively that the animal stolen was a male, and this being the only witness who testified concerning the sex of the animal actually stolen, the fact that another witness testified that previously to the trial the first witness had stated to him this animal was a female was no proof at all that it was in fact of the latter sex. The only legal effect of the evidence of the second witness was to impeach the first. *Watts v. Starr*, 12 S. E. 585, 86 Ga. 392; *Railroad Co. v. Maltby*, 16 S. E. 953, 90 Ga. 630.

2. It being alleged in the indictment that the hog stolen was a female, and the only evidence bearing on the question of sex as to the

animal actually stolen showing that it was a male, there was a fatal variance between the charge and the proof, and consequently the verdict of guilty was contrary to law and the evidence. This is true although the prosecutor testified he had lost a female hog of like color and size about the same time, there being no proof whatever showing that the accused was in any manner connected with the larceny of this female hog, if in fact it was stolen at all.

(Syllabus by the Court.)

Error from superior court, Wilkes county; Seaborn Reese, Judge.

Jule Greene was convicted of larceny, and brings error. Reversed.

The following is the official report:

Defendant was charged with stealing a sow hog belonging to Callaway, and was found guilty. A new trial was denied, and he excepted. He was employed by Callaway in April, 1894, when Callaway (as he testified) lost a red listed sow shoat from his pasture. One Burns testified that on a Sunday morning defendant told him he was going to borrow Callaway's road cart to go after his rations. He went away and returned, when Burns saw blood on his feet, and asked him for "some of that beef" he had bought. He replied he had not bought any beef, and went on and returned the road cart. His wife came up, passed her own house, and went on to Burwell Cofer's house. He told her Jule (defendant) "had done come," and further told her not to "go up there." She said, "Yes, I is going," and went to Cofer's house, pulled open the window, and peeped in. Later in the day fresh pork was cooked and eaten at defendant's house, he being present; and it seemed to be plentiful. About 11 o'clock of that morning he inquired of another witness if the latter wanted to buy some fresh meat of him. Cofer testified, in substance, that at defendant's instance he went with him into the pasture, where defendant caught the hog, and Cofer held the bag for him to put it in. They carried it about a quarter of a mile, when the hog got out of the bag, and defendant killed it. Cofer skinned it, and put it into his father's shuck house. This was on Saturday evening. The next morning defendant came with the road cart, and carried away his part of the hog, together with flour and bacon which Cofer had carried there for him. Cofer testified that: "This was Mr. Callaway's hog. It was about a dollar and a half or two dollars size. It was a boar. I say it was a boar hog. It was red, and a list across it." The indictment described the stolen hog as "one red listed sow hog weighing about 30 pounds, of the value of one and one-half dollars." Callaway was reintroduced after defendant closed, and on cross-examination testified: "I asked Burwell what shoat it was he killed, and he told me they killed that sow shoat." Defendant objected to this as hearsay. It was admitted on the statement of the solicitor general that he had been entrapped by the witness Burwell Cofer. This ruling is assigned as error. Callaway fur-

ther testified that this shoat was one of a litter of six or seven, and somebody had killed three of them. He missed other shoats and this sow shoat. He could not swear whether this was a sow or a boar. When he was inquiring about this hog in controversy, Burwell said that was the one that was killed; she was a sow shoat, and this particular sow hog was then missing; that witness knew of his own knowledge, and he had never seen her since. Recalled, Burwell Cofer testified: "I told Mr. Callaway this was a boar,—this one that was killed. The hog we are talking about now was a boar hog. It had never been altered." It is alleged that the verdict is contrary to law, and without evidence to support it.

Irvin & Wynne, for plaintiff in error. Wm. M. Howard, Sol. Gen., and Harrison & Peebles, for defendant in error.

PER CURIAM. Judgment reversed.

(85 Ga. 550)

DORSETT v. HOULIHAN et al.

(Supreme Court of Georgia. Jan. 28, 1895.)

SALE UNDER TRUST DEED — TRUSTEE'S COMMISSIONS—EMPLOYMENT OF AUCTIONEER—CHARGE ON TRUST ESTATE.

Where, by the terms of a trust deed, it was provided that the trustee should receive for his services in selling and conveying the property described in the deed, and executing the trust, 10 per cent. of the proceeds of the sale, "which commission for said trustee, it is agreed, * * * is a proper and reasonable commission, taking into consideration the circumstances of the property hereby conveyed," and where the trustee employed another person as auctioneer to conduct a sale of the property, and a sale was made by the latter, which failed of consummation because of the inability of the purchaser to pay for the property, and thereafter another sale was made by the auctioneer, which was fully completed, then, even if the trustee, after retaining his full compensation under the deed, had the right to pay the auctioneer for his services any commissions at all out of the balance of the proceeds of the sale, certainly the latter was not entitled, as against the trust estate, to receive out of such balance his commissions upon both sales. If, after allowing the trustee his 10 per cent., any further charge of commissions against the trust estate was lawful, it was going quite far enough to charge it with the commissions of the auctioneer for making the second sale.

(Syllabus by the Court.)

Error from superior court, Chatham county; Robert Falligant, Judge.

Petition by Thomas Houlihan against Charles H. Dorsett and another for an order reducing the expense of a sale under a trust deed by striking out an item for services by defendant Dorsett as auctioneer. Plaintiff had judgment, and Dorsett brings error. Affirmed.

The following is the official report:

A deed to secure a loan of money was made by Thomas Houlihan and Mary Houlihan, and upon default in payment, under proceedings instituted in the superior court, a decree of foreclosure was rendered, whereby Mc-

Laws, as trustee, was ordered to sell the property conveyed in the security deed at public outcry, the same being a lot or parcel of land in the city of Savannah. Under this decree he advertised the property for sale on the first Tuesday in May, 1894, and on that day caused the sale to be made by Dorsett, an auctioneer employed by him for that purpose, and the property was knocked down to Martin Houlihan for \$4,550. Upon being called on, after the legal hours of sale, to carry out his purchase, Martin Houlihan informed the trustee that he did not intend to pay for the property, but had bid upon it at the request of, and for, Thomas Houlihan. The trustee thereupon readvertised the property for sale on the first Tuesday in June, 1894, at the expense of Martin Houlihan, on which day it was again sold by the same auctioneer, and knocked off to one Kelly for \$4,525. This sale was duly confirmed by the superior court, upon petition of the trustee setting forth the foregoing facts. Dorsett, the auctioneer, demanded of the trustee commissions amounting to \$226.88,—half of that sum being for conducting the first sale, and the other half for the second sale,—which sum was included in the bill of expenses presented to the court by the trustee. Thomas Houlihan brought his petition, alleging that the auctioneer was not entitled to any commission for the attempt to sell in May, but only for the sale in June, and praying that the bill of expense be reduced to the extent indicated. The petition was answered by the trustee and by Dorsett, and it was agreed that the statements made in these answers were true. From Dorsett's answer, in addition to the facts already set forth, it appears that before the first advertisement he was employed by the trustee to sell the property, as auctioneer, in the usual manner of such sales, and duly exerted himself in the premises; that it is incumbent upon an auctioneer, not merely to put up and cry the property on the sale day, but, during the whole of the advertisement period, to make personal inquiry as to probable purchasers, and inform them of the time of sale, as well as to do all things in his power towards bringing about the sale at the fullest price obtainable in the market; that he proceeded to do these things, at great labor to himself, and to do everything in his power to promote the sale and produce a full and fair price at the first sale; that the property was knocked down to Martin Houlihan after every effort had been made by Dorsett to procure a better price, and after bona fide bids, the last of which, before that of Martin Houlihan, was \$4,500; that Martin Houlihan stood well, so far as Dorsett knew, and he believed him to be perfectly responsible and able to carry out any contract he might make for the purchase of property, he being a master mechanic and contractor in good standing and business in the city; that Dorsett felt perfectly safe in knocking down the property upon his bid, and without any thought that

there was any combination between Martin and Thomas Houlihan, or that the purchase money bid would not be paid; that Dorsett discharged his whole duty as auctioneer, and made a bona fide sale to Martin Houlihan, and thereby earned his legal and usual commission as auctioneer; that it is the established custom of auctioneers in said city to charge their commissions upon such sales, whether the purchase money is paid or not; that, during the period of the second advertisement, Dorsett again did everything in his power, and discharged his whole duty, informing the purchasers, bringing them to the sale, and endeavoring to make a full and fair sale of the property; that he did resell the property on the first Tuesday in June, and thereby earned his commission, to be paid by the party who employed him in respect to said sale, and not by the party at whose risk the sale may legally have been made; that while Martin Houlihan may be liable to the estate or to the trustee for one commission and for expenses, and for the amount of deficiency between the amounts bid at the two sales, said Martin Houlihan did not employ Dorsett to sell, and is not liable to him, in any respect, by reason of the sale; that if the property was not sold at the first sale, so as to relieve the estate in the hands of the trustee from liability for two sales, this was the result of an arrangement between petitioner in this proceeding and Martin Houlihan, and not in any respect of the conduct of Dorsett, who should not be made to suffer because said petitioner combined with an insolvent purchaser to produce a sale which could not be carried into effect, and to cause the re-employment of Dorsett by the trustee for the second sale; and that Dorsett was wholly without fault in the first sale, and, if the loss should fall upon one of two innocent parties, it should not fall upon him who had no part in bringing it about. The court granted the petition of Thomas Houlihan, and Dorsett excepted.

C. N. West, for plaintiff in error. Barrow & Osborne, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 752)

JONES v. HOWARD et al.

(Supreme Court of Georgia, April 1, 1895.)

DISTRESS WARRANTS—ENTRY.

The registry act of October 1, 1889, does not contemplate or require that a distress warrant for rent shall be entered upon the general execution docket provided for by section 2 of that act. As the judge below, who tried the case without a jury, entertained a contrary view, and therefore necessarily rendered a judgment in favor of the prevailing party, irrespective of the disputed questions of fact involved, there should be a new trial.

(Syllabus by the Court.)

Error from city court of Cartersville; S. Attaway, Judge.

Action between T. R. Jones and W. H. Howard and others. There was a judgment for the latter, and the former brings error. Reversed.

J. M. Moon, for plaintiff in error. John W. Akin, for defendants in error.

PER CURIAM. Judgment reversed.

(95 Ga. 562)

COHEN v. LA ROCHE.

LA ROCHE v. COHEN.

(Supreme Court of Georgia. Jan. 28, 1895.)

TRIAL—INSTRUCTIONS—EVIDENCE—SUFFICIENCY.

The charge of the court was full and accurate as a whole. There was no error in that part of the charge complained of. The verdict was supported by the evidence, and the alleged newly-discovered evidence is not of such a character as ought to have produced a different result.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by R. D. La Roche against Jacob Cohen on contract. Plaintiff had judgment, and from an order denying a new trial defendant brings error. Plaintiff excepts, by cross bill, to the denial of a motion to dismiss the motion for a new trial. Cross bill of exceptions dismissed.

The following is the official report:

The petition of La Roche alleged: He is a real-estate, stock, and bond broker. As such, on May 26, 1891, Jacob Cohen contracted to pay him \$500 upon his getting Gazaway Hartridge, then owner of some of the stock and bonds of the Savannah Times Publishing Company, to sell to Cohen all of Hartridge's stock and bonds in that company for \$5,000. In pursuance of the contract, petitioner succeeded in getting Hartridge to consent to sell the stock and bonds at \$5,000 to Cohen, and on May 26, 1891, Hartridge was ready, willing, and able to and did sell said stock and bonds at said price to Cohen, but Cohen refuses to pay petitioner the \$500, or any part of it.

Upon the trial, La Roche testified: "Cohen approached me, and asked me if I thought the Times could be bought. I told him I did not know, but would see. I called on Hartridge, and he said at that time he would not sell. He did not make the success of the paper he expected, and came to me one day, and said he thought if he could get his price for the Times he would sell. I went to Cohen's house, and told him I thought I could buy the paper for him. He said he thought it was a great thing. We agreed upon \$500 as a proper amount for me to get if I got the property at the price he was willing to pay for it. I succeeded in getting it for \$5,000. Hartridge owned the controlling interest in the Times Company. The sale took place in my office, about May 26, 1891,

in the presence of Platshek, Cohen, Hartridge, and myself. The sale was closed by Cohen directing a ticket of sale to be written, and Platshek signed it. I believe Hartridge wrote it. It was written at Cohen's dictation. Cohen was the purchaser. I had nothing to do with that, because my contract was ended when Hartridge agreed to take the price offered by Cohen. I think there was \$1,000 paid, and 240 shares of stock transferred in blank. Payment of my commission was not dependent on formation of a stock company by Cohen. Cohen engaged me to do certain work, and I did it. When I got Hartridge to agree to sell for \$5,000, my contract was ended. My first conversation was with Cohen, and I then saw Hartridge, and he wouldn't think of selling. Cohen always wanted the property. I have generally acted as Hartridge's broker. Cohen came to see me first. That was eighteen months before the thing was finally consummated. There was no written agreement between me and Cohen. I suppose Platshek represented Cohen as his broker in the interview at my office. Cohen had two brokers in that transaction, which is very frequently the case. I bought the property for him. He may have engaged Platshek to sell it. I kept a copy of the ticket of sale, but Hartridge wanted to use it, and I let him have it. He said he wanted to sue Cohen for specific performance. Don't think he sued Cohen. I suppose Platshek signed his name individually to the ticket of sale. The witness identified his signature to power of attorney transferring stock, dated June 5, 1891, for the transfer of capital stock of the Times Publishing Company owned by Hartridge." This power of attorney was given by Hartridge to La Roche, authorizing him to transfer 200 shares, and was attested by La Roche as notary public. Witness further testified: "That certificate represents all the stock I was authorized to transfer. At that time \$1,000 was paid on account of the sale. The check or money was paid by Platshek." Witness identified Hartridge's signature on back of the check for \$1,000.

Hartridge testified: "In May, 1891, I sold some of the stock and bonds of the Times Publishing Company. I had some negotiations with Cohen relative to the same. What led up to it was La Roche asking me if I would sell my interest in the Times. I did not know then that I would, and it was a long time before I made up my mind to sell. In May, 1891, La Roche told me he could sell the paper. The first I heard of Platshek was in La Roche's office, when Platshek came in, and said, 'My uncle sent me here, and he will give you \$5,000 for your interest.' La Roche told me who his principal was. I said, 'Let Mr. Cohen come down here,' and he went up to Cohen's house, and brought him down to the office. Then we had some discussion. Cohen wanted to wait until the next day. I said, 'No, if you want to buy,

you will have to buy now.' I knew nothing of Platshek whatever, and had no transaction with him such as he has testified to. Platshek wrote the bill of sale. It was written for Cohen, who was standing by. Platshek signed it in his individual name. It was a cash transaction. I made no objection to his signing the ticket, because I thought the money was to be paid. Cohen was standing in the back room. He was the only man I was dealing with. The stock was not delivered to Cohen. Cohen said, 'I will give you \$1,000 in a day or so, and the balance in a few days,' and I said that was perfectly satisfactory. I got \$1,000 from Platshek, but don't know where it came from. Cohen never paid me any money. A day or two passed, and Cohen didn't keep his engagement. Other parties were after me for the paper. I found I could not get my money from Cohen, and told La Roche I wanted to sell the property at Cohen's risk. The contract never was carried out by Cohen. As to my not delivering the \$2,000 of securities I had pledged, the bank was perfectly willing to give me the securities if I were going to get \$5,000 with which to take up my loan. That was understood, and no point was made upon it. Platshek always knew I was willing to deliver the bonds at any time. They were pledged for \$1,200. I never saw Cavanaugh in my life, and had nothing to do with him. The first I knew of his being substituted was, I think, on June 5, 1891. I gave the ticket of sale to a friend, with instructions to sue Cohen, and some months afterwards he returned it, with some excuse about not wishing to interfere with another attorney's business. I have looked for it, but cannot find it. Cavanaugh paid me \$2,750. I did not pay La Roche anything for selling the Times to Cohen. La Roche sold two pieces of property for me. I made his office my headquarters. He is not my broker in this transaction. Cohen's name did not appear in the ticket of sale, and it was not signed by Platshek as agent. La Roche did not sign it. I paid La Roche \$400 for going to Augusta for me, and for making subsequent sale to Cavanaugh, who was to pay \$4,000. Cohen did not state to me what his object in purchasing was."

La Roche further testified that Platshek never spoke to him about buying the Times; that he never knew Platshek wanted the paper, and never knew Platshek in the matter at all.

Cohen testified: "La Roche came to my house, and said he had the Times Publishing Company for sale. That if I could get up a stock company, there was money in it, and that he wanted to make \$500. I told him I would try it, and I saw several gentlemen, and among them Mr. Du Bignon. The stock company was not formed. I entered into no agreement with Hartridge for the purchase of his stocks and bonds of the Times Company. I was at La Roche's office about May

26, 1891, when it is claimed an agreement was made for sale of Hartridge's interest. Platshek and Hartridge made some agreement between them. What it was I do not know. I had nothing to do with it. I did not authorize or instruct Platshek to make or sign any agreement for me relative to the purchase, and he did not sign any paper as my agent. Cavanaugh, I think, bought the stocks and bonds of Hartridge at that time, though Platshek acted as his agent. I do not remember how long before the sale it was La Roche called on me. It was before Cavanaugh bought the stock. I told La Roche, if a stock company could be formed, he could make \$500. The price was not stated. The company was to pay La Roche \$500. I sometimes lend Platshek money. I did not say I would furnish him the money to buy the Times. The day the sale was made, La Roche called for me. His business was the same; that is, to form a stock company. I didn't know what Platshek had to do with it, unless to buy the stock from Cavanaugh. Hartridge never spoke or wrote to me about enforcing any contract for specific performance of that agreement. He has not done it."

Platshek testified: "When the agreement was made for purchase of Hartridge's stock and bonds, I represented myself. Did not represent Cohen in any respect, and had no previous understanding with him in reference to representing him in the matter. Hartridge drew up the agreement. It did not contain Cohen's name, and I signed it individually; not as Cohen's agent. I was the purchaser, and did not borrow any money from Cohen to pay for the purchase. Hartridge did not carry out his part of the agreement. I made a demand for the bonds on La Roche, who represented Hartridge. Both of them had been after me a good many times, and I told them to deliver the securities, and I would pay the money. There were 201 shares of stock and \$2,000 in bonds. Hartridge could not deliver the bonds, because he had hypothecated them in a bank. I made several requests for them on behalf of Cavanaugh, to whom I had sold my interest. I represented Cavanaugh as a money broker to pay for the stock. He gave me certain shares in a real-estate company to hypothecate."

Defendant introduced note dated June 3, 1891, given by Platshek to a bank for \$1,500, stating that 35 shares of the real-estate company were pledged to secure its payment; and Platshek testified this was the stock on which he borrowed the money, and the stock which he hypothecated was not the property of Cohen. Defendant also introduced check for \$1,000, payable to Hartridge's order, drawn on the same bank June 3, 1891, signed by Platshek, and indorsed by Hartridge; and check of the same date, on the same bank, for \$500, payable to the order of Cavanaugh, and signed by Platshek. Platshek

testified that the first of these was the check he gave Hartridge in payment for the stock on behalf of Cavanaugh, and the latter was the check he gave Cavanaugh for the difference between said \$1,000 and the \$1,500 he raised on Cavanaugh's stock for Cavanaugh. He further testified: "I had an understanding with Hartridge, through his broker, La Roche. The price agreed upon was \$5,000. I always go to his place, and he knew I was after the Times for a long time. La Roche called upon me to sell me the stock, etc., because he knew I was in the market. He called on me as many times as I called on him. Cohen used to call at my office every day, to see if there was anything on hand. He called on me the day of the sale. When I signed the ticket of sale, he was standing in the room. I couldn't say whether he heard any part of the conversation or not. I told Hartridge to draw the paper up. He asked how I wanted it drawn, and I said, 'You draw it up,' and he wrote it out. Cohen may have had an idea of what was going on. He was not going to lend me the money for that specific purpose, and did not lend me any money upon the transaction. I paid the \$1,000 for Cavanaugh, not for myself. My idea in buying the paper was that I saw an opportunity to make some money. Cohen did not dictate the ticket of sale. Hartridge wrote it out. I signed it first, and he signed after me. At that time Cohen was talking to La Roche. Hartridge's statement that I met him a short time before the transaction, and told him my uncle was willing to pay him \$5,000 for the paper, is not true."

Defendant introduced testimony showing: The stock books of the Times Company show that on May 26, 1891, Hartridge owned 197 shares of the capital stock, and on June 4, 1891, 201 shares, and that on the latter day Hartridge transferred 201 shares to Cavanaugh; the certificate issued to Cavanaugh for the same being dated June 5, 1891, and signed by Hartridge as president, and another as secretary and treasurer. The books show no transfer of any shares of the stock of the company to Cohen at any time, or that he ever owned any. On June 3, 1891, the wife of J. F. Cavanaugh was the owner of 35 shares of the stock of the real estate above mentioned, and the secretary of that company testified he understood this stock was pledged to the bank by Platshek, her attorney, to secure payment of \$1,500 borrowed from the bank. Defendant also introduced certificate issued June 3, 1891, by the Times Publishing Company, signed by Hartridge, its president, and another as secretary and treasurer, showing that Hartridge was the owner of 201 shares of its capital stock; on the back of which certificate was the power of attorney above referred to. Also letter of Mr. Du Bignon, stating that prior to the time Hartridge parted with the control of the property Cohen called upon him relative to the formation of a stock company to pur-

chase same, and mentioned several parties whom he intended seeing or had seen.

There was a verdict for plaintiff for the amount sued for, and, defendant's motion for new trial being overruled, he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in charging: "If La Roche did get Hartridge to agree to sell to Cohen his stock and bonds for the sum of \$5,000, and Cohen called at his office for the purpose of having the sale drawn up, and that while there Cohen substituted some other purchaser; if you believe Platshek was substituted by Cohen in place of himself; and if you further believe that Cohen asked for several days in which to get up the purchase money, and that this was consented to by Hartridge, and that he was then in a situation to deliver the stocks and bonds,—then the plaintiff would be entitled to a verdict." Alleged to be error, because not warranted by, or applicable to, the evidence, and having a tendency to mislead the jury.

Because of newly-discovered evidence. In support of this ground defendant produced the affidavit of O'Connor, one of his attorneys, to this effect: At or about the date when the stock and bonds of Hartridge were purchased by Cavanaugh, the latter called at deponent's office frequently, and transacted some of his private business there, but has been out of the state over two years, and his whereabouts are not known. Since the trial, deponent had occasion to look up a paper, which necessitated a search of all the papers in the office, and during the same came across the papers attached to this affidavit, which Cavanaugh evidently put away in a remote place in the office without informing deponent thereof. Deponent managed and tried the case, used due diligence to discover evidence and prepare for the trial, and was totally ignorant of the existence of these papers. The papers attached were: Receipt from Hartridge to Platshek, June 3, 1891, for \$1,000, on account of the purchase money of 200 shares Times stock, and \$2,000 bonds of same company, "Balance, \$4,000, to be paid on signing of the proper papers." Also letter of the same date, from the secretary and treasurer of the Times Company to Platshek and Cavanaugh, stating that he found the assets of the Times to be \$5,387.06, and liabilities \$4,500; that Hartridge told the writer Hartridge was to assume all liabilities and collect assets, and he would give Hartridge, that afternoon, a complete list of said liabilities. This letter was dated 1 p. m. (Hartridge had testified that it was about 12 o'clock in the morning when Platshek came to La Roche's office and said his uncle sent him and would give \$5,000 for Hartridge's interest.) Also receipt signed by Hartridge, and attested by La Roche, dated June 8, 1891, to Cavanaugh, for \$1,500, on account 200 shares and \$2,000 Times bonds, "as

per bill of sale." Also receipt signed by Hartridge, dated June 22, 1891, to Cavanaugh, for \$250 on account purchase-money stock and bonds of the Times Publishing Company "per sale ticket." Movant also produced the affidavit of the other of his counsel that the newly-discovered testimony was unknown to him before the trial; and affidavit of movant that he was ignorant of said testimony before the trial, and had used due diligence in assisting his counsel in preparing the case for trial.

The case was tried March 23, 1893, at the February term of the court, and motion for new trial filed at the same term, April 21, 1893, on which day a brief of the evidence was filed, which respondent's counsel had agreed to in writing as a correct brief of the evidence. On April 21, 1893, the court granted an order that movant have leave to amend the motion by adding other grounds at any time before the hearing, and that the motion be heard at any time, in term or vacation, on five days' notice to either side; this order to operate as a supersedeas until further order. At the November term, 1893, the May and July terms having intervened without a hearing, the motion, at the request of respondent's counsel, was set down for hearing on December 9th. On that date it was postponed to December 16, 1893, at which time respondent's counsel moved the court to dismiss it, because service of the rule nisi was never made upon plaintiff, and because plaintiff had never waived service of the rule nisi and grounds for a new trial. The motion to dismiss was overruled, to which ruling, by cross bill of exceptions, plaintiff excepted.

O'Connor & O'Byrne, for plaintiff in error.
McAlpin & La Roche, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 555)

AYERS et al. v. McCALLA, Mayor, et al.

(Supreme Court of Georgia. Feb. 18, 1895.)

MUNICIPAL CORPORATIONS—SCHOOL TAX—AUTHORITY TO LEVY—CONSTRUCTION OF STATUTE.

1. The legislative scheme for the establishment and maintenance of a system of public schools in the city of Conyers, as expressed in the act approved September 11, 1889 (Acts 1889, p. 1287), contemplates the exercise by the municipal authorities of the power to raise revenue for that purpose either by taxation or the issue of bonds, or both. In the former case the power is derived from the provisions of the act itself, after its adoption in the manner prescribed in section 10, without any further approval by a popular vote. In the latter, a separate vote of the people, in addition to that adopting the act, is necessary to confer the power. Where, therefore, an election was held in conformity with the provisions of the act for the purpose of determining whether it should go into effect, and the popular vote was in favor of the establishment of the system of schools provided for, the mayor and council may lawfully levy an annual tax, "not to exceed five-tenths of 1 per cent., on the taxable property of said city, for the purpose of establishing and maintaining said public

schools," notwithstanding the fact that at another election held for the purpose of determining whether or not the municipal authorities should also issue bonds the popular vote was against the issuing of the same. The denial of the power to issue bonds in no manner impairs or interferes with the exercise of the power to tax expressly conferred by the terms of the act, after its ratification by the people.

2. Under the facts disclosed in the record, the court did not err in refusing the injunction. (Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Petition by F. M. Ayers and others against A. C. McCalla, mayor, and others, for injunction. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

The following is the official report:

The petition of Ayers and others against the mayor and aldermen of Conyers prayed for an injunction, as will hereafter appear. The hearing for temporary injunction was upon the petition and amendments, the answer of defendants and amendment thereto, and a demurrer. The injunction was denied, to which ruling petitioners excepted.

The petition alleged: Petitioners are citizens of Conyers, and property owners and taxpayers in said town. The town is duly incorporated under the name of the city of Conyers, and its authorities have authority to tax its citizens to maintain the city government, which will fully appear by its charter to the court shown. The mayor and aldermen, on the — day of —, 1894, assessed petitioner and all residents of the town subject to a taxation 45 cents on the \$100 worth of property for taxes for educational purposes, and to maintain a public school at the expense of all the taxpayers of the town for 1894. Said assessment was illegal, and without authority of the qualified voters of the town, as expressed at an election held for that purpose on the — day of December, 1893. The mayor and aldermen threatened to enforce the collection of said tax, and will collect the same within the next 60 or 90 days unless restrained. Petitioners file this suit on behalf of themselves and all others who may desire to be made parties to the same, and pray for temporary and perpetual injunction to restrain defendants from collecting the tax so assessed, and for the purpose aforesaid. This petition was filed October 8, 1894. By amendment it was alleged: By an act approved September 11, 1889 (Acts 1889, p. 1287), the establishment of public schools for the city of Conyers was authorized. This act and system of public schools provided by it was, for their approval and adoption, submitted to the voters of the city at an election held on the first Saturday in December, 1889, at which election said school system was rejected. On September 16, 1893, said questions were again submitted to the voters of the city at an election held on that day and year, at which said act and school system were adopted. A board of commissioners was then duly elected to carry out the

purposes and provisions of the act (naming the members of the board), who are now exercising the functions of said office. The board, under section 6 of the act, established separate public schools for whites and blacks; said schools to be maintained out of funds arising from taxation bonds, and out of which lots and suitable buildings were to be selected and erected and furnished, this being the only means by which funds were to be raised for the payment of teachers and other expenses. The mayor and aldermen, in order to raise funds as provided by section 6 of the act, under sections 11 and 12 of the act, on December 2, 1893, submitted the question whether taxation bonds should be issued for the purpose of maintaining said schools, and with which to secure suitable lots and buildings, and to furnish and equip the same, as provided by section 6; and at an election then held the taxation bonds were rejected, two-thirds of the voters of the city not having voted for their issue. In violation of said section and of article 7, § 7, par. 1, of the constitution of the state, defendants have levied a tax for school purposes under said act, the same not being for temporary loans to supply casual deficiencies of revenue. Defendants pretend to have authority to levy said tax under section 7 of the act, which section does authorize defendants to levy and collect a tax, in addition to that already allowed by law, not to exceed five-tenths of 1 per cent. on the taxable property in the city, for the purpose of maintaining said schools. Petitioners submit that this section only applies to and empowers defendants to levy taxes to pay the taxation bonds issued under the act, and that, if any other authority is given by said act and section, said section 7 is in violation of the constitution as above set forth, and schools, under the act, cannot be maintained except by issuing taxation bonds, and levying a tax to pay the same. The demurrer was upon the grounds of want of equity and insufficiency in law. Further, that plaintiffs had totally failed to set out any reason why the assessment as mentioned was illegal, without authority of the qualified voters at an election held for that purpose on the — day of —, 1893; and wholly failed to show any reason why the taxes assessed should not be collected. Further, that petitioners wholly failed to show that there were any other dissatisfied taxpayers of the town who wish to be made parties. The answer, briefly stated, was: It is admitted that petitioners have filed this suit in their own behalf, but not that they did so in behalf of others. Under the act mentioned, an election was had on September 16, 1893, when the public school system was voted on and was adopted by two-thirds of the qualified voters of the city. Under the act and said vote, public schools were established, and opened to all the children of both colors of school age

in the city on January 31, 1894, and have been conducted under the act since that time, without opposition or formal objection from any of the citizens or from complainants. All of complainants, except probably Almand, voted in the election to establish the schools; and at a subsequent election, held December 2, 1893, to provide for the issuing and sale of bonds as provided by the act, the following named complainants, to wit, J. C. Stephenson and —, petitioned for an order to submit the question of schools or no schools and bonds or no bonds to the qualified voters of the city. Complainants have made no complaint as to the establishment of the public schools, so far as defendants are informed and believe; and, to carry the public school system into effect, contracts have been made with the teachers thereof, and buildings for that purpose have been secured at expense; the contracts with the teachers commencing at the time the schools were opened, and to continue till —, at an average cost of about \$320 per month, and to meet said expenses of the schools the taxes have been levied which are now complained of. For complainants now to have the injunction granted would totally defeat the object of said public school system, so legally established, and proposed to be carried fully into effect; and, should defendants be restrained in the collection of the funds to support the schools, would be to defeat the teachers in getting pay for their services, or throw the burden thereof unjustly upon others, which would be conducive to great loss, trouble, expense, etc. By amendment it was alleged: The question of bonds or no bonds was submitted to the qualified voters at the time mentioned, and the bonds failed to receive a two-thirds majority of the votes, but defendants deny that the sale of bonds was intended for any other purpose than to procure suitable lots and buildings and equip the same, as set forth in section 11 of said act. Defendants have not violated, nor do they intend to violate, sections 6, 11, and 12 of the act, or article 7, § 7, par. 1, of the constitution, but they are acting in compliance with the act, and by authority of said sections, and not in violation of the constitution. They are attempting to collect the tax for educational purposes, for the purpose of maintaining the schools, but deny that the taxation for said purpose is to pay taxation bonds. The taxation sought is for the purpose of establishing and maintaining public schools, as specified in section 7 of the act, and is not violative of the act nor of the constitution.

Jas. C. Barton and John A. Wimpy, for plaintiffs in error. A. C. McCalla, Geo. W. Gleaton, and Glenn & Irwin, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 768)

HICKEN v. STATE.

(Supreme Court of Georgia. April 15, 1895.)

FORGERY—SUFFICIENCY OF INDICTMENT.

An indictment charging that the accused did "make and forge the following check for money, to wit:

"No. 26. Marietta, Ga., July 17th, 1894.
"The First National Bank: Pay to the order of Mrs. Anna Lyons twenty-five dollars 00/100.

"\$25 00/100 E. C. Henderson."
—Meaning O. E. Henderson, of the firm of Henderson and Austin," etc., is not a good indictment for forgery. It does not charge the forgery of the name of any person alleged to be actually in existence, but, at most, only charges a mere intention to forge the name of a real person bearing the name of O. E. Henderson, and shows on its face that this intention failed of accomplishment. Simmons, C. J., dissenting.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Mrs. M. E. Hicken, alias Mrs. Anna Lyons, was convicted of forgery, and brings error. Reversed.

J. E. Robinson, W. I. Heyward, and Alonzo Field, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

SIMMONS, C. J., dissenting.

(96 Ga. 768)

WESTERN UNION TEL. CO. v. MURPHEY.

(Supreme Court of Georgia. April 29, 1895.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER TELEGRAM—DEFECTIVE ADDRESS—STATUTORY PENALTY.

A telegram addressed to a named person in a designated city, "care of Teachers' Institute," the addressee being a nonresident of that city, did not, as required by the telegraph penalty act of December 20, 1892, which must be strictly construed, specify any place within the limits of the city at which the message was to be delivered; it appearing that the Teachers' Institute was not a permanent body or institution, but simply a convention of teachers temporarily in session, and that for the time being it was holding its meetings alternately in two different buildings, one of which was the county courthouse, and the other a "colored school-house."

(Syllabus by the Court.)

Error from superior court, Pike county; John J. Hunt, Judge.

Action by A. A. Murphey against the Western Union Telegraph Company for the statutory penalty for failure to deliver a message. Brought forward from the last term. Code, § 4271a-c. Judgment for plaintiff, and defendant brings error. Reversed.

Dorsey, Brewster & Howell and Malvern Hill, for plaintiff in error. S. N. Woodward, for defendant in error.

PER CURIAM. Judgment reversed.

(96 Ga. 768)

WALL v. CARTER.

(Supreme Court of Georgia. April 29, 1895.)

NEW TRIAL—FILING BRIEF OF EVIDENCE—WAIVER—DISMISSAL.

Where a motion for a new trial was made during the term at which a case was tried, and an order passed granting further time to prepare and file a brief of the evidence, and before the time appointed for the hearing of this motion a brief of the evidence had been made out, agreed upon by counsel, approved by the court, and ordered filed, though not in fact filed, and at the hearing counsel for respondent in the motion argued it upon its merits, making at the time no objection thereto, this conduct amounted to a waiver of the actual filing of the brief of evidence in the clerk's office; and it was error, after the completion of this argument on the merits, to sustain a motion then made to dismiss the motion for a new trial for want of such filing. Bailey v. Thornton, 19 S. E. 820, 94 Ga. 719, citing Cook v. Childers, 19 S. E. 819, 94 Ga. 718.

(Syllabus by the Court.)

Error from superior court, Marion county; C. O. Smith, Judge.

Action between Peter S. Wall and Wiley Carter. Brought forward from the last term. Code, § 4271a-c. There was a judgment for the latter, and the former brings error. Reversed.

W. D. Crawford, for plaintiff in error. J. H. Lumpkin, for defendant in error.

PER CURIAM. Judgment reversed.

(96 Ga. 763)

MOORE v. SMITH et al.

(Supreme Court of Georgia. April 15, 1895.)

ATTACHMENT—ORDER FOR SALE—VALIDITY—NOTICE OF SALE.

1. Where an order for the speedy sale of personal property levied on under an attachment was granted by a justice of the peace, under the provisions of section 3648 of the Code, there having been no previous notice of the intention to apply for the order, because it was impracticable to have such notice perfected, it was not essential to the validity of the order that it should state the facts showing why the notice was not given. According to the ruling of this court in Wilson v. Garrick, 72 Ga. 660, such an order granted by a justice of the peace was not rendered invalid because it did not fully recite the facts authorizing the sale, strictness of pleading not being required in justices' courts.

2. The claimant having shown title in himself to the property levied upon, and there being no evidence authorizing a finding to the contrary, it was error to adjudge that the property was subject to the plaintiffs' execution.

(Syllabus by the Court.)

Error from superior court, Spalding county; John J. Hunt, Judge.

Action by G. P. Smith and others against Charles Lagardo for services. Plaintiffs had judgment, and execution was issued on certain property in possession of defendant. J. P. Moore intervened, claiming the property. Plaintiffs had judgment, and claimant brings error. Affirmed.

The following is the official report:

Several executions founded on judgments rendered in a justice's court on November 24, 1892, were levied on a show tent and fixtures, as the property of Charles Lagardo. Claims were interposed by J. P. Moore, and the cases, having been appealed to the superior court, were there consolidated, and heard by the judge without a jury. He held the property subject, and the claimant excepted. Claimant admitted possession in defendant in execution at the time of levy, and assumed the burden of proof. His evidence was, in brief, that on April 27, 1892, he sued out an attachment for \$70 against Wyoming Frank, and caused it to be levied on the property now in question, which Frank had brought to Carrollton, where claimant resided. He was the owner of the opera house in that town, and Frank was indebted to him for rent of the same, and for board. He told claimant he had no money to pay him, and that claimant would have to make his money out of the tent and fixtures. On the same day on which the attachment was levied, the levying officer applied for a 10-day order of sale of the property, as expensive to keep and liable to deteriorate, and such order was made by the justice who issued the attachment. On May 9, 1892, the property was sold at public outcry, "under an order of court, after being legally advertised, and knocked off to J. P. Moore at twenty-five dollars, he being the highest and best bidder," as recited in an entry by the sheriff on the attachment, and as appears from claimant's testimony. It does not appear that any notice of the application for the order of sale was given to the defendant in attachment, or to any one else. Claimant testified that at the time of applying for the order the defendant in attachment was in Nashville, Tenn., or on his way there, as he left on the early train for that point on the morning before suing out the attachment, and had instructed the depot agent at Carrollton to ship the tent and fixtures to him at Nashville, upon which information claimant sued out the attachment. If anything was omitted or wrong, in procuring the order for sale, he knew nothing of it. The property was worth two or three hundred dollars, but would not bring it at a sheriff's sale. Lagardo had no title to the property, and never had. He was in Carrollton, and had been there for some time before Frank brought it there. Claimant held it for some time after buying it at the sheriff's sale, and then Lagardo, who was without means, applied to him for the loan of it to carry it to Griffin, for the purpose of showing, and making means by which he and his family could get back to their home in the Northwest. Out of sympathy, claimant let him have the property for said purpose, but had no interest in the show, or the profits thereof. An old man named Hickcock, in whom claimant had confidence, was connected with Lagardo's company, and claimant requested him to keep

him posted as to Lagardo's movements respecting the property. He let Lagardo have the property, believing that Hickcock would not let him injure it, or remove it too far away, without letting claimant know about it; and claimant made Hickcock his confidant, to this effect, and looked to him to keep claimant posted and protect him, having more confidence in him than in Lagardo. The constable who made the levies now resisted testified that, when he did so, Lagardo had gone, and left the tent standing where he had erected it. Shortly afterwards, while he was taking down the tent, claimant approached, and asked him what he was doing with the property, and said, "This is my property, and I don't want it taken down and packed away where it will injure." "I think," said the witness, "he said that he sold it to Lagardo, but had not been fully paid for it. I am not positive, however. I won't be positive, but I think I heard Hickcock say that this show tent and fixtures was Charles Lagardo's. I am not positive that he said the show was Lagardo's or the show tent and fixtures. I will not state, positively, which." There was testimony by plaintiffs that their judgments were for board of Lagardo and his company, for labor, and for rent of the ground where the tent stood; that Lagardo and Hickcock both said the property in dispute was Lagardo's; and that plaintiffs extended credit on the faith of those statements, and would not have done so but for them.

G. W. Austin and Adamson & Jackson, for plaintiff in error. R. T. Daniel and Hammond & Cleveland, for defendants in error.

PER CURIAM. Judgment affirmed

(95 Ga. 468)

EVANS v. STATE.

(Supreme Court of Georgia. Oct. 15, 1894.)

CRIMINAL LAW—IMPEACHING WITNESS—FOUNDATION FOR IMPEACHING TESTIMONY—WEIGHT OF EVIDENCE—PROVINCE OF JURY.

1. One of the state's witnesses having testified that he was induced by the father of the accused to testify falsely before the coroner's jury, and the father having contradicted him as to the facts and circumstances by which the alleged influence was exerted, a conversation between the two witnesses after the false swearing was done is not admissible merely to corroborate the state's witness, but is admissible to impeach the father, if, on being interrogated as to the same while under examination, his attention being called to time, place, and person, he denies a material part of the conversation, so as to bring the matter within section 3872 of the Code, touching the impeachment of witness by proof of contradictory statements. That the father, after having had the state's witness subpoenaed to testify in behalf of the accused, said he would discharge him, or withdraw the subpoena, is not admissible in evidence as an independent fact, but might be relevant as part of a conversation involved in the foregoing propositions.

2. It is not correct practice for the court to charge the jury as to the preliminaries which must appear before contradictory statements by

a witness can be proved to affect his credit, these preliminaries being matters exclusively for the court. But an error in this respect would not be cause for a new trial.

3. If a witness, in testifying at different times, and in different trials of the same case, contradict himself upon immaterial matters alone, it is of no consequence; but if some of the matters be material, and others immaterial, the jury should not be instructed that they are not authorized to consider those which are immaterial, though it would be correct to instruct them that for these alone the witness could not be discredited.

4. On the trial of a criminal case it is error for the court to instruct the jury to give the evidence for the state just such weight and credit as they give the testimony for the defense, and to give it all such weight and credit as they think it entitled to. The latter proposition would be correct, if it stood alone, but the whole is vitiated by the direction to give as much weight and credit to the state's evidence as to that in behalf of the accused. The jury, and not the judge, must determine the relative weight and credibility of the evidence.

5. Other than as indicated in the preceding notes, no error prejudicial to the accused appears in any of the grounds of the motion for a new trial, though there were some slight errors made in his favor.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Elisha Evans was convicted, and brings error. Reversed.

J. W. Walters, D. M. Roberts, and E. A. Smith, for plaintiff in error. Tom Eason, Sol. Gen., and Harrison & Peebles, for the State.

PER OURIAM. Judgment reversed

(95 Ga. 499)

STRONG v. STATE.

(Supreme Court of Georgia. Feb. 5, 1895.)

HOMICIDE—NEW TRIAL—INSTRUCTIONS.

There being no doubt at all that the deceased was murdered, and the only issue at the trial being whether or not the accused was the person who committed the crime, and there being ample evidence to authorize the jury in finding that he was the murderer, a new trial will not be granted on account of slight inaccuracies or errors in the charge of the court; it appearing that, if there were any at all, they were immaterial, and could not have affected the result. No cause for a new trial appears.

(Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Wash Strong was convicted of murder, and brings error. Affirmed.

The following is the official report:

Wash Strong was indicted for the murder of Johnson Duncan. He was found guilty, without recommendation. His motion for new trial was overruled, and to this ruling he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in charging: "The defendant comes before you with the presumption of innocence in his favor, and this remains with

him until overcome by proof. The law, however, presumes every homicide felonious until the contrary appears from the evidence." Because the court erred in charging, "The law presumes every homicide to be felonious until the contrary appears from the evidence." Because the court erred in charging, "If you find from the testimony that the deceased was killed by the defendant, why, then, it is your duty to find him guilty." In connection with this ground, in a note, the court states: "The court immediately followed by giving the converse of the proposition, in connection with the law of reasonable doubt. The entire charge should be read in this connection." Error in charging, "You may give credit to such witnesses, from their best opportunity of knowing the facts about which they testify, you believe best entitled to credit." Error in charging, "While the contention of the defendant is that he is not guilty; that there is not sufficient evidence to authorize you to find a verdict of guilty against him."

Morcock & Warren, for plaintiff in error. Tom Eason, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed

(95 Ga. 547)

CAREY v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. Jan. 14, 1895.)

NEGLECT—NONSUIT.

The plaintiff's evidence, if true, showing facts from which, in the absence of any explanation on the part of the defendant, the jury might have inferred negligence on its part, the case should have been submitted to the jury. Accordingly it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Amanda Carey against the East Tennessee, Virginia & Georgia Railway Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

The following is the official report:

Amanda Carey sued the railway company for damages for the homicide of her husband. After the introduction of testimony for the plaintiff, a nonsuit was granted, to which ruling she excepted.

A witness testified for plaintiff: "The East Tennessee depot is on the west side of the railroad tracks. There are two tracks running along there. Carey was one of its employes, whose duty it was to wipe off trucks, clean the cars, brush out, and put on coal. In the place in which he stayed he kept scuttles, buckets, and brooms. He was killed about midnight. Shortly before he was killed, he and I were standing near the place where he stayed, close to the corner of the fence, talking, and Mr. Burnette came up and told him he might go home. Carey

stepped back, and got a scuttle and his overcoat, and came by me, and told me 'Good night,' and I stepped inside of the gate. I didn't see anything just as I stepped inside of the gate. Didn't see the car until Davis spoke and said, 'Here is a man.' I was looking in the direction of the railroad, but was inside of the gate. My face was down the railroad. The car passed within fifteen or sixteen feet of where I was standing. The reason I didn't see it when it passed was because I didn't hear any noise. I can hear good. I didn't even see it. It was dark, and another thing was, I was not looking for it. I didn't see or hear any signal given. The car passed by before I heard anything. I didn't hear the bell ring, nor nothing else, until Davis spoke. I saw a light, but it was on the hind end of the engine. It was a circus car. The engine was behind the car, and the car was being pushed in the direction of Mitchell street, which is south of the depot. The car was on the east track. I next saw Carey after the cars run over him. Right after they passed over him, Davis said to Lee White, 'Here is a man.' Carey was lying about ten feet from the gate and about sixteen feet from the corner of the fence, sorter cat-a-cornered back toward the corner on the first track. One of his legs was off. From the time I bid him good night until somebody said he was dead I don't suppose was five minutes. The car was a mighty long one. I noticed one end of it,—a closet, instead of being inside, was on the platform, and the only way to get on the platform was from the opposite side. I can't say which side struck him, but he was lying on the east on the railroad, next to the gas house. Just north of the gas house is a water tank, and diagonally across the two tracks west is the depot. The place where Carey and all the hands stayed was between the water tank and the gas house. The fence extends a little ways from the gas house, and is the gas-house fence, and from the corner of the fence to the gate is about eight feet. From the corner of the fence to the little shanty is about thirteen to fourteen feet. When Carey was told he could be relieved he went to the box by the shanty, and got a scuttle, and came back. If there were any lights, I could see none. It was a very dark night. I know of no other light that has been put there since, except the big light in the middle of the street. The lamp at the gas house is not kept lighted. Davis and White reached Carey before I did. White is one of the couplers, and so is Wilson. The car, after passing over him, stopped about twenty feet from the gate where I was standing. That was the back end of the engine. The front end was attached to the coach. When Carey bid me good night, Davis was there. Davis, I guess, was on the hind end of the car. He came from the hind end of the engine. He

was standing on the footboard. Carey had been employed by defendant about five years. His leg was across the east rail of the track, and his body was on the outside of the east rail. After leaving me, Carey turned the corner, and went up the railroad, going south, towards Mitchell street, which crosses the railroad at the south end of the depot. Where he was lying was about sixty-five to seventy yards north of the depot. The space in between the palings and the track was about four feet. Carey lived on Humphrey street, a little west from where he was killed. He lived on the left-hand side of the railroad going south. He crossed Mitchell street and Peters street, the next street south of Mitchell which crossed the railroad. He could go that way or out another street. I said it was necessary for him to cross the tracks in order to go home, because he had either to do that or come by the Central tracks. He could have done that by walking in the mud and water. It had rained that night, and mud and water was there all day. He was not lying in the mud and water, but would have been if the train had knocked him off the cross-ties. His head was not on the ground, but on the cross-ties. I said he was lying cat-a-cornered, and his head on the cross-ties. The space between the tracks where he was hurt is about six or seven feet. I don't know whether he was going across the track or not, but from the position he was in he got across one rail. The train must have been traveling faster than he was, or it would not have caught him. The reason I think so, it ran over and killed him. The train stopped about thirteen or fourteen yards from where he was lying. I didn't say lights were put there since. I said there was a lamp at the gas house, but the railroad had nothing to do with it, nor the electric light at Mitchell street crossing, that I know of. From where he was lying on the track, one could look up the railroad two or three hundred yards. There was no obstruction there to keep him from seeing it. If there had been lights, he could have seen. I do not know whether he could have heard it or not. I was listening, but I did not hear it. I was not listening. Had I been, I might have heard it. I was not on the track. I probably could have heard it had I been listening. Freight cars make more noise than these sleepers, which produce mighty little noise. I found lying beside Carey, in the mud, a scuttle. At night, when he would leave, and was not there, he took them to the depot. In going to the depot it was necessary to cross the tracks. I didn't know the length of an ordinary engine with the tender attached. Some of these sleepers are seventy to eighty feet long; I do not know the length of this one." Another witness testified for plaintiff: "When Carey was killed, I was employed by defendant as a coupler in its yard. I saw him

the night he was killed, about thirty minutes before he was killed and just afterwards. We were always in a little office together. I went to go to the car, and left him there. It was a show car, about sixty feet long, and was being pushed, by an engine, south. It was different from ordinary cars, in that it was closed on the side, and there was only one pair of steps to it; the steps being on the right-hand side going south. The inclosure was wood. The man on the end of the car whose business it is to give signals would stand on the steps on the other side. My duties were to be on the front end, with the conductor. The conductor was on the right-hand side from me. Just before Carey was run over, I was with the conductor inside of the closet. We had nowhere else to stand. I did not have any view down the track. The conductor was on the right-hand side on the steps. I felt it when it hit Carey, and heard him groan. He was on my side of the track,—the left-hand side. That was the track next to the gas house. I told the conductor to wave them down; they had hit somebody. He jumped up, and so did I, and he waved them down. The conductor jumped off, and waved them down. The ordinary length of a switch engine is from thirty to thirty-five feet. The train stopped about twelve feet from where Carey was lying. He usually put the scuttles away somewhere at the depot. I could not say how fast the car was going, because it was night. From where the old man was lying to the corner of the fence was about ten feet. The car made no noise except at the joints. It was like a Pullman sleeper. It was moving when I got off. There were no lights in the coach. I didn't see any signal given nor hear any. I didn't give any. If the bell rang, I didn't hear it. It was between eleven and twelve o'clock, a dark night, and it had been raining. I found near the old man a coat and a scuttle. This car going south should have been on the south-bound track. We were then on the north-bound track, next to the gas house. Carey had no other way of getting to the depot to deposit his scuttles except to cross the tracks. Nobody was on the end of the car except the conductor and I. On a former trial of this case I swore he struck the car like a dash. I didn't swear that a man appeared before me all at once like a dash. I swore it hit him like a dash. I didn't observe the old man until it was done. When I said awhile ago I was in the closet, I meant I was inside the closet on the platform. I was standing up in there. The closet came clean round and took up the steps and extended across the front. The plank extended clear to the top, and while in there you could not see anything except looking out at the side the conductor was on. If the old man came from the right-hand side, I could not see him. I might have testified I was looking

out, but I could not look out through a plank closet. It was impossible for me to swear I was looking out. It was my business to be on that end of the car, looking out. I was on the end of the car on the platform, but was not looking out. I didn't swear I did not have time. I didn't look out but one way, and that was on the conductor's side. I was not looking ahead, but was placed there for that purpose. I was on the end where we did go to look out, but the closet was round me. I don't know whether the conductor was looking out or not. I think I swore we were both looking, but I meant I was as near as anybody could get to it. When the train backs down to the depot for receiving passengers, loading freight, as to whether or not it is unusual for them to back down on the same track they are going to run out on depends on how far they back. If they had a good ways to back, sometimes they did; sometimes they did, and sometimes they didn't. It was my understanding that we were to carry the car, and give it to the freight train at the lower yard, about two miles off. Carey was walking on the end of the cross-ties, and was struck by the corner of the car and knocked down. My reason for stating that is we could see blood, and where his foot dragged. I had my lamp in my hand, and lighted. The conductor had his. I did swear in the other trial that Carey was already in front of the car, and seemed to be going across the track. He could not have been anywhere else but in front. I did testify that it appears that we hit him right back of the head, that it seemed to me like he had just fixed to step over across the track. I don't remember whether I said on the other trial that the lamp was in my hand, or whether I said it was sitting down, but if that is my answer, I will accept it as true. Carey could have seen my light if he had been on the track on the conductor's side. I don't know what would have kept him from seeing the conductor. I can't say that there was nothing to have kept him from seeing the light if he had looked, because a man can carry his lamp behind him. If the lamp had been on the platform, Carey could have seen it if he had been on the side with the conductor. Probably his light was on the step, and there is a side piece to the steps, and I could not say whether or not he saw it. Above Mitchell street there is not such a curve as to prevent people from seeing towards Simpson street, but there is a tank there. It bears around a little. It was crooked from where he was standing. He could see from Simpson street to where he was killed. We got this car beyond the coal house, and should have gone to the second switch. The proper way would have been to have crossed over to the first tunnel, and took the south track. I think it was Carey's right leg that was cut off, and a lick on the back

of the head." Plaintiff put in evidence, from the time table, the following: "Atlanta yard limits extend north to Simpson street and south to McDonald street." Also rules as follows: "The engine bell must be ringing before starting a train, and when running through tunnels, and streets of towns and cities. Conductors, engineers, switchmen, and all other employes whose duties may require them to give signals, must provide themselves with proper appliances, keep them in order, and always ready for immediate use. Flags of the proper color must be used by day and lamps of the proper color by night, or whenever from fogs the day signals cannot be clearly seen." The mortality tables were introduced, and there was evidence as to Carey's earnings, etc., and that he usually got home about 9 or 10 o'clock at night.

R. J. Jordan, for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

PER CURIAM. Judgment reversed.

(95 Ga. 566)

ATLANTIC CONTRACTING CO. v. GRANGE LAND CO.

(Supreme Court of Georgia. Feb. 5, 1895.)

NEW TRIAL—DISCRETION OF COURT.

There is nothing in this case to take it out of the long-established rule that this court will not control the discretion of the trial judge in granting a first new trial in a case where the evidence is conflicting, and he is dissatisfied with the verdict rendered.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action between Atlantic Contracting Company and the Grange Land Company. There was a judgment for the latter, and the former brings error. Affirmed.

Lester & Ravenel and Giguilliat & Stubbs, for plaintiff in error. E. S. Elliott and W. L. Clay, for defendant in error.

PER CURIAM. Judgment affirmed.

(94 Ga. 798)

ANDERSON v. McLEAN et al.

(Supreme Court of Georgia. Jan. 14, 1895.)

NEW TRIAL—BRIEF OF EVIDENCE—APPROVAL—DISCRETION OF COURT.

Where, by an order duly passed, the movant in a motion for a new trial was granted a given time in which to file a brief of evidence, there being in the order no limitation as to the time of approving the same, and the brief was actually filed, but not approved, within the time fixed by the order, it was in the discretion of the judge to approve it afterwards, or refuse to do so; and this court will not control him in the exercise of that discretion, unless it is manifestly abused.

(Syllabus by the Court.)

Error from superior court, Tattnall county; C. C. Smith, Judge.

Action between J. L. Anderson and Malcolm L. McLean & Co. There was a judgment for the latter, and the former brings error. Affirmed.

J. Beasley & Son and Jas. K. Hines, for plaintiff in error. H. J. McGee and Harrison & Peeples, for defendants in error.

SIMMONS, C. J. The act of 1889 relating to the subject of new trials applies only to those courts which hold longer than 30 days. The law governing new trials for courts which hold for less than 30 days is the same as it was before the passage of that act. Under the old law, an application for a new trial must be made within the term at which the case is tried, and a brief of the evidence must also be filed within the term, under the revision and approval of the court. If there is not sufficient time during the term to make out and file a brief of evidence with the approval of the court, the practice is for the court to allow additional time, in vacation, to do so. This court has held in numerous cases that, when this plan is adopted, time is of the essence of the contract, and the applicant must comply strictly with the terms of the order granting him the additional time. It has also held that merely filing a brief, under such an order, is not sufficient; that it must be approved by the judge within the time prescribed in the order; that such a paper is not a brief without the approval of the judge. Whenever, therefore, additional time has been granted, and the paper is filed without the approval of the judge, and has been dismissed in the court below for the want of such approval, this court has refused to control the action of the judge below. It has likewise, in nearly all the cases, approved his action when the brief has been filed within the time allowed, and he has approved it afterwards, and refused to dismiss the case for want of approval within the time prescribed in the order. There is but one exception to these rulings that we now remember, and that is in the case of *Arnold v. Hall*, 70 Ga. 445, where the time for the hearing had expired, and no order was taken to continue it on the day it was to have been heard, and four days after the expiration of the time for the hearing the judge approved the brief, and granted a new trial. This action of the court was reversed on the ground that he had no power to do anything in the case after the time set for the hearing of the motion had expired, and no order had been taken to continue it, or to set it for another day, the court's action really being coram non judice. So it will be seen that this is a matter which this court leaves largely to the discretion of the court below, which we cannot control unless it is manifestly abused. We therefore lay down this rule: That in courts not af-

fect by the act of 1889, *supra*, where a movant for a new trial obtains an order which, without more, merely allows additional time within which to file his brief of evidence, he must not only file it within that time, but it must be approved by the court within that time. If this is done, no motion to dismiss the motion for a new trial for want of filing and approval should prevail. If, upon the other hand, the brief has been filed within the time prescribed by the order, but not approved by the judge, the movant takes the risk of the judge's refusal to approve. If he approves it, that is sufficient, unless his discretion is manifestly abused, and this court will not interfere with his action in the matter. If he fails to approve it, this court will not control his discretion. In laying down this rule, we do so, of course, with the belief that trial judges, in approving or refusing to approve briefs of evidence, will act as upright judges, seeking to do justice between the parties, and to injure no one arbitrarily. These rulings apply likewise to motions for new trials made in courts which hold more than 30 days, when additional time beyond the 30 days is granted the movant within which to file a brief of evidence where none has been filed at all, or when additional time is granted to perfect a brief already filed, but which needs something to make it a complete and legal one, other than the judge's approval. In other words, if, under the order giving further time, there is anything for the movant to do within the time limited by the order, and he fails to do it, he cannot, as a matter of right, insist on further indulgence, but will be subject to the exercise of the judge's discretion, as above set forth. See, in this connection, *Gale v. Water Co.*, 91 Ga. 813, 18 S. E. 11. Judgment affirmed.

(96 Ga. 760)

KISER et al. v. CARROLLTON DRY-GOODS CO. et al.

(Supreme Court of Georgia. April 15, 1895.)

PARTNERSHIP—MORTGAGE BY ONE PARTNER—DISCREPANCY BETWEEN MORTGAGE AND NOTE—PAROL EVIDENCE—DESCRIPTION IN MORTGAGE—SUFFICIENCY—SECOND MORTGAGE—PRIORITY.

A mercantile partnership, composed of two members, being indebted to a bank upon a promissory note in the sum of \$4,398, one of the partners, without the knowledge of the others, executed and delivered to the bank a mortgage containing, itself, a promise to pay the bank \$5,000, and, without mentioning the note for \$4,398, reciting that it was given to secure "the above note"; the mortgage covering "our entire stock of goods, consisting of dry goods, hats," etc., "and all other merchandise kept for sale by us." The mortgage, on its face, bore date one day earlier than the note for \$4,398, but it was shown by parol evidence that this discrepancy in the dates was the result of an error. It was also shown, by like evidence, that the partnership had but one stock of goods, and kept the same at but one place. After certain payments had been made on this mortgage, the partnership gave to another creditor a mortgage upon its stock of goods, in which it was recited that the

bank held a mortgage on the same property for \$3,200, this being the amount to which the indebtedness to the bank had been reduced. There was no fraud or usury in the bank's mortgage, and it was made bona fide to secure an existing debt of \$4,398. *Held:*

1. The parol evidence above referred to was admissible for the purpose indicated, and such evidence was, under the facts of this case, likewise admissible to show what indebtedness the mortgage was really intended to secure.

2. The mortgage to the bank, though made by only one of the partners, was good, although the other partner did not know of its existence. Had he objected to its execution, the question would be different.

3. Under the facts stated, there was no fatal variance between the mortgage and the debt it was given to secure. The mortgage itself containing an actual promise to pay \$5,000, it was at least a valid collateral security for a debt of less amount.

4. The stock of goods covered by the mortgage was, in the light of the parol evidence, applying the mortgage to its subject-matter, sufficiently described and identified.

5. There was no error in adjudging that the first mortgage was entitled to priority over the second in a distribution of the proceeds of the mortgaged property raised at a sale made by a receiver.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by M. C. & J. F. Kiser & Co. against Carrollton Dry-Goods Company and others to foreclose a chattel mortgage. Brought forward from the last term. Code, § 4271a-c. From a judgment declaring the mortgage subject to another mortgage, plaintiffs bring error. Affirmed.

Simmons & Corrigan, for plaintiffs in error. H. M. Reid, Adamson & Jackson, Merrell & Cole, S. E. Green, and Simmons & Corrigan, for defendants in error.

PER CURIAM. Judgment affirmed

(96 Ga. 761)

BENSON v. MAYOR, ETC., OF CITY OF CARROLLTON.

(Supreme Court of Georgia. April 15, 1895.)

CERTIORARI—RECORD—PRESUMPTIONS ON APPEAL

The ordinance of the town of Carrollton, for a violation of which the accused was convicted in the municipal court of that town, not having been brought up, either in the petition for certiorari or the answer of the mayor, the superior court was authorized, and this court is bound, to presume that such ordinance was in all respects legal; and the evidence being sufficient to support the charge against the accused, as stated in the record, and the plaintiff in error failing to show by the record the commission of any error of law by the trial judge, his judgment overruling the certiorari will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Certiorari by Bill Benson against the mayor and council of city of Carrollton, Ga. Brought forward from the last term. Code, § 4271a-c. There was a judgment for respondents, and petitioner brings error. Affirmed.

The following is the official report:

Bill Benson was tried before the mayor of the city of Carrollton for violating an ordinance of that city, and was found guilty and fined \$50 and costs. On certiorari this judgment was sustained. The bill of exceptions recites that Benson was tried upon a charge of disorderly conduct. The petition for certiorari states that he was tried on the charge of keeping spirituous liquors for illegal sale or illegal furnishing. The only evidence was given by John Laidler, who testified that he told Benson to bring him a quart of whisky from Atlanta, and some time afterwards he went to a house where Benson was, and handed him an empty bottle, and Benson went into the back room of the house, and returned with the bottle filled with whisky. Witness paid Benson 40 cents for it. Benson told him at this time he wanted the money to pay freight on the whisky. Benson stated that Laidler and others had asked him to bring them whisky from Atlanta, and he brought it for them. Laidler had asked him to bring a quart. When he came for it there was only a pint left, and Benson let him have it for 40 cents,—what it cost in Atlanta. Benson also stated that he had no whisky for illegal sale or furnishing. The errors assigned in the petition for certiorari are (1) that the ordinance of said city against keeping liquors, etc., for unlawful sale or unlawful furnishing, is null and void, contrary to the constitution and laws of Georgia, contrary to the authority granted in the charter of the city, and in conflict with the act of 1880 prohibiting the sale or furnishing of liquor in the 714th district, G. M.; (2) that the judgment is contrary to evidence, there being no evidence that defendant kept liquor for illegal sale or furnishing; (3) that disorderly conduct is an act calculated to disturb the citizens at the time, must be riotous or boisterous, and attract attention of the people in the neighborhood; (4) that there was no evidence that Benson was a dealer or trader in liquors, or that he kept them for sale, or other illegal purposes.

Oscar Reese, for plaintiff in error. Adamson & Jackson and R. D. Jackson, for defendants in error..

PER CURIAM. Judgment affirmed.

(95 Ga. 559)

GURR v. GURR.

(Supreme Court of Georgia. Feb. 27, 1895.)

HABEAS CORPUS BY PARENT—CUSTODY OF MINOR CHILD—CERTIORARI—POWER OF COURT TO ORDER RETURN OF CUSTODY.

A writ of habeas corpus having been sued out before the ordinary for the custody of a minor child, by its father against its mother, the parents at the time living in a state of separation, and the ordinary having awarded the custody of the child to the father, and this judgment having been immediately executed, after

which the mother presented to the judge of the superior court a petition for certiorari to review all the proceedings in the case had before the ordinary, it was error, after sanctioning the petition for certiorari, to add to the sanction an order directing that the sheriff restore the child in dispute to the custody of its mother, the plaintiff in certiorari, the judge having no power or authority to grant such order. *City of Macon v. Shaw*, 14 Ga. 162; *Lindsey v. Lindsey*, Id. 657; *Taylor v. Gay*, 20 Ga. 77; *Board v. Wimberly*, 55 Ga. 570; *Seamans v. King*, 5 S. E. 53, 79 Ga. 613.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Fish, Judge.

Certiorari by Lillian Gurr against F. M. Gurr to review habeas corpus proceedings in which the custody of her minor child was given to defendant. From an order directing a return of custody to plaintiff, defendant brings error. Reversed.

L. L. Brown, for plaintiff in error. R. D. Smith, for defendant in error.

PER CURIAM. Judgment reversed.

(96 Ga. 759)

AUSTIN v. HAMILTON.

(Supreme Court of Georgia. April 15, 1895.)

SALE—RESERVATION OF TITLE IN SELLER—LEVY BY THIRD PARTY.

Where the owner of personal property, by a parol contract of sale, sold the same to another, against whom there was a judgment, although it may have been the intention of the parties at the time of the sale that the seller should reserve the title until the property was paid for, and that the purchaser should give a promissory note accordingly, yet where no such note was in fact given, but, after an execution based on the judgment mentioned had been levied upon the property, the seller accepted and sold a mortgage thereon which had been previously executed by the purchaser, in which it was recited that the property belonged to the latter, the property, under these facts, was subject to the execution, as against a claim filed by the seller. See *Mann v. Thompson*, 12 S. E. 746, 86 Ga. 347.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Jones, Judge.

Action by G. R. Hamilton against Houseworth to recover personal property. J. V. Austin intervened, claiming title to the property. From an order reversing a judgment for claimant, and ordering judgment for plaintiff, claimant brings error. Brought forward from last term. Code, § 4271a-c. Affirmed.

The following is the official report:

An execution in favor of Hamilton against Houseworth, based on a judgment of November 4, 1891, was levied on a bay colt. A claim was interposed by Austin. On the trial of the case in a magistrate's court, there was a verdict for the claimant. Plaintiff took the case by certiorari to the superior court. The certiorari was there sustained, and final judgment rendered in favor of plaintiff. To this claimant excepted. On the trial in the magistrate's court it was shown that at the time of the levy, February 18, 1893,

(44 S. C. 333)

the property was in the possession of defendant in *fi. fa.* Claimant testified: "I got the colt from John Loveless, and had it in my possession. I sold it to Houseworth, with the understanding it was to be paid for. I delivered it to Houseworth, and asked Biggers, the clerk, to write the note, retaining title in me until the colt was paid for. I did not get the paper he fixed up until after the colt was levied on. I can't read. Biggers read the mortgage to me when I got it from him, and I told him it was not fixed right. I took it as he had it fixed. It does not belong to me now, as I have traded it, and have no interest in it." Biggers testified: "Some time before November 30, 1892, Houseworth and Austin came to me, and said that Austin had traded to Houseworth a colt, and requested me to prepare for them a contract, retaining title in Austin until Houseworth should pay for the same. I was then clerk of the superior court of the county. Agreed to do so, and to witness the same officially, and place it on record. Some time afterwards, and on November 30, 1892, without consulting further with Austin, I wrote out the instrument introduced, had Houseworth sign it, and placed it on record. I had forgotten that the paper should reserve title in Austin, and, by an oversight and mistake, drew the mortgage. I retained the mortgage until after the colt was levied on, when I handed it to Austin, who said it was wrong." Austin further testified that he never knew that Biggers had drawn the mortgage until after the colt was levied on, and would not have delivered same to Houseworth on the contract as written. Houseworth testified that he thought, all along, the title to the colt was retained in Austin, as the contract had provided, and never learned otherwise until after the colt was levied on, and that the statement about ownership ("the above property is and belongs to me"), as expressed in the mortgage, was printed in the mortgage, was not true, and was not understood by witness when he signed it, although it was read to him by Biggers. The mortgage in question was introduced. It was dated November 30, 1892, and recorded December 5, 1892. It was a mortgage on the colt to secure an indebtedness of \$23 to Austin, due December 15, 1893, and contained no reservation of title. The petition for certiorari complained that petitioner objected to all the evidence in regard to what the trade was between claimant and defendant, as the contract was reduced to writing, and would be the best evidence, and that this objection was overruled, and claimant allowed to tell all about the conversation between him and defendant and between him and Biggers. Also, that the jury erred in finding the property not subject, said finding being contrary to law, evidence, etc.

Edwards & Edwards, for plaintiff in error.
E. S. Griffith, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., not presiding.

v.22s.e.nc.5—20

STATE v. GAYMON.

(Supreme Court of South Carolina. June 27, 1895.)

CRIMINAL LAW—INSTRUCTIONS.

On a trial for perjury, a charge that the jury must not allow their personal knowledge of defendant's mental condition to influence their verdict is correct.

Appeal from general sessions circuit court of Clarendon county; J. J. Norton, Judge.

Joseph Benjamin Gaymon was convicted of perjury, and appeals. Affirmed.

The following are the exceptions referred to in the opinion: "(1) That his honor, the presiding judge, erred in overruling defendant's motion for a new trial, based on alleged error of his honor in charging the jury, in substance, that they could not communicate to one another facts known by any of them, but not brought out on the witness stand, going to show that the defendant was not of sound mind or memory at the time the offense is said to have been committed, and in charging the jury, to wit: 'I charge you that you have no right to make communications to one another of a fact bearing upon the case, either in regard to the competency of the defendant or any other fact. * * * You can't, if you knew the defendant to be perfectly sane at that moment, or if you knew him not to be perfectly sane at that time, you can't tell the other jurors so in the jury room; nor you can't, if you knew him to be a man who had no memory, or had knowledge of right and wrong, you can't say so in the jury room, except what you saw upon the stand.' (2) That his honor erred in overruling defendant's motion for a new trial based on alleged error in charging the jury, in substance, that they could not let their personal knowledge of the defendant, or of any fact other than what was proved on the stand, enter into their judgment, save their personal knowledge of the character of the witnesses, and in charging the jury as follows: 'You are not governed by personal knowledge, but by the testimony adduced on the stand.'"

M. C. Galluchat, for appellant. Joseph F. Rhame, Acting Sol., for the State.

GARY, J. The defendant was convicted of perjury at the June, 1894, term of the court of general sessions for Clarendon county, and thereon made a motion before the presiding judge for a new trial, which was refused. He was then sentenced to one year at hard labor in the state penitentiary. The appeal to this court is based upon two exceptions, which will be incorporated in the report of the case, and raise the single point whether his honor, Judge Norton, erred in charging the jury that they must not allow their personal knowledge of defendant's mental condition to enter into their judgment in arriving at a verdict. The question

as to the mental condition of the defendant was not a collateral circumstance, but a material fact in issue, upon which the jury was called upon to pass. Under these circumstances, it would be extremely dangerous to allow the jury to find a verdict upon facts first communicated to them by jurors in the jury room. Such a verdict would be contrary to that part of their oath where they swear to give a true verdict according to the evidence. The practice for which the appellant contends would deprive a party to the cause of the very important right of cross-examination. This is not a case involving the right of a juror to state facts in the jury room touching the credibility of a witness, as was the case of *McKain v. Love*, 2 Hill (S. C.) 506, in which the distinction herein stated was pointed out by the court, which used the following language: "The oath usually administered to the jurors in the common pleas well and truly to try the issue joined between the parties, 'and a true verdict give according to the evidence,' contains a very correct summary of the law on this subject. The jury are bound to give their verdict according to the evidence, and what is or is not competent evidence belongs to the court, and not to the jury, to determine. Generally speaking, therefore, a verdict founded on facts first disclosed in the jury room would be bad, although the facts are known to one of the jury, because it is unfair not to give the party against whom they operate an opportunity of repelling or explaining them. In an anonymous case, in 1 Salk. 405, par. 3, it is said that "if a juror know, of his own knowledge, anything material to the matter in issue, the fair way is to tell the court, so that he may be sworn as a witness." See, also, *State v. Jones*, 29 S. C. 201, 7 S. E. 296. It is the judgment of this court that the judgment of the court below be affirmed.

(44 S. C. 325)

STATE v. RHODES et al.

(Supreme Court of South Carolina. June 26, 1895.)

CRIMINAL LAW—EVIDENCE—INSTRUCTIONS—REVIEW.

1. On a trial for arson, a question asked of a witness who was at defendant's house in the evening of the fire, whether he got any liquor there, was admissible to test his ability to identify those who were present.

2. A charge that "you are kings, in your capacity, and mortal man cannot touch your judgment," is unobjectionable on the ground that outside pressure was being used, and that the effect of the charge would be "to confirm the jury to convict defendant, regardless of law or evidence," when there was no evidence of "outside pressure," and when the court also charged that the jury was to consider nothing except what happened on the witness stand.

3. A verdict of conviction will not be disturbed on appeal on the ground that it was against, or unsupported by, the evidence.

Appeal from general sessions circuit court of Anderson county; O. W. Buchanan, Judge.

Jasper N. Rhodes was convicted of arson, and appeals. Affirmed.

Bonham & Watkins and Tribble & Prince, for appellant. M. F. Ansel, for the State.

McIVER, C. J. The three defendants above named were indicted and tried jointly under a charge of arson, in burning the ginhouse of one James P. Johnson, and upon their trial they were all convicted, and recommended to the mercy of the court. After the verdict was rendered the defendant Rhodes moved for a new trial, upon the minutes of the court, which motion was refused, and the defendant Rhodes was sentenced to imprisonment in the state penitentiary, at hard labor, for the term of 12 years. From this judgment the defendant Jasper N. Rhodes alone appeals, on the several grounds set out in the record, the other two defendants not appealing.

The first and second grounds of appeal, relating only to the confessions made by Lee Owens and John Murphy, in which the name of the appellant, Rhodes, was not even mentioned, are manifestly inapplicable to the questions raised by the appeal, and need not, therefore, be considered.

The third ground of appeal is as follows: "Because his honor erred in allowing the solicitor, against objection by defendant's attorneys, to ask the defendant's witness A. W. Grant if he had not obtained whisky or liquor at Rhodes' on Sunday; the manifest object being to prejudice defendant Rhodes in the eyes of the jury, and said question being wholly irrelevant to the issue being tried." For a proper understanding of this exception, it is necessary to state that the evidence tended to show that several persons, both white and colored, were at the house of the appellant on Sunday afternoon,—on the night of which day the ginhouse was burned,—among whom was the witness Grant; and when he was asked by the solicitor, on the cross-examination, whether the other two defendants were among the colored people present, he replied: "A. I don't know, sir. You know darkeys are so much alike, I don't know that I would know them. Q. Have you ever seen two people that looked just exactly alike? A. Yes, sir. Q. You have seen two people that looked just exactly alike? A. Yes, sir. Q. You are certain of that? A. Yes, sir; I am. Q. Did you see any liquor there that evening? A. No, sir. Q. You didn't get any of it? A. No, sir, I did not; I don't fool with that." At this point the objection of counsel was interposed, and, though the objection was overruled, no further question was asked about liquor. How this testimony can be construed (not to use a stronger term) into an effort on the part of the solicitor to convey the idea to the jury that appellant was selling liquor on Sunday,—which, judging from the argument of counsel for appellant, constitutes the gravamen of the objection,—

It is impossible to conceive, and the suggestion of any such purpose is based solely upon the purest conjecture. The witness was not asked if he got any liquor from appellant, and, as there were several other persons present, there was not the slightest reason to assume that the intention was to show that the witness got any liquor from appellant, or even that he had any, though another of defendant's witnesses was permitted to say, without objection, that he and the appellant did go out of the house and get a drink. It is very obvious that the sole purpose of the testimony which constitutes a basis of this ground of appeal was to ascertain whether the witness Grant was unable to identify the "darkeys" of whom he spoke, because of his being "in liquor." It is clear, therefore, that there is nothing in the third ground of appeal; for, even if the testimony in question was irrelevant to the issue on trial, it certainly was within the limits allowed on cross-examination to test the correctness of the testimony of the witness.

The fourth ground of appeal is presented in the following language: "Because his honor erred in charging the jury as follows: 'You are kings, in your capacity, and mortal man cannot touch your judgment,'—it being apparent, even from his honor's charge, that prejudice and feeling existed in the case against the defendants, and that 'outside pressure' was being used, if any of the jurors were influenced by such considerations, the effect of these words uttered by the presiding judge would be to confirm them in their determination to convict the defendant, regardless of law, or evidence." It seems to us that this ground of appeal is based upon two wholly gratuitous assumptions, unsustained by any evidence whatever: (1) That "outside pressure" was being brought to bear to induce the jury to find the defendants guilty. (2) That the jurors, or some of them, at least, would yield to such outside pressure; and this involves a grave imputation against jurors, which this court would be slow to indorse. But, more than this, when the whole passage from which the words quoted in this ground of appeal are taken is read together, it is very obvious that the sole purpose of the language quoted from the judge's charge was to fortify the jury against the effect of any outside pressure, if any there was, and to impress upon their minds their duty to decide the case according to the testimony as adduced on the stand, without regard to any other consideration. Here is the whole passage: "Now, gentlemen, you are to consider yourselves set apart solely for the purpose of considering what you hear in this courthouse, seeing what you see here, and you are not to pay any attention to outside pressure. You must be oblivious to any outside pressure. You are kings. In your capacity, and mortal man cannot touch your judgment. You are to be the sole judges. You are to listen to nothing that goes on on the outside. Your

ears are to be deaf, and your eyes blind, to all except what happens here on this witness stand. Your duty is to inquire as to the guilt or innocence of these parties, as to what happens here in the courthouse, right here on the stand." It is manifest, therefore, that the fourth ground of appeal cannot be sustained.

The fifth ground reads as follows: "Because his honor erred in not granting a new trial to this appellant, because it appears from the record that the verdict is against the manifest weight of the evidence, and against the law as it was given to the jury by the court. Because it is shown by the record of the evidence that, eliminating the so-called confessions of the alleged accomplices, the only testimony against this appellant, Rhodes, was the testimony of the little negro girl Mary Williams, which was contradictory on its face, and which was contradicted point blank by the testimony of four adult, intelligent, white witnesses." It seems to us that the very terms in which this ground of appeal is couched sufficiently show that it cannot be sustained by this court, for it is abundantly apparent that the whole question turned upon the credibility of the witness Mary Williams, and that is a question peculiarly and exclusively within the province of the jury. Whether the jury have correctly solved that question it is certainly beyond the province of this court to inquire. Ever since the case of *State v. Cardozo*, 11 S. C. 195, followed by numerous other cases, it has been uniformly held that this court has no power to set aside a verdict of a jury in a criminal case on the ground that the verdict was against the evidence, or unsupported by it. That power has been lodged exclusively in the circuit court, and its decision, so long as no error of law is committed by it, is final and conclusive. We are unable to discover that his honor, Judge Buchanan, committed any error of law in refusing the motion for a new trial. He did not refuse the motion for want of power to grant it, as in the case of *State v. David*, 14 S. C. 428, and in *Wood v. Railway Co.*, 19 S. C. 579, which would have been error of law; but the motion was refused, as appears from the record, because the circuit judge was not disposed to put his judgment against that of the jury. Now, reading that remark in the light of the circumstances of the case, it is very obvious that, the circuit judge seeing that the whole question was one of credibility of testimony,—a question peculiarly within the province of the jury,—he was disposed to respect the judgment of the jury upon that question, and in this there certainly was no error of law.

The only remaining ground of appeal is the sixth, which reads as follows: "Because his honor erred in charging the jury as follows: 'Now, gentlemen, something has been said here about an alibi. The books say an alibi is a dangerous defense,' etc.,—the error consisting in this: that the defendant had made

no effort to set up an alibi, but, on the contrary, proved by his own witnesses that he was at the very place, at the very hour, charged by the girl, but that no such conversation as she alleges to have heard between him and Lee Owens and John Murphy took place, or could have taken place without their knowledge; but by the judge's charge as to an effort to prove an alibi the jury were misled into believing that this was only an attempt to prove an alibi." It will be observed that the circuit judge did not say that the appellant had set up an alibi as a defense, and did not even say that he had attempted to prove an alibi. But what he did say was: "Something has been said here about an alibi. The books say that an alibi is a dangerous defense, yet, when there are no circumstances showing any lack of completion in the chain, it is as complete a defense as can be devised, because the law says a man cannot be in two places at one and the same time, and we all know that. He cannot be in Anderson and in Abbeville the same day, at precisely the same time." This was all that was said on the subject, and how this can have misled the jury it is impossible for us to conceive. The fact that something was said about an alibi—by whom or for what purpose does not appear—certainly could not have had any effect in misleading the jury. But when we look into the testimony the reason for making this remark is apparent, for it there appears that Mary Williams, a witness for the state, had testified that after hearing Rhodes, the appellant, tell the other two defendants that if they would burn the ginhouse he would furnish the matches and the oil, these three persons—Rhodes, Owens, and Murphy—left the house, and went down towards the stable, in the direction of the ginhouse, after which defendants offered several witnesses to prove that Rhodes, the appellant, never left the house that evening; and this is probably what gave rise to the remark about the alibi. We do not think, therefore, that the sixth ground of appeal can be sustained. The judgment of this court is that the judgment of the circuit court be affirmed.

(44 S. C. 335)

Ex parte MOSCATO.

(Supreme Court of South Carolina. July 1, 1895.)

INTERSTATE EXTRADITION—PROCEDURE—HABEAS CORPUS PROCEEDING—SUFFICIENCY OF EXCEPTIONS.

1. In extradition proceedings under Rev. St. U. S. § 5278, the mandate of the governor, directing the delivery of the accused to the agent of the state demanding his rendition, need not recite that the governor of the latter state either produced or caused to be produced a copy of an indictment, or an affidavit before a magistrate, showing that accused has been charged with having committed the crime.

2. In habeas corpus proceedings, exceptions to an order remanding petitioner to the custody of the agent of another state, who held him by virtue of a mandate of the governor issued in pursuance of a requisition, on the ground that the "warrant is insufficient in law, the same not being in compliance with the constitution and laws of the United States and of this state" and "because no proper requisition was made by the governor of the demanding state," are too general for review on appeal.

Appeal from general sessions circuit court, Charleston county; Ernest Gary, Judge.

Petition by Toney Moscato for a writ of habeas corpus in the matter of requisition proceedings. From an order remanding petitioner to the custody of the officer, he appeals. Affirmed.

Murphy, Farrow & Legare, for appellant.
W. St. Julien Jervey, for respondent.

GARY, J. Toney Moscato, the appellant, by petition applied to Hon. Ernest Gary, then presiding as circuit judge in Charleston county, for a writ of habeas corpus, alleging that he was imprisoned and restrained of his liberty by Charles J. Wade, and that the cause of his detention was not known to him. The writ was granted, and the return of Charles J. Wade set forth: "That he holds the said prisoner by reason and virtue of the mandate of his excellency, the governor of the state of South Carolina, issued in pursuance of a requisition from the governor of the state of New York, whereby it is commanded that the said fugitive, Toney Moscato, be delivered to Charles J. Wade, who is authorized to receive and carry him to the state of New York for trial, in accordance with the laws in such case made and provided. To which said requisition there produced he craves reference." Toney Moscato then presented the following reasons for his discharge: "And the said Toney Moscato, in his own proper person, cometh into court here, and, having heard the return to the writ of habeas corpus read, sayeth: (1) That he ought to be discharged from his imprisonment because he says that he is advised that the warrant annexed to said return and made part thereof is not sufficient in law, in this: that it does not recite that the governor of the demanding state either produced or caused to be produced a copy of an indictment found, nor an affidavit made, before a magistrate of a state, showing that the person demanded is charged with having committed the alleged crime in the state of New York; nor that a copy of such indictment or affidavit was certified as authentic by the governor of the state making the demand. Nor is there any evidence before the court, save the said warrant and the return, and this he is ready to verify." The mandate referred to in the return of Charles J. Wade recites: "Whereas a requisition has this day been received from his excellency the governor of New York for the rendition of Toney Moscato, who stands charged with a crime

of grand larceny, in the second degree, in said state, and who has escaped therefrom, and taken refuge in the state of South Carolina." Upon hearing the return to the writ and the traverse thereto, the presiding judge made an order remanding the prisoner to the custody of the agent of the state of New York, from which order the prisoner appealed to this court. An order was thereupon made by the presiding judge staying the execution of the order pending said appeal.

Appellant's exceptions are: (1) "That the warrant set out in the return herein is insufficient in law, the same not being in compliance with the constitution and laws of the United States and of this state." (2) "Because no proper requisition was made by the governor of New York on the governor of this state." These exceptions fail to point out the specific errors complained of, and are too general for consideration by this court. But, even if the exceptions were sufficient to raise the objection to the proceedings urged by the prisoner upon the hearing before the circuit judge, they could not be sustained. The objection there urged was that the mandate was not sufficient in law, in that it failed to recite certain requirements of the act of congress of 1793 contained in section 5278, Rev. St. U. S. It was not contended that the requirements had not been complied with, except that they were not recited in the mandate. There is no provision of law requiring such recital.

In the case of *Ex parte Swearingen*, 13 S. C. 83, the court says: "Another ground taken is that even if the requisition from the governor of Georgia be, in every respect, in conformity with law, yet the mandate issued by the governor of this state was insufficient to authorize the arrest of the petitioner, inasmuch as it does not, in express terms, order the arrest of the prisoner, but only directs that he be delivered to the agent of the state of Georgia. We do not think it at all important to inquire whether the mandate was sufficient to authorize the arrest of the petitioner. The petitioner claims that he is illegally detained in the custody of the sheriff, and the only question before us is, not as to the legality of his arrest, but as to the legality of his detention, and the cause shown for that is the mandate of the governor of this state, issued in pursuance of a requisition from the governor of Georgia. If that requisition is in conformity to the provisions of the act of congress, as we have already ascertained it to be, the mandate of the governor of this state to deliver the prisoner to the agent of the state of Georgia necessarily follows, and it matters not in this inquiry how the sheriff originally acquired the custody of the prisoner. *Dows' Case*, 18 Pa. St. 37. When he is brought before us, the return shows that he is now in custody by lawful warrant for a lawful purpose."

It is the judgment of this court that the order appealed from be affirmed.

(40 W. Va. 726)

STATE v. FLESHMAN.

(Supreme Court of Appeals of West Virginia.
June 21, 1895.)

FORGERY—INDICTMENT—VARIANCE.

1. While in an indictment for forgery it is unnecessary to set forth a copy or fac simile of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury.

2. When the alleged forged note is set out in *haec verba*, and in the body thereof are the words "with 6 per cent. int. from date," and the note offered in evidence contains no such words, this is a variance, both in substance and legal effect, fatal to the introduction of such last-mentioned note as evidence in support of the allegations of the indictment.

(Syllabus by the Court.)

Error to circuit court, Monroe county.

R. R. Fleshman was convicted of forgery, and brings error. Reversed.

Rowan & Boggess, for plaintiff in error.
T. S. Riley, Atty. Gen., for the State.

DENT, J. R. R. Fleshman was convicted of forgery at the March term, 1895, of the circuit court of Monroe county, and sentenced to two years' confinement in the penitentiary. On writ of error, he now relies upon six separate alleged errors committed by the trial court:

1. The demurrer to the indictment, for the reason that it was too general, and did not specify the particular part of the note forged. This was not necessary. 8 Am. & Eng. Enc. Law, 500, 502. A forged note, being false in one material part or signature, is false in toto, and must be so regarded as to the person against whom the fraud is aimed.

2 and 3. The forgery in this case consisted in representing the signature of one John Fleshman to be the signature of another person of the same name, with fraudulent intent. 8 Am. & Eng. Enc. Law, 464, 467; *State v. Dennett*, 19 La. Ann. 395; *Pennsylvania v. Misner*, Add. 44; *Com. v. Foster*, 114 Mass. 312. Such being the case, the venue of the crime was properly proven, and the evidence of Charles A. Brown as to the conduct and representation of the accused properly admitted.

4. In both counts of the indictment, the note alleged to have been forged is set out in *haec verba*, as follows, to wit: "\$250.00. Six months after date, we promise to pay Charles A. Brown two hundred and fifty dollars, for value received, with 6 per cent. int. from date. This Decr. 17th, 1892. R. R. Fleshman. [Seal.] Allen Fleshman. [Seal.] John Fleshman. [Seal.]" It was unnecessary, under section 6, c. 158, of the Code, to do so, but only to describe the note as in an indictment for larceny; but, being set out, it must be proved as alleged. A material variance between the allegata and probata on the trial of an indictment for larceny is fatal. 12 Am. & Eng. Enc. Law, 865. And it must

be equally so in trials for forgery. The note offered in evidence corresponds in all respects with the note set out in the indictment, except the latter contains the additional words "with 6 per cent. int. from date." These words materially change the substance and the legal effect of the notes, and it is a matter of impossibility to reconcile this difference, and pronounce them to be identically the same note. The accused having objected to the admission of the evidence, it should have been excluded. 8 Am. & Eng. Enc. Law, 517; State v. Fay, 65 Mo. 490.

This being plain and prejudicial error, it becomes unnecessary to decide the other two assignments, to wit, the refusal to grant a continuance, and the misbehavior of the counsel in the argument of the case, as the errors committed, if such, can be avoided on retrial. Suffice it to say that a reasonable opportunity should be afforded the accused to obtain his witnesses, and prepare for trial, and counsel in argument should be required to confine themselves to the facts in evidence before the jury.

For the error aforesaid, the judgment is reversed, the verdict set aside, and a new trial awarded, and the case is remanded for further proceedings in accordance with law.

(40 W. Va. 718)

STATE v. COBBS.

(Supreme Court of Appeals of West Virginia.
June 19, 1895.)

HOMICIDE—INSTRUCTIONS—FAILURE TO REQUEST— WAIVER—IMPEACHMENT OF VERDICT— AFFIDAVITS OF JURORS.

1. It is not error for a court to omit to instruct a jury that it may punish murder in the first degree with either death or confinement in the penitentiary, unless asked to do so.

2. It is error to refuse to do so when asked, though not asked until the jury announced its verdict, but before its discharge.

3. The law does not fix any time for instructions. The court may fix it by rule.

4. A court may, for good reason, return a jury to its room to further consider and amend or alter its verdict, at any time before a verdict is received by the court and the jury discharged.

5. A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to specific law points ought to be asked. A court may, without request, if it think the interests of justice and a fair trial call for it, instruct a jury in matter of law, the instruction being sound in law and relevant to the evidence; but it is not bound to do so unless asked; but, if asked to give such proper specific instructions, it must do so.

6. The court suggests privately to counsel of prisoner the prudence of instructing the jury of its power to punish murder in the first degree either with death or by confinement in the penitentiary, and counsel says that he prefers to take chances rather than call the jury's attention to that law at that time. This does not estop the prisoner from asking such instruction later, even after the jury has announced a verdict of murder in the first degree, but before it is received or the jury discharged.

7. Affidavit of jurors that they were ignorant of the law that it is with a jury to say whether murder in the first degree shall be punished with death or confinement in the penitentiary cannot be read to impeach the verdict.

8. As a general rule, affidavits of jurors to impeach their verdict cannot be read.

(Syllabus by the Court.)

Error to criminal court, Mercer county.

Peter Cobbs was convicted of murder, and brings error. Reversed.

J. W. Hale, for plaintiff in error. T. S. Riley, Atty. Gen., for the State.

BRANNON, J. Peter Cobbs was sentenced to be hanged, for the murder of David Adams, by the criminal court of Mercer county, and then applied to the circuit court of that county for a writ of error, which was refused, and then he obtained a writ of error from this court. It is said that the criminal court erred in failing, on its own motion, without request, to instruct the jury that if they should find the prisoner guilty of murder in the first degree, they could either find that he be sent to the penitentiary for life or punished with death. Under the criminal practice in Virginia, and also in West Virginia until the Code of 1868, when a person was charged with felony, the procedure of the trial began with a formal arraignment, proclamation by the sheriff, and charge by the clerk. The charge by the clerk instructed the jury what they should do under the law in case they found the defendant guilty, as, for instance, what punishment they should impose, where the manner and degree of punishment were committed to them by law. This charge was under the eye of the court, was considered as an instruction by the court, and, if erroneous, was ground for reversal. See its form, 3 Rob. Prac. (old) 175. See Allen's Case, 2 Leigh, 727. Our Code, § 2, c. 159, abolishes such arraignment, sheriff's proclamation, and clerk's charge. I think that the duty of informing a jury as to its power to elect between punishment by death or confinement in the penitentiary in murder cases would have been a part of the clerk's charge under the former practice, and that its omission would be error, if that practice still prevailed; but, such practice having been dispensed with, this matter is, like any other matter of law touching the trial, the subject of instruction, and governed by the law relating to instructions. I do not think that this power of election between the two punishments has anything about it so peculiar as to distinguish it from other rights of the defendant under the law, so as to make it incumbent on the court to give an instruction of its own motion, and render its omission error. A court is not bound, even on motion, to instruct the jury generally on the law of the case. *Womack v. Circle*, 29 Grat. 192, par. 8. Then why so as to this matter? 2 Thomp. Trials, § 2188, does say that in criminal cases it is the duty of the judge to advise the jury as to the punishment which the law imposes on the crime, so they may properly assess the penalty according to the magnitude and character of the crime, and cautiously adds, "And it is supposed that a failure to do this,

even where not requested, would, in most jurisdictions, be ground of reversing the judgment." Doubtless the advice here given by Judge Thompson to courts to see that juries do not act in the vital matter of punishment in obscurity and confusion of mind is judicious in all jurisdictions, and doubtless its observance is essential and indispensable in all jurisdictions, as in England and many of the American states, where the judge "sums up" the case, as it is said, that is, delivers a charge, in which he covers the whole ground of the case, giving his opinion on law and fact; and this charge is necessary, and must be full in its exposition of the law of the case. 1 Bish. Cr. Proc. §§ 976, 979, 980; Whart. Cr. Pl. §§ 709, 711. This charge is a material part of the trial. But in the Virginias this "summing up" or charge is unknown. Our practice is widely different. Under our practice the judge must not state the evidence, or discuss or give or intimate his opinion upon it. If anything drops from him, even casually or inadvertently, in giving instructions or otherwise, indicating an opinion on the weight or effect of the evidence or the credibility of a witness, it is generally ground for reversal. *Dejarnette's Case*, 75 Va. 867; *Whitelaw's Ex'r v. Whitelaw*, 83 Va. 40, 1 S. E. 407; *State v. Hurst*, 11 W. Va. 54; *State v. Thompson*, 21 W. Va. 741; *State v. Greer*, 22 W. Va. 800; *State v. Sutfin*, Id. 771. Thus, in this state, no duty rests on the judge to instruct on the general features of the case, law, or fact. I have said that the matter of instructing as to punishment falls under the law of instructions. Under that, it was not the duty of the judge, unasked, to give the instruction. We are not discussing the question whether it is error for a judge, without request by either side, to give instructions, as in *Gwatkin's Case*, 9 Leigh, 678. I do not doubt that, as held in *Blunt's Case*, 4 Leigh, 689, the court may properly instruct the jury on a question of law when, in its opinion, justice requires such interposition, though it be not asked by either party. But the question in point now is whether a court is bound, without request of specific instructions, to give them. It is clearly not so under our practice. *Dejarnette's Case*, 75 Va. p. 877; *Rosenbaums v. Weeden*, 18 Grat. 785; 4 Minor, 747; *State v. Caddle*, 35 W. Va. 73, 12 S. E. 1098. The cases of *Kitty v. Fitzhugh*, 4 Rand. (Va.) 600, *Brooke v. Young*, 3 Rand. (Va.) 106, and *Womack v. Circle*, 29 Grat. 192, holding that a party must ask instructions on specific points, and that even when asked the court is not bound to instruct generally on the law of the case, logically negative the claim that it is error for a court not to instruct when not asked. The party must ask specific instructions.

But this does not end or settle the prisoner's right touching this matter; for, when the jury came in with a simple verdict of guilty of murder in the first degree, without any

finding that he be punished by confinement in the penitentiary, he asked the court to tell the jury that it had a right to make such addition to its verdict, which the court refused to do. This solicited instruction certainly propounded the law correctly. It is a matter of clear and important right that a party has right to ask a proper instruction, and have it given, and it is error to refuse it. *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.*, 34 W. Va. 155, 11 S. E. 1009. Here is an instruction asked, properly stating the law, vitally important to the defendant, as on it perhaps hung his life, refused. This is all you can make out of it, so far, and its refusal is error, unless, under the circumstances, it can be justified. Strong reason is called for, in the very nature of the case, to warrant this refusal. The attorney general says it was asked too late. It was not asked, as would have been proper, before the retirement of the jury; but when the jury came into court, and after its verdict had, by direction of the court, been read aloud, but before it was received by the court, while the jury was still present, and before its discharge, the instruction was asked. The object of the law was to give a fair trial. The law does not absolutely fix any time for giving instructions. *Gwatkin's Case*, 9 Leigh, 678. *Gibson's Case*, 2 Va. Cas. 70, holds that not until the court has received for record the verdict is it perfected, and until then it may be amended. I think while the jury is present, and before discharged, the verdict may be amended. So held in *Sledd's Case*, 19 Grat. 813. Where is the sound reason against giving a jury a simple, isolated instruction upon a single point, as here proposed, in a matter so vital to the prisoner, and sending them back to their chamber? The court virtually gave an instruction and sent the jury back, and they amended their verdict, in *State v. Davis*, 31 W. Va. 390, 7 S. E. 24. After such instruction, the jury should be sent again to their room for further consideration. I know that in *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177, and *Tully v. Despard*, 31 W. Va. 973, 6 S. E. 927, where instructions have been submitted after the retirement of the jury, and refused because offered too late, this court held that it would not for that cause reverse, unless it affirmatively appears that the court manifestly abused the large discretion vested in it in such case. This leaves to the appellate court considerable discretion. Abuse of discretion, as used in those cases, does not only mean corrupt action, but misuse or erroneous exercise of that discretion. It seems to us that the case in hand is a plain instance of one calling for reversal. Here is an instruction asked, unquestionably correct in law, upon a statutory provision, and upon a single proposition admitting of no two adverse opinions, calling for no qualifying instruction or further argument of counsel, working no surprise to the state, doing it no shadow of injustice or harm, tending to

promote and not to hinder a fair trial, and so vital to the prisoner that upon it possibly depended his life. If we do at all review the exercise of the discretion by the criminal court, we must say that we see no adequate reason for the refusal of the request. This is not a civil case, like the cases above referred to, but one involving life, and a discretion in such a matter in both courts should lean in favor of the accused. It does not appear that any fixed court rule prescribed the time when the instructions should be asked; and, even if there was such a rule, the peculiar circumstances of this case would call for a departure from it. *Organ Co. v. House*, 25 W. Va. 64. The nature of the instruction asked—its peculiar nature—rendered it proper at any time before the jury's discharge, if asked.

Three jurors, by affidavit, say that they thought that if the jury found a verdict of murder in the first degree it was with the court to determine whether the accused should suffer death or be confined for life in the penitentiary, and not their duty to determine that matter, and that if they had known it was the province of the jury to determine between those two punishments they would have found in favor of punishment by confinement in the penitentiary, and that thus they acted in mistake of law; while three other jurors, by affidavit, say that the right of the jury to elect between the two modes of punishment was fully discussed, asserted, and explained in the jury room, before all the jurors, and that it was explained there that under the verdict found the prisoner would suffer death. Here is a strange contradiction. It is almost inconceivable that it should exist. It is a signal illustration of the wisdom of the rule of law that the evidence of jurors shall not be received to impeach their verdict. If the first affidavit is read, it makes a strong case for the exercise of the power of the court to grant a new trial. Can it be read? I do not think these affidavits on either side can be read,—not to impeach the verdict by showing ignorance or mistake of law. *Harnsbarger v. Kinney*, 6 Grat. 287; *Bank v. Waddill*, 31 Grat. 469; *Reynolds v. Tompkins*, 23 W. Va. 229; *Probst v. Braeunlich*, 24 W. Va. 356. If jurors can be thus allowed to overthrow their verdict, what verdict might not be overthrown? How wide open would be the door to tampering with and bribing jurors? Is every single juror to be allowed to say he misunderstood the law? Though affidavits of jurors will not be received to impeach their verdict, they are received to support it to a very limited extent only where facts come to the attention of the court, *prima facie* invalidating the verdict, which is not the case here. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982. There may be instances of hardship under the rule, but public policy favors the rule, and it cannot regard individual instances of hardship. The rule is thus broadly stated in 2 Thomp. Trials, §

2618, and is fully sustained by authority cited: "Upon grounds of public policy courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, to show mistake in it, or that they misunderstood the charge of the court, or that they otherwise mistook the law, or the result of their finding, or that they agreed on their verdict by average or by lot." See many authorities collected in 5 L. R. A. 523, to case of *Bartlett v. Patton*, 33 W. Va. 71, 10 S. E. 21.

Another circumstance may be summoned to sustain the action of the court, namely: Counsel agreed not to argue the case, but to state what they conceived to be the law of the case, and, nothing having been said by counsel on either side as to the right of the jury to find for punishment by confinement in the penitentiary, the court called counsel for the prisoner to his desk before the jury retired, and called his attention to that fact, and the counsel remarked to the court that he would rather take chances than call the jury's attention to that law at that time. This was a private conversation between the judge and the counsel, practically not in the presence of the prisoner, and not heard by him, and it was qualified as to time. Is it a waiver by him? Is it an estoppel against his right afterwards to ask the court to tell the jury as to their right to impose either punishment? I do not think counsel's authority to bind the prisoner would be carried by a court so far. Not a whisper had been made by judge or counsel about this right of the jury to impose either punishment, which I think prudence suggests should be done by the court, and it would be very, very rigid to say that because the counsel, without the prisoner's knowledge, took this lottery of chance, when it failed, the prisoner would be inexorably bound by it in a matter of life and death. A court need not, unless asked, give instructions. A prisoner may undoubtedly waive them; but he has a right to ask them. Here it is not a question of waiver, but it is a question of whether he could, before it was too late, ask a proper instruction, or whether his counsel could for him recant the waiver which he had privately made. I think he could have retracted it had he known of it or made it himself.

The point that there was a separation of the jury arising from the manner in which they were kept over night is made by counsel, but not urged. There was no legal separation. There is nothing of importance or novelty in this case upon this question, which has been so much discussed in former cases, calling for further discussion. *Thompson's Case*, 8 Grat. 637; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982; *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507.

Reversed and remanded for new trial.

(116 N. C. 28)

WRIGHT v. BROWN et al.

(Supreme Court of North Carolina. April 30, 1895.)

WILLS—NATURE OF ESTATE—SPECIFIC PERFORMANCE.

1. A devise of an estate to a woman and her heirs, and, in case of her death without issue, to another and her heirs, creates a contingent estate, which does not presently vest in the remainder-man.

2. A conveyance with warranties by a remainder-man of his contingent estate will be considered an executory contract, which equity will enforce.

Appeal from superior court, Beaufort county; Boykin, Judge.

Action by M. F. Wright against C. M. Brown and others to set aside a contract for the purchase of real estate. From a judgment for defendants, plaintiff appeals. Affirmed.

Chas. F. Warren, for appellant. W. B. Rodman, for appellees.

FURCHES, J. James Ellison, being the owner in fee simple of the lands mentioned in the case agreed, devised the same to his granddaughter Polly Ann Ellison, "to be hers and her heirs and assigns. But in case my said granddaughter, Polly Ann, do die leaving no lawful issue at her death, then I devise and bequeath * * * to my daughter Augusta L. Ellison, her heirs and assigns,"—and died in 1865. That some time after the death of the testator the said Polly Ann and Augusta L. sold and conveyed this land to Ida M. Swindell by deed with warranty. And by successive conveyances from Ida M. Swindell the defendant became the owner thereof, and has contracted to sell the same to the plaintiff, Wright. That since the date of the conveyance to Ida M. Swindell, the said Augusta L. has died, leaving a son surviving her, who is her heir at law. But the said Polly Ann is still living, unmarried, and is about 50 years of age. Upon these facts the plaintiff, Wright, alleges that the defendant Brown is unable to give him a good and indefeasible title to the lands, and for this reason refuses to pay plaintiff the purchase money. And this presents the question for our consideration,—whether the defendant can convey a good and clear title to plaintiff. If he can, plaintiff should not recover in this action. If he cannot, then he should recover.

By the terms of the will of James Ellison, Polly Ann took a conditional fee simple in the land, liable to be determined upon said Polly Ann's dying without leaving issue surviving her at her death. And the said Augusta L. took the remainder, denominated an "estate or interest by way of executory devise." The defendant has a deed from Polly Ann, with warranty, and if it should turn out that she has the fee simple the trouble would end, and the defendant would have a good title. Therefore it is seen that the trouble lies in determining what estate or

interest Augusta L. took in the land. All hands admit that she took some interest, and defendant contends she took a present vested estate, though subject to be divested by the said Polly Ann leaving issue, her surviving, at her death; that this estate would pass by descent, and might be devised and assigned. This the plaintiff denies. The estate of Augusta L., whatever it be, is clearly contingent, and, in contemplation of law, may never vest. This depends upon the fact whether Polly Ann dies without leaving issue. If it depended upon the death of Polly Ann alone, it would be a vested estate or interest, as it is certain that Polly Ann will die. But it does not do this. The other condition is added,—that she must die "without leaving issue living." This, in contemplation of law, whatever her age may be, is uncertain, and will remain so until her death. But still, under our decisions, it would seem that Augusta L. had such an interest in these lands as might be assigned and conveyed by deed, and, with warranty, would be an estoppel to her heirs, with warranty. It has been held, as far back as McDonald v. McDonald, 5 Jones, Eq. 211, followed by the cases of Mastin v. Marlow, 65 N. C. 695; Bodenhamer v. Welch, 89 N. C. 78; and other cases,—that an heir apparent may sell and assign his expectancy in the estate of his ancestors. And the courts of equity will enforce such assignments, if they are fair and open, and a sufficient consideration appears. But these transactions, though by deed, are not considered as conveyances, but as executory contracts, which equity will enforce. But in this case Augusta had more than a bare expectancy. She had, under the will of James Ellison, by way of an executory devise, a future estate or interest in the land, which might be assigned. Watson v. Smith, 110 N. C. 8, 14 S. E. 640. But this case falls more directly under the case of Foster v. Hackett, 112 N. C. 555, 17 S. E. 426. In that case, Mildred Goforth willed the lands in controversy to two single daughters, and the heirs of their bodies, and, if they died without leaving such issue, then to the survivor, and then to the heirs of the deviser. During the lifetime of the two daughters (the first takers), one of the heirs at law of the deviser (Mildred) sold her interest to the defendant Hackett, and conveyed the same by deed with warranty. And this court held that the grantor (the heir of Mildred) had such an estate or interest in the lands as she might assign and convey to the defendant, and that her heirs, she being dead, were estopped to claim the same. In that case there was the uncertainty as to who would be the heirs at law of the deviser, Mildred, while in this case there is no such uncertainty. The second taker is fixed by the will, which makes this case stronger for the defendant Brown than that case was for the defendant Hackett. The case of Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011, is cited by plaintiff as authority to support

his contention. But we do not think it conflicts with the view we have taken of this case. Indeed, we think it is in harmony with what we have said, and sustains this opinion. There is no error, and the judgment is affirmed.

HARGRAVE v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. June 20, 1895.)

LOCAL OPTION LAW—PROSECUTION FOR VIOLATION—INDICTMENT.

An indictment under Code 1887, § 587, for a violation of the local option law, reciting that the defendant, at a certain time and place, "did unlawfully sell wine, spirituous liquors, malt liquors, and mixtures thereof," is not bad because it fails to allege that the sale was without a license; or because it is not stated whether the sale was by wholesale or retail; or because it fails to state that the magisterial district had voted against the sale of liquors therein.

Error to circuit court, Tazewell county; Samuel W. Williams, Judge.

A. F. Hargrave was found guilty of selling liquor in a magisterial district which had voted against licensing the sale of liquor, and brings error. Affirmed.

A. J. & S. D. May, H. C. Alderson, and J. H. Fulton, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

RIELY, J. This was a prosecution in the county court of Tazewell county, against the plaintiff in error, for a violation of the local option law. The indictment was founded on section 587 of the Code, and charges that the defendant "on the — day of —, 1892, in the said county, in the Jeffersonville magisterial district, did unlawfully sell wine, spirituous liquors, malt liquors, and mixtures thereof." Upon the trial he was found guilty by the jury and fined \$100. He thereupon moved the court to set aside the verdict and award him a new trial, and also moved the court in arrest of judgment, both of which motions the court overruled, and gave judgment against the defendant for the fine and costs of the prosecution, and ordered further that he be imprisoned in the jail of the county for 30 days.

The grounds assigned for the motion in arrest of the judgment relate to the sufficiency of the indictment, and are the following: First, that the indictment fails to charge that the sale of the intoxicating liquors was without a license; second, that it fails to set forth the manner of the sale, whether by wholesale or retail; third, that it fails to describe the particular place of the sale; and, fourth, that it does not allege that, prior to such sale, Jeffersonville magisterial district, at an election held in accordance with the statute, had voted against licensing the sale of intoxicating

liquors therein. The indictment in this case is substantially the same as the indictment in *Savage's Case*, 84 Va. 582, 5 S. E. 563, and *Id.*, 84 Va. 619, 5 S. E. 565, and also in *Thomas v. Com.*, 90 Va. 92, 17 S. E. 788. Substantially the same objections were made in those cases as in this, and overruled, and the indictment pronounced by this court to be good and valid. We are of opinion that the case at bar belongs to that class of cases in which it is our duty to apply the principle of *stare decisis*, without reference to what our own opinions might be, if the questions raised were now for the first time presented to us; and that, consequently, this case must be ruled by the decisions above referred to, and the indictment held to be sufficient. Nor did the court err in overruling the motion for a new trial. No serious contest was made by the counsel for the plaintiff in error over this matter, and indeed could not be, for the testimony abundantly proved the sale of the intoxicating liquors as charged in the indictment.

It therefore follows that the judgment of the circuit court of Tazewell county must be affirmed.

(96 Ga. 760)

BARNETT v. TRAVIS.

(Supreme Court of Georgia. April 15, 1895.)

APPEAL—PRACTICE—PARTIES.

A defendant in a bail trover suit in a justice's court, against whom a judgment is rendered, may appeal in forma pauperis to a jury in that court, whether a surety upon the bail bond given in the case, and against whom a judgment is likewise rendered, joins in the appeal or not. See Code, § 3619, and cases there cited; also *Macon & B. R. Co. v. Washington*, 69 Ga. 764.

(Syllabus by the Court.)

Error from superior court, Fayette county; C. L. Bartlett, Judge.

Action by M. Travis against Weldon Barnett. Brought forward from the last term. Code, § 4271a-c. There was a judgment for plaintiff, and defendant brings error. Reversed.

E. F. Weems and Longino & Golightly, for plaintiff in error.

PER CURIAM. Judgment reversed.

(96 Ga. 756)

CURRAN et al. v. ROME IRON CO.

(Supreme Court of Georgia. April 8, 1895.)

NEW TRIAL—CONFLICTING EVIDENCE—COMMENT OF COUNSEL.

It appearing that the evidence introduced before the jury in the justice's court was conflicting, and that counsel for the prevailing party at the trial in that court improperly commented on facts not in evidence, this court will not reverse a judgment of the superior court by which

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

a certiorari sued out by the losing party was sustained, and a new trial ordered.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action between Curran, Scott & Co. and Rome Iron Company. Brought forward from the last term. Code, § 4271a-c. There was a judgment for the latter, and the former bring error. Affirmed.

Henry Walker, for plaintiff in error. A. G. Ewing and J. W. Ewing, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., not presiding.

(95 Ga. 484)

THOMAS v. STATE.

(Supreme Court of Georgia. Feb. 5, 1895.)

HOMICIDE — CONTINUANCE — GROUNDS FOR NEW TRIAL — AMENDMENT — INSTRUCTIONS.

1. Where, upon the trial of a criminal case, it appears that for some time previous to the trial the defendant had been confined in jail; that in due season he requested the sheriff to subpoena a witness in his behalf, who resided in the county, and thereafter, several times, reminded the sheriff of his requests, the latter promising to comply therewith; and where it further appears that the facts to which the alleged witness would, if present, swear, were not only material, but of vital consequence to the defense; and the showing being in all other respects in perfect conformity with the requirements of the law,—it is no reply to a motion to continue upon such a showing, because of the absence of such witness, that on the night immediately preceding the trial the sheriff had sent a bailiff to subpoena the witness, who, going to the house of the witness, was unable to find him, or to ascertain his whereabouts, and the refusal to grant a continuance was error.

2. Where a motion for a new trial is made during the term, and an order taken to perfect it in vacation, the court, as to that case, in contemplation of law, continues in session until the time limited in the order; and a party moving for a new trial may, as a matter of right, under section 3503 of the Code, amend his motion at the hearing by the insertion of new and independent grounds of error, and this right is not subject to any arbitrary limitation imposed either by the practice prevailing in any particular judicial circuit, or by the order of the judge in granting a rule nisi. Motions for new trial must be made during the term, unless upon extraordinary grounds, but, for proper reasons, the presiding judge may grant such reasonable time thereafter for the preparation of the grounds and brief of evidence as the justice of the case may seem to require; and where such time is granted the judge may not arbitrarily refuse to allow amendments to the grounds of the motion because, according to the practice prevailing in that circuit, certain classes of exceptions to rulings of the presiding judge are required to be submitted during the term. In all such cases, however, the movant must abide the consequences of the judge's inability to remember with such accuracy the minor happenings upon the trial as will enable him to certify the grounds as true. If he remembers, he should allow the amendment. If he does not, he should refuse to certify its truth. In this case it does not appear that the presiding judge did not remember, and he therefore erred in rejecting the amendment offered.

3. The office of a charge by the court is to give to the jury such instruction touching the rules of law pertinent to the issues involved in the pending trial as will enable them intelligently to apply thereto the evidence submitted, and from the two constituents, law and fact, make a verdict. In delivering his charge the trial judge should carefully avoid an invasion of the province of the jury. He should refer to the evidence only so far as is necessary to present the leading issues in the cause, leaving the minor contentions of opposing counsel to the consideration of the jury, under appropriate general instructions. It should contain no such summary of the evidence as might, to a jury, either seem to be an argument, or amount to the expression or intimation of an opinion thereon. It is therefore error (1) for the presiding judge to repeat the substance of the testimony of the state's witnesses, as detailed from the stand, and submit this, with the argumentative deductions drawn therefrom by the state's counsel, as the issues in the case. (2) It is likewise error, where the evidence shows only that the defendant and deceased went off together, to charge that, if the defendant "took charge of the deceased, he should account for him." (3) It is likewise error to use such language, in instructing the jury upon the subject of the impeachment of a witness, as to suggest to their minds that, because of his ignorance or inexperience, he had been overreached or entrapped by counsel in the cross-examination; such a matter being one exclusively for the jury, and appropriate to be dealt with by argument of counsel, rather than by the charge of the court.

4. Where the presiding judge, by his general charge, presents to the jury the law governing the substantial and controlling issues in a case, the mere failure or omission to charge upon minor points, to which his attention is not called at the time, is not ground for a new trial.

(Syllabus by the Court.)

Error from superior court, Worth county; B. B. Bower, Judge.

Charles Thomas was convicted of murder, and brings error. Reversed.

The following is the official report:

There were two counts in the indictment against Thomas,—one charging him, as principal, with the murder of Tom Watts, and the other as being accessory before the fact to the murder of Watts by Nim Kerce and Cliff Kerce. He was found guilty of being accessory before the fact, with the recommendation that he be imprisoned in the penitentiary for life. His motion for new trial was overruled, and to this he excepted. He also excepted and alleged that the court erred in refusing to approve the twenty-third ground of the motion for new trial, as corrected by the court; insisting that he ought, under the facts of the case and the law, to be allowed to make said ground as an amendment to the original motion for new trial. The grounds of the original motion for new trial were that the verdict was contrary to the evidence, and without evidence to sustain it. This motion was filed during the term at which the case was tried, and during that term the court passed an order reciting that the court was about ready to adjourn, and the stenographer not having had time during the term to write out the evidence and charge of the court, so that the defendant's counsel could prepare a motion for a new trial, it was, by consent, ordered that

defendant's counsel have until November 25, 1894, to prepare a brief of the evidence, and present the same to the court for approval, and to amend his motion for new trial as to any exception to the charge of the court, and the motion to continue, and that said motion be set for trial on said date in November, but might be reset by the judge without prejudice to either side. What was presented as the twenty-third ground of the amended motion was as follows: Because the court erred in this: When the jury first came in and delivered their verdict, it read: "We, the jury, find the defendant guilty, as accessory before the fact, and recommend him to the mercy of the court." The judge then asked them if they meant by that to put him in the penitentiary for life. The foreman replied that they wanted the court to put a less punishment than that on him. The court then erred in telling the jury, "Gentlemen, if you wish to put the defendant in the penitentiary for life, you must so write on your verdict, or the penalty will be death." Defendant insists that this was error. This ground was corrected by stating that the court charged the jury fully and explicitly on the subject of the punishment,—that the punishment would be death unless they recommended that the defendant be punished by imprisonment in the penitentiary for life, in case they found him guilty,—and then sent the jury back to their room to make up their verdict. As to this ground, the court certified that it was disapproved, as incorrect, and, after being corrected by the court, was stricken because the amendment by this ground came too late, according to the order above mentioned, which limited the amendment to only such grounds as the motion for continuance, and exceptions to the charge of the court; the court having stated to counsel for defendant that all other grounds must be made before the adjournment of the court, while they were fresh in the mind of the court, according to the practice in that circuit. The amended motion was upon the ground that the court erred in refusing to grant the continuance asked for. The motion for continuance was as follows: Defendant testified: "I have an absent witness named Tom Willey. He is not absent by my leave or consent, and I expect to have him here by the next term of the court. He lives in this county. I am not making this motion for delay, but in order to get his testimony. I expect to prove by him that Tom Watts was seen by him the morning after the time Hiram Warren said he went off with me, and that he was cutting potato vines, to set out potatoes; that Tom Watts was alive, and helped me cut potato vines, the morning after Warren swears he went off with me, and was not seen afterwards. Tom Willey lived with his mother, and came by there that morning. The road ran right by the potato patch. Mr. Willey will swear that he saw Watts the morning after the

night Warren swears he saw him go off with me. I am positive he will swear that. I tried to get him here last court. I told the sheriff last Monday, a week ago, to send out subpoenas for him. Last Monday the sheriff told me to make out a list and give it to him, and I told him I could not write, and he asked, could none of the boys write, and I said 'No'; and he said he would attend to it in the morning, if I could make him think of it, and Tuesday morning I mentioned it to him again, and he told me he had to go off, but would be back after breakfast, and he came back, and I mentioned it to him again. I was in jail all the time. I mentioned it to him last Monday, a week ago, and every day since." In resistance to this motion for continuance the state introduced one Kemp, who testified: "I had a subpoena for Willey. Went to his house, and he was not there; that is, I could not raise anybody. And I went up to Mr. Watson's, and called, and they said he was not there, and they asked what I wanted, and I said I had a subpoena for him, and they said his wife was there, and I asked her where he was, and she said she could not tell where he was; that he went off that morning, and that he might be at Mr. Kerce's, but she did not know whether I could find him there or not. I did not go to Kerce's to hunt for him. That was last night, between ten and eleven o'clock, and, if Willey was at home at all, he lay mighty close. My instructions from the sheriff was to go and summon him. I did not go to Kerce's because his wife said she did not know whether he was there. She did not say he had gone there, but that he might be there. When I found Willey's house, it was about ten or eleven o'clock last night. I asked Mr. Kerce first where Willey was, and he said he was at home. There is nothing unusual for a man to be away from home." Another ground of the amended motion was that there was no evidence that the defendant was present or absent at the time the crime was committed, and procured, counseled, or commanded another to commit the crime. Also because the court erred in stating in the charge to the jury what was admitted by the defendant, and especially in adding thereto the words, "and on the way to what was alluded to as Judge Heygood's, where some of the evidence alluded to preaching being held that night, or a pretense that preaching would be there that night," because it states what has or has not been proven.

Error in charging: "The state insists in this case that the defendant here was one of the perpetrators of that murder, either being one of the actual perpetrators of the crime, or that he counseled or procured, advised or commanded, it to be done by some one else." Alleged to be error because there was no evidence going to show that defendant counseled or procured, or advised or commanded, the crime to be committed.

Error in charging: "The state insists: That the defendant and Nim Kerce made a plot near the gate that leads into the lane that leads to the lot of Albert Kerce, in which they agreed to kill Tom Watts. That Nim Kerce first made the proposition, 'Let us kill Tom Watts,' and that the defendant agreed to it, and then asked, 'How will we get him off,' and that defendant proposed that they would make out to Tom Watts that there would be preaching at Judge Heygood's that night, and that he would get him off that way; and Nim told him to go and get Tom as soon as he finished his supper, and bring him down to his (Charley's) house, where Nim would go. And Nim went off then towards the defendant's house (Charley Thomas' house), and Charley Thomas went towards Albert Kerce's house, where Tom Watts was eating supper, and met him between the yard gate and the house, Tom having finished his supper, and took him off with him, going towards the defendant's house. And that was the last that was ever seen of Tom Watts, until he was found murdered out there by the round pond." Alleged to be illegal because reciting and repeating what was sworn to by Hiram Warren, defendant insisting that such statement of what has been proved cannot be made under what "the state insists."

Error in following the above statement of facts with the following: "The state insists, from that, that this defendant having taken charge of Tom Watts, under that plot, for the purpose of killing him; for the purpose of pretending to carry him to church, at Judge Heygood's, under a plot to kill him at the round pond, which was on the way from Albert Kerce's to Judge Heygood's; having taken charge of him, and Tom Watts having been found dead out there, apparently having been killed some time, and not having been seen after that night, and after the defendant took charge of him,—that it would devolve upon the defendant to account for him, if he did not kill him, after he took him in his charge; that that would be sufficient circumstance to warrant a verdict of guilty against him; that it would be the duty of the defendant to account for him, if that evidence is true,—of his making the plot, and taking charge of and starting off with him, and Tom never being seen any more until found dead where they said he would be murdered at." Alleged to be illegal because there was no evidence that defendant took charge of Tom Watts, or had such charge of him as required defendant to account for him, and also as stating what has or has not been proved.

Error in following the above charge as follows: "I charge you, if you believe that testimony, you would be authorized, if you saw proper, to find a verdict of guilty against the defendant, on these circumstances and the evidence of that plot, either as principal or as accessory, according to the testimony. It would have devolved upon the defendant, if he did indeed make a plot with another to

kill Tom Watts on the way to Judge Heygood's, at the round pond that night, and a part of the plot was that he was to take charge of him, and carry him down to his house, and finally carry him on a pretended mission to church, by the round pond, for the purpose of getting him out there to be killed; if that was the plot, and you believe he took charge of him for that purpose,—it would devolve on him to show what he done with Tom Watts. And, if he did not show what he did with him, you would be authorized, if you saw proper, and believed him guilty, beyond a reasonable doubt, or that testimony,—you would be authorized to find a verdict of guilty against him, either for murder, as principal, in the first degree, or as accessory before the fact, according to the whole testimony in the case." Alleged to be erroneous because stating what has or has not been proved, treating the plot as established, and because there was no evidence to convict defendant as accessory before the fact, and because it authorized the jury to find a verdict, if they saw proper, without regard to the evidence, and assumed that defendant had control and possession of the deceased.

Error in following the foregoing charge with: "The state insists, further, that the defendant has not given any account of his own whereabouts, except what he gave in his statement on the trial before, which the state introduced itself. In his statement on the present trial, I believe, no account was given of his whereabouts that night, at all. I do not remember, positively, but you can look to the testimony; but the state saw proper to introduce his statement made on the previous trial, where he does give an account of where he was. The state, therefore, insists that he gave no account of himself, except his own statement made in his own behalf on his trial for murder." Alleged to be illegal.

Error in charging on the testimony of Warren: "Now, there are many rules by which you would be governed, in determining whether the evidence is true or not. You would, of course, have to call upon your human experience, to, perhaps, a great extent, and to your knowledge of human nature and mankind, so as to look at the evidence from every view and every standpoint, and give the evidence a fair consideration, not an unfair consideration,—give that witness' evidence a fair consideration, so as to see whether it is true or not. In doing so, you would have the right to consider who that witness is. You would have the right to consider whether he is an expert,—that is, a shrewd, sharp witness, versed in law, acquainted with courts, acquainted with all the intricacies of law questions; whether he knows the difference between what the effect of his testimony would be in one way and in another way; whether he is so learned and educated and skilled in the law that he would know of those differences and variations that might be given to testimony, like a shrewd lawyer would, or wheth-

er he be a man of common intellect, an ordinary, plain man, uneducated, unacquainted with courts, unaccustomed to testifying, not accustomed to testifying from the stand; whether he be educated or not. Judge of this from the character of the testimony, the manner he gave in his testimony on the stand,—whether he is a plain, ignorant, unsophisticated man, or whether he is a sharp, shrewd, expert witness, or not,—and deal with his evidence according to what you might see that he was." Alleged to be an erroneous presentation of the law on that question.

Error in charging further as to said witness: "And also consider what seems, from the testimony in the case, to be the strength of his mind, or the strength of his memory, or the acuteness of his mind, to lay stress or emphasis on any particular part of the testimony, or to be watchful or not watchful about his statements when asked questions by the lawyers; whether he is a witness that would be very watchful to see whether he did not contradict himself, or whether he would not be watchful; whether he is a witness that would be very particular about minor points, or whether he is a witness that might naturally be not very particular about minor points,—not be watchful of his statements as to minor points; how easily or how hard it would be to entrap him or to confuse him, or to throw him off his guard or his balance; whether he is a witness so shrewd and expert and skilled that you could not throw him off his guard at all, could not make him make contradictory statements, or whether he is a witness so plain and so unsophisticated and so uneducated, and so unskilled and unaccustomed to courts and law, that he could not be thrown off his balance and made to contradict himself. Look to all that, as reasonable, intelligent, honest, fair-minded men, so as to determine whether this witness has spoken the truth, or has willfully lied." Alleged to be not a proper or legal presentation of the law on the point charged upon.

Error in continuing the charge as to said witness as follows: "It is contended by the defendant that he has made many contradictory statements in his testimony on the stand during this trial; that he said at one time that he had finished feeding the hogs before he heard this conversation, and said at another time that he was feeding the hogs, or something of that nature or character. Look to it, and see, from the nature of that evidence, the character of that witness, whether he would seem to have been apt to have been watchful as to his particular sayings on that particular point,—whether he meant that he went out there to feed the hogs, or whether he meant that he was feeding the hogs at the very time of the conversation." Alleged to be an illegal presentation of the law on the point charged upon.

Error in continuing the charge as follows: "I charge you, further, that, in criticising the testimony of a witness, the witness has

a right to explain himself. If the witness states he was out there feeding hogs when he heard the conversation, and another time he states he had finished feeding hogs, and started back to the house, when he heard the lawyer say, 'How do you make such contradictory statements as that,' he has a right to explain; and if he explains that what he meant was that he went out there to feed hogs, that that was the way he was out there, and after he fed the hogs he started back and heard the conversation, you can take that explanation, and consider it with the witness' evidence, and determine whether he willfully lied, or merely had not been very watchful in regard to his statements,—whether he was a man that was used to being watchful, or not, in regard to his statements. So it would be in regard to any other statement of that character." Alleged to be not the law.

Error in continuing the charge as follows: "If the witness stated at one time that they were standing at the lot gate when the conversation occurred, and stated at another time that they were standing at the lane gate, if he then is assailed on the ground that he has made a contradictory statement, if he stated at one time that the conversation took place at the lot gate, and another time that it took place at the lane gate, he has the right to explain; and if he explains that what he meant by saying they were standing at the lot gate was that they were standing at the lane gate, which you had to go through to go into the lot, you have a perfect right to take his explanation along with the other evidence, and see whether he meant willfully to tell a lie, or was merely not very watchful and keen and shrewd about making his statement." Alleged to be illegal.

Error in continuing the charge: "A witness who is unskilled and untrained, uneducated, unaccustomed to testifying, and unaccustomed to courts and lawyers, and the acuteness of lawyers, will be considered accordingly. Another witness, who is sharp and shrewd, educated, skilled, and trained as a witness, accustomed to courts, and accustomed to the shrewdness of lawyers' questions, will be considered in that light. So you should consider who the witness was, and what he was, so as to determine whether, consecutively, he has spoken the truth, or not spoken the truth." Alleged not to be the law.

Error in continuing the charge: "If the witness testified on a former trial that the defendant, Charley Thomas, said, 'Let us kill Tom Watts,' and testified on this trial that the other party said, 'Let us kill Tom Watts,' and that Charley Thomas agreed, and he is assailed for that, you will look—even if the witness makes no explanation of it, you will look—to see whether the witness was a man that was calculated to be very watchful and careful in those exact statements, or whether he was a man that would

likely make a slip of that kind, or not; and if you believe it was a mere slip of the tongue that he said Charley, one time, and the other man, the other time, that made the proposition about the plot, and you get 'between' his testimony, you have a right to do so." Alleged not to be good law.

Error in continuing the charge: "And then you can further consider that everybody is capable of making mistakes. It is possible for reporters to make mistakes. It is possible for the judge to make a mistake, when he approves the testimony as being the testimony that a witness testified to. It is possible for a witness to have made a mistake, and corrected it afterwards. I cannot say to you who would have more probably made the mistake,—whether the court or the stenographer or the witness. That is for you to judge according to the testimony. I cannot say to you that the witness would have more probably made it than the court would. I cannot say to you that the court would have more probably made it than the witness would. You will take all that into consideration,—the possibility of human mistakes by anybody, by the best of them,—and then consider whether that is sufficient reason to show that the witness was false, or not, or to discredit the testimony." Alleged to be not the law applicable to such facts.

Error in continuing said charge: "And also you would deal with all the discrepancies and contradictions, or seeming contradictions, that are shown between the statements of the witness on the stand this time, and on the stand before, according to the brief of the testimony. Consider whether the brief of the testimony is absolutely correct, or not, or whether the brief of the testimony might not be wrong, and the witness correct. You have a perfect right to consider that, because it is possible either one might have been mistaken. The jury is not bound to say that the brief of the testimony is absolutely correct. The jury must look at it from every standpoint, as reasonable, rational, intelligent, honest men, and determine what the character of the testimony of that witness was,—whether it was the testimony of a false witness or a true witness." Alleged to be illegal.

Error in continuing said charge: "You have the right to look at the general character of the testimony,—how far the substantial facts are corroborated, that were testified to before, by the testimony of the witness this time. For instance, to illustrate, if the witness says there was a plot made between Nim Kerce and Charles Thomas somewhere about those gates, and that plot was that they proposed to kill Tom Watts, and that the manner of the killing should be that Nim Kerce should go on to Charles Thomas' house, and Charles Thomas should bring Tom Watts on there, see how

far the substantial plot was adhered to and corroborated that was testified to before,—how far it was corroborated by the testimony of the witness that testified again. You have the right to look to it that way, and if these same discrepancies, such as a little variation between what gate it was, or whether he was in the very act of shelling out corn to the sow, or had finished it and stepped two steps, or not, or whether Charley Thomas first made the proposition, or Nim Kerce made it; you have the right, if you see proper, to look to the substantial plot, and not be governed by any variations or discrepancies or immaterial points, or you may be governed by them, if you see proper." Alleged to be not the law.

Error in charging: "You have the right to look to all that, and consider his testimony according to the man who gave it in, and the circumstances under which he gave it in, and the cross-questions which were asked him at the time he gave it in. You have the right to consider anything he said about being scared or frightened, or how he looked,—whether he looked composed, or not. You have the right to consider all that, and from all that, and all the other evidence in the case, come to the conclusion whether that witness is a true witness or a false witness." Alleged to be not good law.

As to the above exceptions to the charge, the court states that they were approved as being a correct statement of the parts of the charge which they respectively purport to state, but can only be considered fairly by taking the whole charge of the court in view.

Error in failing to charge as to what constituted impeachment by contradictory statements made under oath, the effect thereof on the witness' evidence, and the evidence that would be material to the issue on trial, or anything else under said law.

Error in failing to charge that the evidence relied on by the state to convict was circumstantial, and in order to convict on such evidence it should be so strong or convincing as to exclude every other reasonable hypothesis except that of the guilt of the defendant, or anything on that line.

As to the last grounds of the motion, the court states that they were approved only so far as being what is insisted on by defendant. But the court insists that the charge, as given, meets substantially this requirement; besides, there was no request to charge on these points.

Further, because, as defendant insists, the whole charge was more favorable to the state than the defendant, and its general aspect, tenor, and effect were against the defendant.

D. H. Pope, for plaintiff in error. W. N. Spence, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(96 Ga. 783)

PEARCE v. PULLEN.

(Supreme Court of Georgia. May 15, 1895.)

NEW TRIAL—DISCRETION OF TRIAL JUDGE.

This case falls within the general rule that the discretion of a trial judge in the general grant of a first new trial will not be disturbed by this court.

(Syllabus-by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by H. A. Pearce against M. E. Pullen, administratrix, on promissory notes. Brought forward from the last term. Code, §§ 4271a-4271c. Plaintiff had judgment, and, from an order granting defendant a new trial, brings error. Affirmed.

The following is the official report:

Pearce sued Mrs. Pullen, as guardian of S. H. Pullen (her husband), a lunatic, upon two promissory notes, one for \$500, dated September 12, 1887, and due December 25, 1889, and the other for \$120.10, dated September 12, 1887, and due December 25, 1889, each bearing interest from maturity, and each stating that it was given as purchase money "in" lot of land number 149 in Lowell district 1163. Before the trial of the case, Pullen died, and it seems to have proceeded against Mrs. Pullen, as his administratrix. She pleaded non est factum; also, plene administravit; also, that the notes were without consideration, there being no valid debt existing or incurred at the time the notes purport to be executed. There was a verdict for the plaintiff for the amount sued for. Defendant's motion for a new trial was granted generally, and to this Pearce excepted.

There was much evidence in the case which was conflicting, especially as bearing upon the question as to whether the notes were ever executed by Pullen. As explanatory of some of the grounds of the motion, the bearing of which does not sufficiently appear from the grounds themselves, the following is stated: There was evidence for the plaintiff that, previous to the giving of the notes sued on, there had been a trade between plaintiff and Pullen, in which plaintiff had bought from Pullen said lot 149; that plaintiff remained in possession of that lot two or three years, and made considerable improvements upon it; that they rescinded the trade, and after considerable dispute, to reimburse plaintiff for the amounts he had paid, Pullen gave to plaintiff the two notes, the smaller note being for interest; that this transaction occurred in September, 1887, and the notes were placed in the hands of Adamson & Jackson for collection in 1890; that they were printed notes, and plaintiff filled out the blanks in them, etc. The notes introduced in evidence were printed notes, with the blanks filled in in writing.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in

admitting the following evidence of R. D. Jackson, one of the firm of Adamson & Jackson, over defendant's objection, on the ground that Pullen was dead and Jackson was incompetent to testify to the transaction between Pearce and Pullen: That the firm of Adamson & Jackson, of which witness was a member, had for collection the note given by H. A. Pearce to S. H. Pullen for purchase money of lot of land No. 149, in the Fourth district of Carroll county, known as the "Echols Place," and that on the 13th day of September, 1887, plaintiff and S. H. Pullen came into the law office of Adamson & Jackson, and asked them to verify a calculation they had made in the settlement of said note and the bond for title that said S. H. Pullen had given to plaintiff to said land, and that they made the calculation for them from data and amounts said plaintiff and S. H. Pullen furnished; that he, witness, did not remember the amounts, or of what the data consisted, and that it was his, witness', understanding from said H. A. Pearce and S. H. Pullen that they had made a settlement themselves, but wanted said firm of Adamson & Jackson to verify it by making the calculation for them; that said firm did make the calculation from amounts and data so furnished, and found the amount of \$73.07 in favor of said H. A. Pearce, and against said S. H. Pullen, for which said S. H. Pullen gave his note; that in this matter his firm represented both Pullen and Pearce. There was no charge made for the work, but said S. H. Pullen did not appear satisfied with it, and that then the cancellation of said bond for titles was written out by W. C. Adamson, of said firm, on the back of the same, and was signed by said H. A. Pearce.

Error in allowing plaintiff, over defendant's objection, to amend his declaration by adding thereto another petition, filed to the April term of the superior court of Carroll county, by plaintiff against defendant and her minor children, to set aside a year's support to them out of the estate of Pullen. It appears that this amendment was voluntarily withdrawn by plaintiff before the case was submitted to the jury.

Error in allowing plaintiff to testify, over defendant's objection, that S. H. Pullen told him, plaintiff, that two mules which he saw said Pullen in possession of in 1887 were his, and that he bought one from Mr. —, and the other from Mr. —; the objection being that Pullen was dead, and hence plaintiff was incompetent to testify to conversations he had with Pullen.

Because, after plaintiff dismissed his amendment above referred to, the court failed to rule out the evidence of witnesses named, who testified as to what it was worth a year, or what it took a year, to support the family of S. H. Pullen, deceased, in the same style and manner they lived prior to his death, and as to what the rents of the plantation owned by said Pullen at the time

of his death were worth per annum; this evidence having been admitted on the issues made by the amended petition, which amendment was withdrawn by plaintiff during the concluding argument of his counsel to the jury. The court at that time told the jury that the entire question involving the year's support was withdrawn from their consideration, and also so directed them in his charge.

Because the verdict was contrary to a specified portion of the charge.

Error in not sustaining defendant's objection to the interrogatories of R. L. Pearce, on the following grounds: (1) Because the fourth cross interrogatory is not fully answered; the answer does not state who produced the notes. (2) Because the ninth cross interrogatory is not fully answered; the answer does not state what said place was worth for rent annually. (3) Because the interrogatories are in different handwriting of witness or commissioners. Because the answers of the witness R. L. Pearce to depositions sued out by plaintiff, and which were read to the jury, were written by one Henry Stroup, who was hired and paid by said witness for that purpose; the said R. L. Pearce and the commissioners, David Thomas and J. W. Rodgers, all being able to write, which fact was unknown to defendant or her counsel, and could not have been discovered by them by the utmost diligence prior to the trial of said case, said interrogatories not having been opened until the 4th day of April, 1893.

The question and answer objected to in the first of the objections to Pearce's interrogatories are as follows: "If you say S. H. Pullen signed each of said notes alluded to by you in answer to second direct interrogatory, state at what house or place they were signed. Who produced the notes, who furnished the ink, who were present when they were signed? If you were present how came you not to sign your name to them as a witness? Answer: They were signed at ginhouse as above stated. My father furnished ink. I was present, my uncle O. B. Pearce, and a negro boy. They did not ask me to sign said notes as a witness." The question and answer referred to in the second ground of objection to Pearce's interrogatories are as follows: "How long did H. A. Pearce remain in possession of lot of land 149 in Lowell district 1163? What was said place reasonably worth for rent? Answer: H. A. Pearce owned said lot of land two or three years, rather think three years. When H. A. Pearce came in possession of said land it was in bad repair, and was not worth much as to rents. During the possession of said H. A. Pearce he improved said land, building new fences. Said land was badly grown up with briars, sage, and sprouts, making the work considerable in cleaning up, and, I think, at the time Pearce sold the land to

Pullen, the place was worth \$150 or \$200 a year." It appears that, though taken before amendment, these exceptions were not called to the attention of the court, and determined before the case was submitted to the jury.

Because of newly-discovered evidence. In support of the motion upon the grounds of newly-discovered evidence, defendant produced the affidavit of Henry Stroup: "On March 16, 1893, I wrote out the depositions of R. L. Pearce. I am an enrolled attorney, but being clerk of the county court, Logan county, Ark. (see Mansf. Dig. § 411), I am not, nor can I be, in any way engaged in the practice of law. Pearce paid me for the work I did as clerk of the court, but nothing for the writing, and had I been busy at anything else I would not have done the writing. The commissioners and witness came into my office to have the necessary affidavits taken, and requested me to write the answers to the interrogatories. I acted only as an amanuensis in this matter, and wrote down the answers only at the dictation of the witness, commissioners being present. The witness was sworn as the law directed. The deposition was signed and sealed, the commissioners writing across the seal, as the law directs, and one of the commissioners started from my office with the deposition, saying as he did so that he was going to mail it. I have no interest in the case, either financially or otherwise." Also the affidavit of O. B. Todd: "Some time before Pearce and Pullen had the settlement of the land trade which resulted in Pullen taking back the land, I heard Pearce say that he had lost money on Pullen, that he had paid Pullen a certain amount on the land, which witness does not remember, but thinks it was five or six hundred dollars, and that in the settlement he struck off even with Pullen, and let him keep the amount he had paid on the land, rather than have suit, and to get straight with Pullen." Also an affidavit as to the good character and credibility of Todd. Also affidavit of R. L. Williamson: "In October, 1889, Pearce called at my house, and said to me he had two notes against Pullen, took them from his pocket, handed them to me, and asked what I thought of them. I casually looked at them and said I guessed they were all right. Pearce asked if some good man were to sign them as witness if it would not help them some. I said I didn't know but it might. Pearce then said it could be to some man's interest to sign the notes as witness. I said that might be true, but that I didn't want to make any money that way. I don't remember the amount of the notes, but one of them was for \$500, and the other for something over \$100." (The notes sued on had no attesting witness.) Also an affidavit as to the good character and credibility of Williamson. Also affidavit of G. W. Hyde: "In

December, 1884, Pullen and Pearce were at my shop, and Pearce agreed to give Pullen a mortgage on his Ward place to secure the payment of \$500, which Pearce was to pay upon taking possession of the Echols place (said lot number 149). Pearce was then in possession of the Echols place. They agreed to meet at my shop on a set day, and go to Franklin and have the mortgage written. They did so meet, and went towards Franklin, and a few days afterwards Pullen handed me the mortgage, and asked me to have it recorded, which I did January 1, 1885. Afterwards Pearce told me he had paid off the mortgage by making a deed and borrowing the money from a loan association. After Pullen died, Pearce showed me a \$500 note on Pullen, and said he had another for \$200. I know that Pearce forged my name to a note, to which note, when sued, I filed a plea, and was released." Also affidavit of F. M. Almon: "In the spring or summer of 1888, in company with Pearce, I passed Pullen's house, when Pearce said, 'That is a grand rascal' (meaning Pullen); that 'he beat me out of \$600 in a trade.' I asked him why he didn't make him pay, as he was good for his indebtedness, and he (Pearce) said, 'I have no showing for it.'" Also affidavit as to the good character and credibility of Almon. Also affidavit of J. W. Hollingsworth: "Some time between the fall of 1888 and 1891, I had a settlement with Pearce, and Pearce, while looking through his papers, come across two notes against Pullen, one of which was for \$500, and the other for \$120. Both were written on large-sized paper." Also an affidavit as to the good character and credibility of Hollingsworth. Also affidavits of defendant and her counsel, Messrs. Brown & Loftin, as to their ignorance of the matters set forth in the above affidavits, at the time of the trial, and as to their diligence in preparing for trial. Also affidavit of various persons that Levy Hollingsworth is plaintiff's father-in-law, Robert Hollingsworth is plaintiff's brother-in-law, and Isaiah Steele is a tenant of Hollingsworth.

By way of counter showing, plaintiff produced the affidavit of O. B. Todd: "I do not know whether the facts as stated in a former affidavit, about the settlement between Pearce and Pullen, about Pearce losing money on Pullen, has reference to purchase money or improvements. All I intended to say therein was that Pearce had bought land from Pullen, that afterwards they had made a rue bargain, that Pearce lost money on Pullen, as stated in the first part of my affidavit. In my haste I failed to comprehend some of the facts, as prepared by defendant's attorney, as to letting Pullen keep the money. Pearce said he had lost money on Pullen, and that he gave him the

amount lost rather than have suit." Also affidavit of J. W. Hollingsworth: "The facts stated in a former affidavit is all I know in reference to the case. Mrs. Pullen did know the facts before the former trial. This and one other is all the affidavits I have made in the case." Also the affidavits of Levy and R. S. Hollingsworth, Steele, and another, that they are acquainted with the general character of Hyde, and from it would not believe him on oath. Also the affidavit of O. B. Pearce: "I lived with plaintiff in 1889, and heard him tell his wife the 1st of September to get his Pullen notes, that he and Jones were going to Carrollton that day, and wanted to carry them there and leave them with some good lawyer until he came back, as he was going off to be gone some time, so if they were not paid when due he could commence suit. They went to town that day and came back, and I asked him who he left the notes with, and he said Adamson & Jackson." Also affidavit of F. H. Almon: "The conversation with plaintiff referred to in my other affidavit occurred about the time Pullen and plaintiff were making their settlement about the land Pullen had sold plaintiff. I am not positive as to the year, but it was about the time of the settlement, whether in 1888 or 1887. Plaintiff might have gotten the notes afterwards. Mrs. Pullen knew the facts stated in said affidavit, before the trial of the case, and had me subpoenaed as a witness. I so informed Hamrick, her attorney, but he insisted on taking my affidavit." Also the affidavit of plaintiff: "I told Williamson no such thing as stated in his affidavit, neither was I in the state of Georgia in October, 1889, nor was I in possession of the notes. I left the notes with my attorney, and went to Texas in September, not being certain as to the date of my return. I did not return until some time in November,—about 17th. The other affidavits read as newly-discovered evidence I deny the truth of, though I admit them to be new inventions, but not discoveries. Zeal of counsel and carelessness of witnesses combined to produce these affidavits, without proper material of basis. Mr. Hyde, Mr. Todd, Mr. Almon, Mr. Williamson, J. W. Hollingsworth are, to say the least of it, woefully mistaken as to the allegations submitted. The notes sued on have been in hands of my counsel since September 29th. I married Wince Echols' daughter about 17 years ago. My first wife was a Hollingsworth."

C. P. Gordon and Adamson & Jackson, for plaintiff in error. W. D. Hamrick and W. F. Brown, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 784)

REESE v. STRICKLAND.

(Supreme Court of Georgia. May 15, 1895.)

ACTION ON NOTE — FAILURE OF CONSIDERATION — PAROL EVIDENCE — INSTRUCTIONS.

1. Although, where "a contract or cause of action" has been reduced to writing, its terms cannot be varied by parol contemporaneous evidence, yet where suit was brought thereon, and the defense in part was failure of consideration, and there was some evidence to support the same, it was error for the court to charge that "parol evidence cannot be introduced to attack it [the contract or cause of action] in any way, unless said writing is first overthrown by proof of fraud, accident, or mistake." To vary the terms of the contract, and to attack the plaintiff's cause of action thereon by pleading and proving failure of consideration, are altogether different things.

2. Assuming that the magistrate charged the jury as alleged in the traverse to his answer, which traverse was found true, the superior court did not err in holding that this charge was erroneous, nor in sustaining the certiorari because of the error therein committed.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action by Oscar Reese against W. W. Strickland on a promissory note. Plaintiff had judgment, and defendant brought certiorari to the superior court. From a judgment for defendant on the certiorari, plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Reese sued Strickland in a magistrate's court upon a promissory note, the amount of which had been reduced by various credits to \$28. Strickland filed the plea of general issue, failure of consideration and recoupment, alleging, among other things, that the note was given for a mule which was completely worthless as a farm mule (the purpose for which he bought it), and that it was guaranteed to him to be a good farm mule. The evidence as set out in the petition for certiorari, which was adopted by the answer of the magistrate, was conflicting as to the diseased condition of the mule, and as to plaintiff having guaranteed it to defendant. There was a verdict against defendant. He took the case by certiorari to the superior court, alleging that this verdict was contrary to evidence and law, and would not have been rendered but for erroneous instructions given by the magistrate to the jury; that the magistrate erred in charging the jury, "Written evidence is the highest and best evidence;" and, by request of plaintiff, the court stated to the jury that parol evidence was inadmissible to vary the terms of the contract, or get out of paying the note sued on; also, because of an alleged statement made by counsel for plaintiff in his argument to the jury. The certiorari was sustained on the ground of error in the magistrate's charge. To this ruling plaintiff excepted. In the record is a traverse to the answer of the magistrate, denying that counsel for plaintiff had made the statement as alleged, denying that the evidence was such

as was stated in the answer, and setting out what the evidence was; and also denying that the charge of the magistrate was correctly set forth. The charge as set out in the traverse as: "Written evidence is of higher character than oral. Where the parties have reduced their contract or cause of action to writing, such writing is the best evidence of said contract or cause of action, and any agreement made before or at the execution of the contract such agreement or conversation is merged therein and parol evidence cannot be introduced to vary, add to, or take from the terms of said contract. In other words, parol evidence cannot be introduced to attack it in any way, unless said writing is first overthrown by proof of fraud, accident, or mistake." It is stated in the bill of exceptions that the traverse to the answer had been adjudged true.

Adamson & Jackson, S. E. Grow, W. F. Brown, and Oscar Reese, for plaintiff in error. Cobb & Bro., for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 768)

EADY v. BLANTON et al.

(Supreme Court of Georgia. April 15, 1895.)

INJUNCTION — EVIDENCE — DISCRETION OF COURT.

Irrespective of other questions involved, the evidence being conflicting as to the alleged insolvency of the defendant, this court is unable to say there was an abuse of discretion by the trial judge in refusing to grant the injunction.

(Syllabus by the Court.)

Error from superior court, Spalding county; John J. Hunt, Judge.

Petition by H. P. Eady against B. P. Blanton and another for injunction. Brought forward from last term. Code, §§ 4271a-4271c. There was a decree for defendants, and plaintiff brings error. Affirmed.

The following is the official report:

H. P. Eady brought a petition against B. P. Blanton and the sheriff to enjoin them from further proceeding to collect an execution which had been levied on petitioner's property. The injunction was denied. The petition alleges that on August 11, 1894, petitioner consented to Blanton to take judgment upon a suit then pending against him in the superior court for \$400; \$200 to be due November 15, 1894, and \$200 on November 15, 1895. Blanton has since become indebted to petitioner \$402.18, principal, besides interest and attorney's fees, on five promissory notes, two of them payable to J. P. Hammond & Co., and three payable to Hammond, Hull & Co., which, on November 15, 1894, were transferred for value to petitioner by J. A. Drewry, the attorney for Comer, Hull & Co., successors to Hammond, Hull & Co. The execution so to be enjoined was issued on November 15, 1894. Before this was done, petitioner tendered to Blan-

ton his notes aforesaid, in settlement of the judgment, and is now ready and willing to surrender them in settlement of the same. The notes are due and unpaid, and Blanton is insolvent, and unable to respond to petitioner's demand for the amount of said notes. Blanton answered that the judgment from which the execution issued was taken by consent, in pursuance of a previous agreement between him and Eady, in settlement of an account upon which he had sued Eady, amounting to nearly \$800. In making the settlement, he was acting merely as agent for H. W. Sparks, who owned the claim against Eady, having bought it on January 3, 1894, together with others transferred to him in writing. Eady purchased the notes now set up by him, on the same day the execution was issued, paying Drewry \$125 therefor, and having notice that said notes had been dishonored by respondent, and that he did not owe them. He owes upon all of the notes only \$54.80, after deducting several credits, which balance he is ready and willing to pay. He denies that the notes were tendered to him before the execution was issued; but, after it was levied, they were presented, and he then stated that he did not owe them, but offered to pay what he did owe. He denies that he is insolvent. Blanton made affidavit to the facts stated in his answer; and Eady made affidavit that he was in business with Blanton for 15 years, and knows his circumstances, and that he is insolvent. One of the notes in question is dated January 24, 1890, and the other four in June, 1890. The first is signed by C. S. Collins, and, "B. P. Blanton, Security," is for \$106.98, and is payable to J. P. Hammond & Co. The second is signed by C. S. Collins and B. P. Blanton, is for \$246.45, and bears credits amounting to \$125. The third is signed by Jules Fuler and B. P. Blanton, is for \$156.35, and is indorsed by a credit of \$25. The fourth is signed by Frank Lawrence and B. P. Blanton, and is for \$2.75. And the fifth is signed by B. P. Blanton, is for \$214.65, and bears a credit of \$175. J. P. Hammond swore that Blanton was a joint signer and obligor, and not a security, on the notes; that they were taken by deponent as agent for Hammond, Hull & Co.; that no other payments were made thereon except what appears on the back of each; that those given to J. P. Hammond & Co. were held by Hammond, Hull & Co. as innocent holders, of whom Comer, Hull & Co. are successors; that demand was several times made on Blanton for payment of the notes, and he stated that he would pay them; and that no settlement was ever made with him by deponent on said notes. J. A. Drewry swore that the notes were turned over to him for collection by Comer, Hull & Co.; that he presented them several times to Blanton for payment, who claimed that there was a settlement between himself and J. P. Hammond & Co.; that he fre-

quently stated that he would pay the notes against him in favor of Hammond, Hull & Co.; that the notes have never been paid, nor any part of them, since deponent received them for collection in the fall of 1891 or spring of 1892; and that he sold them on November 15, 1894, to H. P. Eady, for \$125. D. W. Patterson, of the firm of J. P. Hammond & Co., swore that they were agents of Hammond, Hull & Co., and, as such, sold to Blanton the guano for which these notes were given, and that a receipt for \$44.85 was given as a credit on the notes, and the same is a proper credit. Defendant also introduced receipts amounting to \$559.85, as stated in his answer.

Patterson & Wimbrough, for plaintiff in error. R. T. Daniel, for defendants in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 477)

DUNCAN v. STATE.

(Supreme Court of Georgia. Feb. 18, 1895.)

RAPE—INSTRUCTIONS.

1. Where, in a trial for rape, the contention of the accused was that he had no connection whatever with the perpetration of the offense, it was error, in charging the jury with reference to the alleged crime, to use the following expressions: "Now, you will have reference and cognizance of the evidence in the case which connects the defendant with it." "But if you do not believe that, upon consideration of the whole evidence, and weighing the whole of it, that the defendant's testimony outweighs that of the state, which places the man (the accused) there at the time, then you should not believe the alibi." These expressions contain intimation of opinion on the part of the presiding judge that the accused was connected with the perpetration of the crime, and that he was present at the place where it was committed, and therefore, under section 3248 of the Code, a new trial must be granted.

2. While other rulings and charges of the presiding judge are not entirely free from criticism, there was not in any of them, save as indicated in the preceding note, any error requiring the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Adolphus Duncan was convicted of rape, and brings error. Reversed.

John Clay Smith and P. F. Smith, for plaintiff in error. C. D. Hill, Sol. Gen., for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, J., providentially absent, and not presiding.

(95 Ga. 352)

SAWYER v. KENAN et al.

(Supreme Court of Georgia. Feb. 5, 1895.)

REPLEVIN—SUFFICIENCY OF EVIDENCE.

The action being for the recovery of certain calves, and the evidence for the plaintiff, at

most, only showing that the defendant's agent, by mistake, marked one or more calves belonging to the plaintiff in the defendant's mark, and it being further shown that after this had been done the calf or calves so marked remained in the plaintiff's possession, and there being no evidence that any of the calves sued for were ever thereafter taken possession of or converted by the defendant to his own use, the verdict in the plaintiff's favor was entirely without evidence to support it, and therefore contrary to law.

(Syllabus by the Court.)

Error from superior court, McIntosh county; Robert Falligant, Judge.

Replevin by Spalding Kenan and another against Amos Sawyer. There was a judgment for plaintiffs, and defendant brings error. Reversed.

The following is the official report:

In a magistrate's court, Spalding and Evelyn E. Kenan brought their action against Amos Sawyer for the recovery of six head of calves, which, it was alleged, the defendant marked in his own mark, and branded in his own brand. There was a judgment for plaintiffs, and defendant took the case, by appeal, to the superior court. There the jury found for the plaintiffs \$60. Defendant's motion for new trial was overruled, and he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also, the ground that the court erred in overruling motion for "new trial" at the conclusion of plaintiffs' case, made upon the ground that plaintiffs had failed to make out a case, having failed to show that defendant had ever taken possession of cattle sued for, and also having failed to show "what the color, and whether bulls or heifer cattle." The evidence for plaintiffs was to the following effect, in brief: Plaintiffs own cattle on Sapelo Island. In the spring of 1888, Spalding Kenan went there to see about the marking of his cattle. This was after the marking of defendant's cattle. Frank Sawyer told Kenan he had marked six of Kenan's calves, and that if Kenan would not tell Frank's brother, the defendant, Frank would give Kenan two for one. Kenan saw four of his calves, marked in defendant's mark, in Kenan's pasture, following Kenan's cows. Kenan does not know the color, nor whether they were bulls or heifers, but they were following and suckling Kenan's cows. He did not accept Frank Sawyer's offer. There was then a large number of Sawyer's cattle in pasture. Kenan sold all his cattle to Fulton for \$10 a head, and the reason he charged \$10 a head for these six calves was because he sold all his other cattle to Fulton at that rate, and would have gotten \$10 apiece for them if they had been with the others. The last Kenan saw of the calves, they were on his pasture. Gardner, Kenan's overseer on the island, saw six of Kenan's calves in Kenan's pasture, marked in defendant's mark. He did not know what year it was, but it was the same year "we" did the marking, and Saw-

yer shipped cattle to Savannah. Gardner heard Frank Sawyer offer Kenan two calves for one. Kenan had at the time about 300 head of cattle on the island. Cattle are seldom lost on the island from bogging or disease. The last Gardner saw of the calves, they were in Kenan's pasture. It was just after Frank Sawyer marked them when Kenan came, and "we" marked. Sawyer shipped cattle to Savannah. A lot of his cattle fed on Kenan's pasture. Gardner does not know the color, nor whether the calves were heifers or bulls. Kenan's son was on the island in 1888, and saw several of his father's calves marked in Sawyer's mark. For defendant, the testimony was, in brief: Frank Sawyer had nothing to do with the markings of Kenan's calves. He told Kenan that a mistake had been made in marking in 1888, and that one of his calves and one of Mrs. Wyly's had been marked, and offered to settle with him for the same. The other was settled for with Mrs. Wyly. Frank Sawyer was agent for defendant. He shipped calves to Savannah in 1886, and got six dollars a head for them. They are worth from five to six dollars a head. He did not ship any of Kenan's cattle. Does not know of its having been done, and does not know what calves Kenan claims. Defendant was at the North during the time. Frank Sawyer never took possession of Kenan's calves. If he had, he would have known it, in separating the calves from their mothers. He did not tell Kenan that he had marked six, and would give two for one. Jim Green assisted in marking Sawyer's cattle in 1888, and does not know of the marking of Kenan's calves, but heard Frank Sawyer make the statement to Kenan testified to by Sawyer. It was in the spring of 1888. Green superintended the marking of Sawyer's cattle that year, and was present whenever cattle were shipped to Savannah. They always penned before shipping, and could have told if they had shipped any of Kenan's. The calves would try to follow the mothers, and it would be difficult to separate them, and when in pen they would bellow for their mothers. Defendant's cattle often ranged on Mrs. Spalding's pasture. Kenan's pasture is between Mrs. Spalding's and that of defendant, and the public road runs through Kenan's pasture. There is no fence between Mrs. Spalding's pasture and that of Kenan, and wherever the fence between Kenan and Sawyer's crossed the public road there were gates placed. In driving defendant's cattle from Mrs. Spalding's pasture, having to pass through Kenan's land to reach defendant's, there was sometimes difficulty in driving through, the cattle separating. To the knowledge of Roberts, a witness who helped to drive the cattle, none of Kenan's were marked, and he would have known whether they had any of Kenan's. In shipping, Roberts put the first calf aboard belonging to Sawyer. In driving through, all the calves with Saw-

yer's mark were gathered up. Roberts shipped all the calves himself in 1888 and 1889, and they were all in Sawyer's mark. Whenever Sawyer drove cattle, Jacob Green minded the gate between Sawyer's and Kenan's pastures, to see that cattle belonging to any one else did not come in, and did not see any belonging to Kenan. Frank Sawyer does not know what became of the calf of Kenan's which had been marked with defendant's mark, and did not take possession of it.

W. De R. Barclay and W. G. Charlton, for plaintiff in error. Lester & Ravenel, C. L. Livingston, and Gignilliat & Stubbs, for defendants in error.

PER CURIAM. Judgment reversed.

(96 Ga. 755)

HUGHEY v. JACKSON.

(Supreme Court of Georgia. April 8, 1895.)

NEW TRIAL—DISCRETION OF COURT.

The motion for new trial in this cause not alleging the commission of any error of law, this being the second verdict in favor of the defendant, and the evidence being sufficient to warrant the finding of the jury, the discretion of the trial judge in refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

Action by W. M. Hughey against Melissa Jackson. There was a judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Fain and W. R. Rankin, for plaintiff in error. R. J. McCamy and O. N. Starr, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 756)

SPINKS v. WASHINGTON.

(Supreme Court of Georgia. April 8, 1895.)

ACTION ON ACCOUNT—FAILURE OF CONSIDERATION—PLEADING—AMENDMENT.

1. The action being upon an account for the price of guano, a plea which did not state that the seller had failed to comply with the requirements of the law as to the sale of commercial fertilizers, but merely alleged that the guano was not merchantable and reasonably suited for the purposes intended; that the defendant had used it on his crops in a proper manner, and that the same were properly cultivated, and the seasons reasonably good; but, on account of the worthlessness of the guano as a fertilizer, it failed to benefit his crops, by reason of which the consideration of the contract of sale totally failed,—was properly stricken on demurrer. Scott v. McDonald, 9 S. E. 770, 83 Ga. 23, and cases cited.

2. In such case there was no error in rejecting an amended plea to the effect that the guano did not contain the ingredients indicated by the analysis branded on the sacks in which it was contained. The vices of the amended plea were that it failed to state what were the ingredients so indicated, and that it omitted the word

"substantially" in the averment that the guano failed to contain such ingredients. Code, § 1553b; Acts 1890-91, vol. 1, p. 144.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by L. M. Washington, to use, against J. W. Spinks. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Geo. P. Roberts, for plaintiff in error. L. M. Washington and A. L. Bartlett, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., not presiding.

(96 Ga. 757)

WESTERN UNION TEL. CO. v. EDWARDS.

(Supreme Court of Georgia. April 8, 1895.)

TELEGRAPH COMPANIES—NEGLECTED DELIVERY OF MESSAGE—STATUTORY PENALTY—REQUIREMENTS—EXTENSION BY CUSTOM OF COMPANY.

According to the principle ruled by this court in *Telegraph Co. v. Timmons*, 20 S. E. 649, 83 Ga. 845, the telegraph company, under the facts disclosed by the record and set forth in the reporter's statement, was liable for the statutory penalty, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Junes, Judge.

Action by R. E. Edwards against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Edwards sued the Western Union Telegraph Company for the statutory penalty for failure to deliver with impartiality, etc., a telegram sent by him from Douglasville to Price Edwards, then attending court at Buchanan, Ga. There was a verdict for plaintiff, and, defendant's motion for a new trial being overruled, it excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in refusing to grant a nonsuit on the motion of defendant. The evidence for plaintiff was to the following effect: Plaintiff delivered to the agent of defendant at Douglasville, Ga., a telegram to Price Edwards, at Buchanan, Ga., on July 22, 1892, at 11 a. m., and paid the agent the charges for transmission. Price Edwards was in Buchanan, Ga., attending court, at the time. He was then living in Tennessee, but was well known to almost every person in Buchanan. He was intimately acquainted with the agent there, and was boarding at the same hotel with him on July 22d. He never received the telegram. It was the custom of defendant there, and had long been, to deliver telegrams to

nonresidents and others, especially during the terms of the court, when many attorneys and others were in attendance on the court. During the terms defendant employed a message boy to deliver telegrams, and Price Edwards had himself received such telegrams, and had seen them delivered to the judge and others. Error in allowing Price Edwards to testify in reference to the custom of defendant at Buchanan, over objection of defendant. What this objection was is not stated. Error in charging: "If defendant delivered a message to any nonresident at Buchanan, attending court at that time, it would be bound to deliver messages to other nonresidents, under like circumstances and conditions. The law requires it to serve the public impartially. It is as much bound to deliver to one person as another."

Dorsey, Brewster & Howell and Malvern Hill, for plaintiff in error. Edwards & Edwards, for defendant in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., not presiding.

(96 Ga. 743)

HAYNES et al. v. SCHAEFER.

(Supreme Court of Georgia. March 18, 1895.)

HOMESTEAD.

This case is controlled by the decision in the case of Towns v. Mathews, 17 S. E. 955, 91 Ga. 546.

(Syllabus by the Court.)

Error from superior court, Hart county; Hamilton McWhorter, Judge.

Action by Edward Schaefer against J. M. Haynes and others, in which Elizabeth A. Haynes and another interposed a claim. Brought forward from the last term. Code, §§ 4271a-4271c. Plaintiff had judgment, and from an order overruling a motion for a new trial claimants bring error. Affirmed.

The following is the official report:

An execution in favor of Schaefer against J. M., T. W., and J. M. Haynes, Jr., issued upon a judgment of September 20, 1886, was levied upon 140 acres of land in Hart county, as the property of J. M. Haynes, deceased. A claim was interposed by Elizabeth A. and Sarah G. Haynes, daughters of the deceased. Upon the trial of the case, under the direction of the court, there was a verdict for plaintiff. Claimants moved for a new trial, and, the motion being overruled, they excepted. The motion was upon the general grounds, and upon the ground that the court erred in directing the verdict. The evidence showed that J. M. Haynes died in February, 1891, in possession of the land, having been in possession of it for 40 years prior to his death. The land was duly set apart by the ordinary of Hart county as a homestead, under the constitution of 1868, on January 23, 1869. The application for the homestead was

filed by J. M. Haynes, "as the head of a family." The application described Haynes as a citizen of Hart county, as the head of a family, and claimed the homestead under the constitution of 1868 and the act of October 3, 1868. When the land was set apart, Haynes, his wife, the two claimants, and other children, were living on the land, and constituted the family of Haynes. Mrs. Haynes died some 15 years ago. All the boys have become of age, and all the girls married off, except the claimants. The claimants remained members of the family, living with Haynes, and dependent on him for a support, until his death. When the homestead was set apart, one of the claimants was about 24 years old, and the other 20, both being unmarried females. They have remained unmarried, and have continued to reside on the land, since the death of Haynes, and have been and are dependent on the land for a support. They have no property, and no means of support, except the land, being physically unable to work.

P. P. Proffitt, W. L. Hodges, and A. G. McCurry, for plaintiffs in error. Jas. H. Skelton, Jr., for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 744)

GRIGGS et al. v. WILLBANKS.

(Supreme Court of Georgia. March 25, 1895.)

DISTRESS WARRANT—DISMISSAL OF COUNTER AFFIDAVIT—EXECUTION—AFFIDAVIT OF ILLEGALITY.

The dismissal of a counter affidavit to a distress warrant leaves nothing to be tried, and the distress warrant at once becomes again operative as final process. This being so, a verdict and judgment rendered upon a distress warrant, against the defendant therein and the sureties on his bond, for the eventual condemnation money after the dismissal of the counter affidavit, was void, and an affidavit of illegality filed by the sureties to the enforcement of an execution issued upon such judgment was rightly sustained. *Habersham v. Eppinger*, 61 Ga. 199; *McCulloch v. Good*, 63 Ga. 519; *Anders v. Blount*, 67 Ga. 41; *Girtman v. Stanford*, 68 Ga. 178.

(Syllabus by the Court.)

Error from superior court, Habersham county; C. J. Wellborn, Judge.

Affidavit of illegality by L. Willbanks, execution defendant, against Mary P. Griggs and others, execution plaintiffs. Brought forward from the last term. Code, §§ 4271a-4271c. There was a judgment sustaining the affidavit, and plaintiffs bring error. Affirmed.

The following is the official report:

Plaintiffs sued out a distress warrant for \$350, claimed to be due for rent of an hotel and furniture. Defendant filed a counter affidavit, and gave a bond for the eventual condemnation money, with Willbanks and others as securities thereon. The trial resulted in a verdict for the full amount claimed by plaintiffs, and judgment denying a new trial

was reversed by the supreme court. *Brittain v. Griggs*, 88 Ga. 232, 14 S. E. 609. When the case came on for trial in the superior court, counsel for defendant agreed with counsel for plaintiffs that, if they would accept a verdict for \$305, they might have it without further trouble or proof. Thereupon plaintiffs' counsel took an order dismissing defendant's affidavit and plea, and took a verdict and judgment against defendant as principal and Willbanks and others as securities on replevy bond, for \$305 principal, besides interest and costs. This was done without the knowledge or consent of Willbanks, who was not present nor represented. Execution issuing from the last-mentioned judgment having been levied on his property, he filed an affidavit of illegality upon the facts recited. It was sustained, and plaintiffs excepted.

W. T. Crane, C. H. Sutton, and W. I. Pike, for plaintiffs in error. Jones & Bowden and M. G. Boyd, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 748)

OGLESBY & MEADOR GROCERY CO. et al.
v. HYNDS MANUF'G CO. et al.

(Supreme Court of Georgia. March 25, 1895.)

EXECUTION SALE OF MORTGAGED LANDS—DISTRIBUTION OF PROCEEDS—ESTOPPEL.

It affirmatively appearing that the plaintiffs in execution did not consent to a sale of the entire estate in the mortgaged property; that their counsel, before the sale, had informed counsel of the mortgagees that they would not so consent, and had also notified the crowd in attendance upon the sale that only the equity of redemption would be sold,—nothing passed at the sale except that equity, and the plaintiffs in execution are not estopped from so asserting merely because counsel for the mortgagees announced at the sale that the entire property would be sold; and that the purchaser would get a good title; especially when it appears that on a former trial of this case the same counsel admitted in open court that the plaintiffs in execution had made no such consent. The case is in no way substantially different from what it was when before this court at the October term, 1893 (21 S. E. 63, 93 Ga. 542); and the questions now made are controlled by the general principles then announced.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. Wellborn, Judge.

Application by J. G. Hynds Manufacturing Company and others against the Oglesby & Meador Grocery Company and others for the distribution of the proceeds of an execution sale. Brought forward from the last term. Code, §§ 4271a-4271c. There was a judgment for petitioners, and respondents bring error. Affirmed.

The following is the official report:

This case was before the supreme court at the October term, 1893. 93 Ga. 542, 21 S. E. 63. It was held that "the holder of an un-foreclosed mortgage on property brought to sale under a general judgment junior to the mortgage could not, without the consent of

the mortgagor and the plaintiff in execution, cause the entire estate to be sold, and afterwards claim the fund in the sheriff's hands"; also, that "the mortgage in this case not having been foreclosed, and no such consent having been given by the plaintiffs in *fi. fa.*, the interest sold was merely the equity of redemption, and the court erred in holding that the mortgage was entitled to the fund." After that decision was rendered, there was another trial in the superior court, resulting in a verdict in favor of the movants in the rule, and against the holder of the mortgage, whose motion for a new trial was overruled. The grounds of the motion are that the verdict was contrary to law and evidence, and that the court erred in ruling that the doctrine of estoppel did not apply in this case; counsel for respondent insisting that the evidence warranted the jury in finding that movants were estopped from denying their consent to the sale of the property. The present record contains an amendment filed at the last trial by the respondent company, the holder of the mortgage, which was foreclosed after the sale of the property. This amendment alleges that respondent purchased the property at the sale for \$500, its full value, in good faith, believing that the entire property was being sold, and that respondent would be required to claim the money in the hands of the sheriff upon the mortgage; that the entire property had been levied on and advertised for sale under plaintiffs' *fi. fas.*, and it was sold free from the equity of redemption by the plaintiffs' process; that plaintiffs at the time of the sale stood by and consented and permitted respondent to expend \$207.70 for the payment of a purchase-money lien on the property to A. A. Hope, the vendor of the same to the defendant in *fi. fa.*, solely for the purpose of clearing the property of all incumbrances in order that the sale might convey the entire property, and plaintiffs are now estopped from denying that the entire property was sold; that respondent paid the further sum of \$21.92 to the attorney for plaintiffs in *fi. fa.*, for bringing the money into court, and, having paid these sums to clear the property of all incumbrances, it would be inequitable and unjust for respondent to lose the money so paid, and be required to pay these *fi. fas.* Therefore, respondent prays, in order that an equitable and just settlement of these matters may be reached, that the property be resold and the money arising therefrom be distributed according to the priority of liens, after paying back to respondent the \$229.62 which it paid out as aforesaid, and that it have such further relief as the nature of the case requires. At the trial, respondent introduced testimony as follows: Plaintiffs' *fi. fas.* were placed in the hands of the sheriff by Joseph Allen, who told him to levy on the property in question. Defendant pointed out the property to the sheriff, and told him to levy on it; that it was all she had, and she wanted

it to go as far as it would to pay as near all her debts as possible. She told the attorney for the mortgagee the same thing. The sheriff levied on the whole property, and it was advertised for sale. On the day of sale, and before it took place, Stanton, representing the mortgagee, paid to Charters, attorney for Hope, who held a claim for purchase money of the property, the amount of said claim,—\$177. At the time of the sale, the attorney for the mortgagee announced to the persons present that the entire property would be sold, and the purchaser would get a clear title to the property, and that the mortgagee would look to the money in the hands of the sheriff for the payment of the mortgage. Charters bid for the property up to what he thought it was worth, his last bid being \$475. He heard no objection to the announcement of the attorney for the mortgagee. He was bidding for an investment. The property was knocked off to the mortgagee for \$500,—its full value. The \$177 was paid by the sheriff out of the \$500 purchase money. Charters thought he would get title to the whole property, because he thought the mortgagee would be estopped by the notice given by its attorney. Joseph Allen testified: "I was representing plaintiff in fi. fa. at the sale. Boyd, attorney for the mortgagee, came to me before the sale, and asked if I would agree and let the whole title pass, and allow his mortgagee to claim the money. I told him I would not consent to allow the whole property to sell, nor to anything unless it would get the money for the parties I represented. I did not consent to a sale of the entire property. I bid for the property for plaintiffs. Made several bids after Charters stopped bidding. I think my last bid was \$499. I bid \$499 understanding that I was bidding for the property subject to the mortgage. I notified the crowd before the sale that only the equity of redemption was being sold, and that the mortgagee would not be allowed to claim the money." It appeared that, on the former trial, Boyd, attorney for the mortgagee, admitted that plaintiffs or movants were not present at the sale, and that they made no consent or agreement that the entire estate should be sold, and the mortgagee would claim under its lien.

M. G. Boyd and Mayson & Hill, for plaintiffs in error. J. C. Boone and H. H. Dean, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 749)

McCLELLAND v. MAYOR, ETC., OF CITY OF MARIETTA.

(Supreme Court of Georgia. March 25, 1895.)

FEDDLERS—LICENSE—INTERSTATE COMMERCE.

This case is controlled by the decision of this court in Range Co. v. Johnson, 11 S. E. 233, 84 Ga. 754.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Certiorari by H. R. McClelland against the mayor and council of the city of Marietta. Brought forward from the last term. Code, §§ 4271a-4271c. There was a judgment for defendants, and plaintiff brings error. Reversed.

The following is the official report:

By ordinance of the city of Marietta, "no person, either for himself or another, shall take or solicit orders for any article of merchandise whatever, within the corporate limits of said city, without first obtaining a license from the mayor therefor," under penalty named, "provided nothing in this or the preceding section shall be construed to require persons belonging to that class familiarly known as drummers, who only solicit wholesale orders from dealers, to obtain a license from the mayor." The plaintiff in error was convicted before the mayor of violating this ordinance by doing business within the city without license. By certiorari he alleged that said judgment was contrary to evidence and to law. The certiorari was overruled. It appeared that plaintiff in error, a resident of Ohio, had solicited and taken orders from persons in Marietta for shirts and underwear, to be filled by Eshelman & Craig, a corporation of Philadelphia, Pa., of which company plaintiff in error was agent. This company sells shirts and underwear manufactured at its works in Philadelphia. Its goods are sold by its agents by samples, throughout the United States. It furnishes each agent with samples, and the agent exhibits these samples, and takes orders for the company for the purchase of such articles, and transmits the order to the company at its place of business, and the company fills the order from its home office, and delivers the goods as the orders are taken, but in no case does the agent sell or deliver the samples intrusted to him. The company has no place of business in Georgia. Sometimes, when it has several purchasers at one point, it sends the goods to one customer, and notifies the others to call on that one for them, allowing him 15 cents per package for delivery. The agent is done with an order when he takes it and forwards it to the company, and has nothing to do with the delivery of the goods.

J. Z. Foster, for plaintiff in error. E. Faw, for defendants in error.

PER CURIAM. Judgment reversed.

(96 Ga. 750)

DRAKE et al. v. ESTES.

(Supreme Court of Georgia. March 25, 1895.)

LIENS—PRIORITY.

This case is controlled by the decision of this court in the case of Hill v. Cole, 10 S. E. 739, 84 Ga. 245; and, this being so, the construction of the registry act of 1889 is not involved.

(Syllabus by the Court.)

Error from superior court, Forsyth county; George F. Gober, Judge.

Application by Langston Estes against Horace Drake and others for a rule for the distribution of the proceeds of a sale. Brought forward from the last term. Code, §§ 4271a—4271c. There was a judgment for petitioner, and respondents brought error. Pending the proceedings in error, said Langston Estes died, and V. R. A. Estes, his administratrix, was substituted as a party. Affirmed.

The following is the official report:

A rule was brought against the sheriff for the distribution of \$75.40, arising from the sale of land as the property of Mary M. Bennett, the claimants of the fund being Estes, on the one hand, and Drake and Howell, on the other. The case was submitted to the judge upon the following agreement as to facts: Mrs. Bennett bought land for \$500, and held it under bond for title from William Garrett. On January 25, 1890, \$105 of the purchase money was due, and, by agreement, Estes advanced \$200 to Mrs. Bennett, paying her \$95, and paying \$105 to Garrett; taking from Garrett a deed to the land, and she surrendering the bond for title she held, and taking one from Estes, and giving him her notes for \$232, due 12 months after date. The deed from Garrett to Estes was properly recorded. Estes brought suit upon his notes, and obtained judgment against Mrs. Bennett on January 6, 1891. On February 2, 1892, he executed a deed to Mrs. Bennett in conformity to the bond for title, had it filed and recorded in the clerk's office, and thereupon caused his executions to be levied on the land, which was sold by the sheriff, and brought \$303. After deducting expenses, etc., the sum of \$287.60 was left, of which the sum of \$75.40 was held up by the sheriff under notice from Drake and Howell, who claimed the same on their executions against Mrs. Bennett; that of Drake being for \$46.30, besides interest, attorney's fees, and costs, less credits of \$25, founded on a judgment of December 6, 1890; and that of Howell being for \$34.44, besides interest and costs, founded on a judgment of September 5, 1891. Estes claimed the fund under three executions,—two for \$100 each, the third for \$32, besides interest and costs on all three. They were founded on judgments rendered on June 6, 1891. All five executions were issued from a justice's court. Those of Estes were entered on the general execution docket of the superior court on August 25, 1892. Those of Howell and Drake were so entered on May 3, 1892. The land was sold on April 5, 1892, under the executions of Estes. No usury was apparent upon the face of the notes payable to Estes. Service was acknowledged of the suits on those notes. No plea was filed, and the judgments recited that they were for the purchase price of the land. Mrs. Bennett is insolvent. The judge ordered that Estes be first paid, counting interest at 7 per cent. on the \$200 advanced by him, and purging his

debt of usury, and that the balance, if any, be applied to *fi. fas.* according to priority. He held that Drake and Howell could not attack the deed from Garrett to Estes, and from Estes to Mrs. Bennett, because they claimed thereunder when they asked for this money; that the lien of Estes dated from the time of the record of the deed to him, which was prior to the date of the judgments of Drake and Howell; and that the nonrecord of the executions in time did not affect the case. Drake and Howell excepted.

J. P. Brooke, for plaintiffs in error. H. L. Patterson, for defendant in error.

PER CUBIAM. Judgment affirmed.

(96 Ga. 772)

O. M. ALLEN, JR., BUGGY CO. v. BUSH.
(Supreme Court of Georgia. April 29, 1895.)

NEW TRIAL—SUFFICIENCY OF EVIDENCE.

The evidence demanded a verdict for the plaintiff, and therefore the finding for the defendant was contrary to law, and a new trial ought to have been granted.

(Syllabus by the Court.)

Error from superior court, Miller county; J. M. Griggs, Judge.

Action by the O. M. Allen, Jr., Buggy Company against J. S. Bush. Brought forward from the last term. Code, §§ 4271a—4271c. There was a judgment for defendant, and plaintiff brings error. Reversed.

The following is the official report:

The O. M. Allen Buggy Company sued Bush upon an account for four certain buggies. He pleaded not indebted, and there was a verdict in his favor. Plaintiff's motion for new trial was overruled, and it excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc.; also, because the court erred in admitting in evidence, over plaintiff's objection, because of incompetency and irrelevancy to the issue, the testimony of Bush and Moody that the buggies shipped to defendant were not suitable for the purposes intended, for use in this section; error in charging: "If the defendant took the buggies out of the depot at Arlington, not knowing of any failure on the part of plaintiff to come up to the contract, and, after examining them, he found that the buggies were not such as contracted for, he immediately returned the buggies to plaintiff, he would not be liable in this action." The evidence in brief was, for the plaintiff: Plaintiff sent defendant circulars and papers, and, when defendant ordered by letter the four buggies in question, he inclosed to plaintiff in the letter the slip of paper referred to in his letter, which contained on the front side of it the picture of a buggy, under which was printed the words "No. 20 Empire Buggy," and on the reverse side a description of the buggy, which did not state the number of spokes to the wheel, and stated that the wheels were strictly B grade, Sarven

patent, or compressed banded hubs, and further stated that, in ordering, the width of the track should always be stated, and, when nothing was said, plaintiff always sent four feet eight inch. In response to this letter from defendant, plaintiff shipped four buggies, which, according to the evidence for the plaintiff, were the buggies which had been ordered. Plaintiff never authorized defendant to reship, but defendant did have the buggies reshipped to plaintiff, and plaintiff has at all times refused to take them back, and could not receive them back without sustaining great loss. Plaintiff ordered him not to reship them, but it does not appear that this order was given before the goods were reshipped. The testimony for defendant, briefly stated, was that he ordered the buggies by the picture; that he had been in the business for a number of years, and could look at the picture of a buggy and tell what kind of hubs it had; that the picture represented the buggy with patent hubs, with 16 spokes to the wheel; that the buggies shipped had not those patent hubs, had only 14 spokes to the wheel (which makes a wheel much weaker than one with 16 spokes), and were narrow gauge,—that is, had 4 feet 8 inches track, and were not reasonably suited for the purposes for which they were intended; that the buggies shipped him had jogged spokes and wooden hubs unbanded; that, when the buggies arrived at Arlington, the railroad agent would not let him have them out to examine until he paid the freight; that he paid the freight on them, and began putting one of them up, and, when he found that they were not the buggies he had ordered, he went to the railroad agent, got back the money he had paid as freight, and delivered back the buggies to him, and told him to ship them to plaintiff; that he did not know what a Sarven patent hub was; that he did not get the buggies he had ordered; he thought he had ordered broad-gauge buggies; that he ordered them as cheap buggies; a good, first-class buggy costs from \$35 to \$150 (the buggies in question were ordered at \$34.20 each); that the buggies came up to all the statements in the circulars, as far as he knew, except that they did not have the patent hub shown in the picture, and did not have 16 spokes, as shown in the picture; and that he had no direction from plaintiff to reship, but reshipped the buggies before hearing from them.

R. H. Powell & Son, for plaintiff in error.
A. L. Hawes and I. A. Bush, for defendant in error.

PER CURIAM. Judgment reversed.

(96 Ga. 770)

HOBBS v. GEORGIA LOAN & TRUST CO.
(Supreme Court of Georgia. April 29, 1895.)
LAND SOLD ON EXECUTION—INTEREST OF DEBTOR
—EQUITABLE TITLE—NOTICE.

The evidence showing conclusively that the legal title to the land levied upon was in the

defendant in execution, and there being no evidence to show that even, if the claimant had a secret equity in the land, the plaintiff in execution had any notice or knowledge thereof at the time of extending credit to the defendant in execution on the faith of his title, there was no error in directing a verdict for the plaintiff in execution.

(Syllabus by the Court.)

Error from superior court, Harris county;
W. B. Butt, Judge.

Action by the Georgia Loan & Trust Company against W. R. Hobbs. A. E. Hobbs, for herself and another, interposed as claimant. Brought forward from the last term. Code, §§ 4271a-4271c. There was a judgment for plaintiff, and claimant brings error. Affirmed.

The following is the official report:

An execution in favor of the Georgia Loan & Trust Company against W. R. Hobbs, based upon a judgment of October 10, 1892, was levied upon 120 acres "on north side" of land lot 211, in the Eighteenth district of Harris county. A claim was interposed by Miss A. E. Hobbs, for herself and on behalf of her sister, Katherine Hobbs, who, she averred, is non compos mentis. Upon the trial of the claim, the court directed a verdict for the plaintiff, to which ruling and direction claimant excepted. The evidence for plaintiff was that defendant in *fi. fa.* was in possession of the land levied upon at the time of the levy, and was served with notice of the levy; that the levying officer knew that claimant and her sister lived on the land, but he considered defendant in possession; that Hardy Hobbs, father of claimant and defendant, died several years ago on this land; and that defendant lives close to where his father died, but the levying officer did not know whether on the same lot or not, but on a part of the Hardy Hobbs land. Plaintiff introduced a warranty deed from Hardy Hobbs to W. R. Hobbs, duly executed and recorded, conveying the land in dispute and other lands; also, deed from W. R. Hobbs to plaintiff, conveying the land in dispute, and deed from plaintiff to W. R. Hobbs, filed and recorded with the clerk of the superior court. The dates of these deeds do not appear. The testimony for claimant was to the following effect: Hardy Hobbs owed W. R. Hobbs money, and made the deed first above mentioned to secure its payment, but, before he died, had paid the money. How much it was the witness did not know, but he paid it at different times and in different amounts, and claimant counted a part of the money. Hardy Hobbs has been dead about 10 years. He died on the land where he lived. Defendant lives on a part of the land embraced in the deed from Hardy Hobbs to him, received the deed, and has given in the land in dispute as his own and paid the taxes since he received the deed. His sisters, the claimant and Katherine Hobbs, lived with his father, and have lived at the same place since his father's death, together with his mother, and, since the death of his mother,

have still resided at the old home. Defendant and claimants are the only heirs, and the three are working the land now, and have been since defendant took the deed. Katherine Hobbs is non compos mentis. The mother of claimant A. E. Hobbs, before the death of said mother, gave said A. E. and her sister her interest in the land, but gave no writing conveying it, and they have been in possession since, claiming it as their own.

R. A. Russell and C. J. Thornton, for plaintiff in error. J. H. Martin, J. H. Worrill, and B. H. Walton, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 772)

SMITH et al. v. SMITH.

(Supreme Court of Georgia. April 29, 1895.)

RECEIVER—APPOINTMENT—ABUSE OF DISCRETION.

Under the particular facts of this case, as disclosed by the record, there was no abuse of discretion in appointing a receiver.

(Syllabus by the Court.)

Error from superior court, Muscogee county; C. C. Smith, Judge.

Petition by Sophronia Smith against Solomon Smith and others. Brought forward from the last term. Code, §§ 4271a-4271c. There was a decree for petitioner, and defendants bring error. Affirmed.

The following is the official report:

Upon the petition of Sophronia Smith against Solomon, Squire, and Antoinette Smith, a receiver was appointed for certain property which the petitioner alleged belonged to the estate of William Smith at the death of said William. To this decision the defendants excepted. The petitioner alleged: Petitioner, as the widow of William Smith, applied for a year's support out of his estate. Commissioners were duly appointed, who made their report, citation issued, and the report of the commissioners was approved by the ordinary. Copies of said proceedings are attached. The commissioners reported that the widow should have for her year's support \$350, which she had selected to take in a certain city lot in Columbus hereafter to be mentioned, said lot being of the value of \$350; and this report was made the judgment of the court of ordinary at its November term (November 5th), 1894. William Smith died intestate, owing no debts, and seised and possessed of said lot, and lived and died in the residence upon said lot. There has been no administration upon his estate, nor is any necessary, as it only comprises said lot and a child's part in a small tract of land adjoining, which he inherited from a deceased wife, who is the mother of defendants. Upon the death of her husband, in July, 1894, defendants, being his children by a former marriage, took possession of said property, now have possession of it, and refuse to permit petitioner

to enter it. William Smith left no minor children, defendants being each over 30 years old. Defendants are each insolvent. Notwithstanding the petition for and the granting of the year's support, on the day the year's support was approved, and after it was approved, defendants appeared before the ordinary, and applied for an appeal by filing a pauper affidavit, copy of which is attached. They filed no objection in writing to the granting of the year's support, as is provided by section 2573 of the Code, and the Acts of 1884-85, p. 49, amendatory thereof; and no such objections have ever been filed, but the only paper filed is the said pauper affidavit. The object of defendants in filing it was to delay petitioner in the possession and enjoyment of her year's support, and to enable defendants to keep and use the property. Under the facts above stated, defendants cannot now, in the superior court, file objections to the year's support, and the appeal has the effect of suspending the judgment of the ordinary without the requisite pleadings therefor. Were the appeal properly entered and objections filed, petitioner is entitled under the law to necessities for her support from the estate of her husband pending the appeal. She is an old negro woman, poor, and physically unable to do much labor, and in great want of the necessities of life. She prayed for the appointment of a receiver for the lot first above mentioned, to take it, and rent it, and pay her the small rental, which will not exceed \$5 per month, for her support pending the appeal, and, upon termination of the appeal, for a decree giving her the land set apart for a year's support, for injunction and process. Defendants answered: It is not true that William Smith died seised and possessed of the land, but the land was the property of these respondents long before and at the time of his death. For more than seven years before his death, he was old and feeble, unable to earn a livelihood, and petitioner abandoned him, affording him no help or sustenance whatever, and so remained up to his death for more than seven years. When she had so abandoned him for more than seven years before his death, he gave the lot of land to these respondents, who were his children and heirs at law, and then turned over to them all the title deeds to the lot, and required them to support and take care of him until his death, and they did so for more than seven years, and up to his death, paying all the taxes on the property from the time of the gift up to his death, and he never paid any taxes or exercised any control over the property after the gift, but respondents were in possession, claiming it as their own, and it was so recognized by him for several years and more up to his death; and they pleaded the foregoing in bar of the right of petitioner to have a 12-months' support out of the property. The hearing was had upon the petition and an-

swer, both of which were sworn to, and upon various affidavits. Petitioner made affidavit: She married William Smith in 1876, and lived with him at his home, on the property in which the year's support is taken, until about five years ago. She did not separate from him, and the relation of husband and wife continued between them to his death. For the past five years he was not able to do much physical labor, and, in order to earn a support for herself and him, she had to hire her labor, and, to do this, had to move nearer the city than his house. She is over 60 years old, and had to reside nearer her work, but during this period he visited her nearly every week, and she divided with him her small earnings. He rented to his death a one-room house in the yard of his home, and with this small rental and what she gave him he subsisted. Defendants are each 35 or 40 years old. Squire has not in 20 years lived on the lot with his father, but has a family of his own. Solomon has been out of the state most of the past 12 years, and not until the last 18 months has he been about his father. Antoinette has lived in the house with her father, and, during the long period in which petitioner lived in her husband's house, Antoinette remained there, and was supported by them. When petitioner married her husband, the residence had but one room, but with their joint labor another was added. Petitioner earned good wages, which she turned over to him. The little one-room house in the yard was paid for by earnings of herself and husband, and was built for a shop for her to sell merchandise in, to see if they could not thus make a livelihood. Every improvement made on the place in the past 15 years has been paid for by her wages and his earnings, but none have been made during the past 8 years. He exercised ownership over the property, and was in possession of it to his death, claimed it as his, and about 8 months ago tried to sell a portion from the rear end of the lot. She nursed him during his last illness, remained with him night and day, and was with him when he died. During his last illness he talked to her about how his children, and especially Antoinette, had treated him, and said he wished to provide for petitioner, and asked that she look in his trunk, and hand him his deeds; but, when she looked in the trunk, she found they were gone, and no papers were left except certain receipts for lumber and tax receipts. She reported this to him, and he replied that some one had taken them out during his sickness. She attached the tax receipts to the affidavit. They were receipts for taxes for 1879, 1890, and 1892, being for state and county taxes for those years, and balance of city tax for 1890. Plaintiff also introduced the affidavit of a physician that he attended her husband in an illness several years ago, during which he was nursed and attended by plaintiff,

his wife; that he was called on to visit him during his last illness, and, on three visits made, saw plaintiff at the bedside of William Smith, nursing him; and that the daughter of William Smith was in the house, but plaintiff was nursing and caring for him; also an affidavit that in the spring of 1894 William Smith came to see deponent, and tried to sell him the rear portion of the lot, but deponent was not prepared with money to purchase it, and therefore did not trade. For defendants, an affiant deposed: He was personally acquainted with William Smith for 20 years before his death, and for about 5 months just previous to his death saw him almost daily. Has frequently heard him say the property he lived on at the time of his death had been given by him to his children; that his wife left him, and would not live with him, though he was willing to live with her; and that on this account he had given his property to his children. Another deposed: He was personally acquainted with William Smith from emancipation to the time of William Smith's death, and has frequently heard him say that he had given the property upon which he died to his children. Another deposed: She had been personally acquainted with William Smith for about 25 years, and for the past 15 years was his next-door neighbor. His wife did not live with him for the last 7 years of his life. Deponent has often heard him say that he had given his property to his children. He was old and feeble, and unable to work, for several years before he died, and was supported by his children. Another deposed: She had lived neighbor to William Smith the last 20 years of his life. For 7 or 8 years before he died, he was old and feeble, unable to work, and was taken care of by his children. His wife did not live with him for a good many years. Deponent has often heard him say that he had given his property all to his children.

Blandford & Grimes, for plaintiffs in error.
Brannon, Hatcher & Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 776)

HINKLE v. STORY et al.

(Supreme Court of Georgia. May 13, 1895.)

CONTINUANCE—PROPERTY SUBJECT TO EXECUTION.

There was no legal merit in the motion for a continuance, and, as, under the facts in evidence, the property levied on was manifestly, and beyond doubt, subject to the plaintiffs' execution, there was no error in directing a verdict accordingly.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by Viola Story, for herself and another, against L. V. Bosworth and others. L. E. Hinkle interposed as claimant. Brought

forward from the last term. Code, §§ 4271a-4271c. There was a judgment for plaintiff, and claimant brings error. Affirmed.

The following is the official report:

An execution in favor of Viola Story, and Viola Story as next friend, against L. V. Bosworth, principal, and J. J. Smith and J. B. Hinkle, securities, on trustee bond, for \$301.-21 principal, interest and costs, based on a judgment of December 14, 1892, was levied on a house and lot in Americus, as the property of J. B. Hinkle, which was claimed by Mrs. L. E. Hinkle. The case coming on for trial, claimant announced "Not ready," upon the ground that claimant was sick and unable to attend court, and introduced a witness who testified that claimant was sick and unable to attend court; that she was sick the Saturday before, when the case was set for trial "to-day"; that "she is no worse to-day than she was then, but rather better." One of claimant's counsel said he understood she was confined to her bed, and he was not able to go to trial without her present, as she was his client. The court held that as the case was announced "Ready" on the Saturday before, and the proof showed that defendant was sick at that time, and not well enough to attend court at that time, that showing, under the rules, should have been made at the time that the case was called in its order to be set; and the court ruled claimant ready. In a note to the bill of exceptions the judge states: "Claimant's attorneys announced 'Ready' on Saturday before the case was tried, at which time the case was called for assignment, and was set for trial on the following Monday. The evidence showed that claimant was sick at that time, confined to her bed, and unable to attend court. The rules of the bar association, to which claimant's attorneys belong, which have been in use for many years in Sumter superior court, provide that, when a case is called for assignment, motions for continuance for existing causes shall be then made, and, if not then made, that the case shall not be continued, except for intervening cause. Claimant's attorneys well knew of this rule, and had often recognized it in their practice in the court. Besides, the case had been continued at a former term, upon claimant's stipulating not to withdraw her claim, and had already been set for trial at least once, if not twice, during the present term, but had been allowed to go over for reassignment, to accommodate claimant." Plaintiff introduced the execution, with entries thereon, which execution was objected to by claimant's counsel because the judgment from which the execution issued was entered December 14, 1892, and the execution was not issued until March 9, 1893, and not entered upon the execution docket until the said last-named day. Plaintiff introduced a witness who testified that at the time the property was levied on it was in possession of J. B. Hinkle. The levy was made June 6, 1893. Claimant introduced a deed made

by J. B. Hinkle to claimant, his wife, dated December 22, 1892, upon a consideration of five dollars cash, and love and affection, conveying the realty in question, other realty, and all the personalty of the grantor, including his books and accounts. This deed was recorded March 21, 1894. The attorneys for the parties announced that they would submit the case without argument, whereupon the court ordered a verdict finding the property subject, to which ruling, and directing the verdict, claimant excepted.

Fort & Watson, for plaintiff in error. L. J. Blalock and W. P. Wallis, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 777)

INGRAM et al. v. CLARKE et al.

(Supreme Court of Georgia. May 13, 1895.)

PRACTICE ON APPEAL—BRIEF OF EVIDENCE—REVIEW.

This being a case in which no motion for a new trial is to be reviewed, and there having been a manifest disregard of the requirements of the supreme court practice act of 1889, as to the manner of bringing up the evidence in such a case, because the evidence incorporated in the bill of exceptions consists almost entirely of documents from which the formal, irrelevant, and superfluous parts were not eliminated, and it being clear that there was no bona fide effort to brief the evidence as the law directs, this court will not undertake to consider or pass upon the same; and, there being in the case no question which can be properly adjudicated without reference to the evidence, it will be assumed that the judgment below was correct. *Ryan v. Kingsbery*, 14 S. E. 596, 88 Ga. 361; *Hart v. Respass*, 14 S. E. 910, 89 Ga. 87; *Horne v. Seisel*, 19 S. E. 709, 92 Ga. 685; *Smith v. Ray*, 18 S. E. 525, 93 Ga. 253.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by J. B. Ingram and others against W. F. Clarke, trustee, and others. Brought forward from the last term. Code, §§ 4271a-4271c. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. P. Wallis, R. L. Maynard, and J. B. Hudson, for plaintiffs in error. Bacon & Miller and W. M. Hawkes, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 777)

CHISM v. VARNEDOE.

(Supreme Court of Georgia. May 13, 1895.)

APPEAL—PRACTICE—BILL OF EXCEPTIONS—CERTIFICATION.

The bill of exceptions, as certified, containing only a portion of the evidence, and it being impossible to ascertain therefrom whether or not the trial judge erred in rendering the judgment complained of, which was a decision of the case upon the law and facts without the intervention of a jury; and the remainder of the evidence, purporting to be an exhibit to the

bill of exceptions, being neither identified as such by the signature of the judge or otherwise, nor incorporated in a brief and made a part of the record, so that this court could order the same to be certified and sent up by the clerk of the court below,—the judgment must stand affirmed. *Harman v. Stange*, 62 Ga. 167; *Masland v. Kemp*, 70 Ga. 786.

(Syllabus by the Court.)

Error from superior court, Lowndes county; A. H. Hansell, Judge.

Action by James E. Ohism against Anna C. Varnedoe. Brought forward from the last term. Code, §§ 4271a-4271c. Judgment for defendant, and plaintiff brings error. Affirmed.

G. A. Whitaker, for plaintiff in error. D. C. Ashley and Glenn & Rountree, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 730)

MATHEWS v. COUNCIL et al.

(Supreme Court of Georgia. May 13, 1895.)

ACTION ON ADMINISTRATOR'S BOND—SUFFICIENCY OF DECLARATION.

Under the decision of this court in the case of *Gibson v. Robinson*, 16 S. E. 969, 90 Ga. 756, the plaintiff's declaration in the present case set forth a good cause of action, and it was error to dismiss the same on demurrer.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Action by George N. Mathews against James Council, administrator, and others, on an administrator's bond. Brought forward from the last term. Code, §§ 4271a-4271c. From an order sustaining a demurrer to the complaint and dismissing the action, plaintiff brings error. Reversed.

The following is the official report:

George N. Mathews sued James Council and five others upon an administrator's bond, for the recovery of \$84.91, with interest and costs. On demurrer for want of a cause of action alleged, the declaration was dismissed, and plaintiff excepted. He alleged that on July 4, 1892, defendants entered into an administrator's bond, jointly and severally obligating themselves, in the sum of \$20,000, that James Council should administer according to law upon the estate of David Williams, deceased; that the estate which went into the hands of the administrator to be administered was of the value of \$10,000, or other large sum; that Williams, at his death, was indebted to plaintiff \$84.91 upon an account, which the administrator failed to pay; that at the July term, 1893, of the justice's court of the Fifty-First district, G. M., plaintiff sued the administrator on said account, and obtained judgment for the sum named, besides interest and costs; that, the administrator having failed to pay the judgment, an execution was issued against the lands and tenements, goods and chattels, of the deceased, which were in the hands of the administrator to be admin-

istered, and the constable of said district made return that there was no property of David Williams in said county upon which to levy the execution; and that by reason of the above recited facts a breach of the bond has been made and established, and defendants have become jointly and severally bound to pay plaintiff \$84.91, with interest and costs, which sums they refuse to pay.

Loud & Clarke, for plaintiff in error. N. R. Beasley, for defendants in error.

PER CURIAM. Judgment reversed.

(96 Ga. 778)

HANCOCK v. COUNCIL et al.

(Supreme Court of Georgia. May 13, 1895.)

ACTION ON CONTRACT—COMPLAINT—SUFFICIENCY.

The declaration sets forth, in substance, a cause of action. Although it is silent as to whether the contract alleged to have been made was in writing or in parol, the facts stated show that even if it was in parol, and therefore originally within the statute of frauds, it was made valid and binding by performance. The breach of the contract, and the consequent damages to the plaintiff, are sufficiently stated, as against a general demurrer. It was error to dismiss the action.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Action by W. H. Hancock against Council, Grady & Co., on a contract. Brought forward from the last term. Code, §§ 4271a-4271c. From an order sustaining a demurrer to the complaint and dismissing the action, plaintiff brings error. Reversed.

The following is the official report:

Hancock sued Council, Grady & Co. for a breach of contract. Upon demurrer for want of a cause of action, the declaration was dismissed, and plaintiff excepted. He alleged that in February, 1886, he was induced and persuaded to equip and put in operation a steam sawmill by defendants, for the purpose of squaring logs for market, upon the following contract: He was to erect the mill, and defendants, who owned several tracts of pine timber land, were to supply the mill with all logs suitable for sawmill purposes upon said lands, and pay him \$2 per 1,000 for squaring same, or to allow him to cut from said lands any or all of said timber at \$1 per 1,000 feet, to be paid by him to them, with the further agreement that either or both should have the privilege of cutting and hauling said timber to the mill. He had a lucrative position, and left it upon the express agreement of defendants that they would furnish his mill all the logs or timber suitable for sawmill purposes from the several tracts of land owned by them, or allow him to cut the same. Upon this contract he erected the mill at the point selected and mutually agreed upon by him and them, at an outlay of \$6,000; and for a year

or more after the agreement they furnished to him logs from said lands, and he found the business profitable. About December 10, 1888, he made the following supplemental contract with them: In order to facilitate the delivery of logs to the mill, and square a larger number of pines from which turpentine had been extracted on said lands, he agreed to reduce the price of squaring the logs 25 cents per 1,000, and sawing deal 50 cents per 1,000, if defendants would procure and lay down, upon the wooden tramroad which had been constructed jointly by them and him for use in the conduct of the mill business, sufficient iron rails to iron heavy curves and grades; and they procured and put down said iron rails, and he made said reduction, amounting to \$1,100, or other large sum, it being made on about 4,000,000 square feet of square logs and deal; and after the aforesaid amount had been squared, and 1,700 acres, more or less, of the lands for which the mill was located to saw remained uncut and undelivered, defendants refused to deliver any of the remaining uncut timber to the mill, or to allow plaintiff to cut it himself, as agreed on. The sawmill business was fully established and in successful operation, and his reasonable profits in squaring the timber of said remaining lands would amount to \$13,600, or other large sum. Wherefore, by their willful and reckless violation of the contract, plaintiff was damaged the sum last named, and upon the reduction of the price of sawing he sustained damage to the amount of \$1,100, or other large sum.

J. M. Stubbs, W. L. Clarke, and J. E. Wooten, for plaintiff in error. A. C. Pate and Roberts & Smith, for defendants in error.

PER CURIAM. Judgment reversed.

(96 Ga. 781)

SMALL v. PAULK et al.

(Supreme Court of Georgia. May 13, 1895.)

OPEN ACCOUNT—NEW TRIAL—SUFFICIENCY OF EVIDENCE.

The action being upon an open account, and the evidence offered in support of the same not being sufficient to authorize a finding for the plaintiff, there was no error in refusing to set aside a verdict for the defendants upon a motion for a new trial, the sole grounds of which were that the verdict was contrary to law and contrary to the evidence.

(Syllabus by the Court.)

Error from superior court, Irwin county; G. W. Warwick, Judge pro hac vice.

Action by A. B. Small against E. Paulk & Co. on an open account. Brought forward from the last term. Code, §§ 4271a-4271c.

Judgment for defendants, and plaintiff brings error. Affirmed.

The following is the official report:

A. B. Small sued E. Paulk & Co., a firm composed of Elbert Paulk and E. D. Paulk, for a balance of \$186.43 and interest, alleged to be due upon an account, an itemized statement of which was attached to the declaration. The jury found for the defendants, and plaintiff moved for a new trial, on the grounds that the verdict was contrary to law and evidence. The motion was overruled. The evidence is as follows: W. P. Duncan testified: "I was traveling salesman for plaintiff. I visited defendants' place of business during the time of the sales of goods embraced in the account sued on. I cannot say I sold all of the goods, but I did sell part of them. The account sued on is just, true, due, and unpaid. I do not know that each or any of the items set out in the account sued on were shipped, only that I sold defendants the goods about every two weeks, and they made payments to me, and never complained. I always took their orders in a little memorandum book, and then transcribed them, and sent to plaintiff in Macon. I frequently saw in defendants' place of business some goods I sold them. I only arrive at the exact amount which I say is due from a statement furnished to me by the bookkeeper in Macon. I have not the book that I took the orders in, and do not now remember that any item embraced in the account sued was ordered through me. Do not know of my own knowledge that any part of the bill is due, or what has been paid to the house. I never did tell either of the defendants that they were entitled to a credit of \$75 on the account sued on. At the last term of this court I was here as a witness in this case, after the suit was brought, and had conversation with them concerning the account. We were talking of a settlement of the account sued on, and they claimed that they were entitled to certain credits, either \$75 or \$47, or both, which should go on the account, and demanded an itemized statement of their account; and I promised to send it. I told the bookkeeper to send it. Do not know that he did or did not. I did not. They never disputed the account, but claimed that they were entitled to credits thereon. They did not admit that the account was just as sued on. The subject under discussion was the account sued on. This was long after the suit was filed." The defendants introduced no evidence.

Busbee, Crum & Busbee, for plaintiff in error. Martin & Whipple, for defendants in error.

PER CURIAM. Judgment affirmed.

(44 S. C. 344)

STATE v. DERRICK.

(Supreme Court of South Carolina. July 5, 1895.)

GRAND JURY—VENIRE FACIAS—RETURN—CONFESSIONS AS EVIDENCE—HOMICIDE—CIRCUMSTANTIAL EVIDENCE—REVIEW ON APPEAL.

1. The writ of venire facias need not show that the sheriff served it on the jury commissioners where it appears from the record that the writ was duly issued, and that the jury commissioners acted in obedience thereto.

2. The validity of an indictment is not affected by the fact that the sheriff failed to make a return of service upon the grand jurors under oath, or because it does not appear how the service was made on them, if the record shows that said jurors acted in obedience to the summons.

3. The failure of the sheriff to serve a summons on a petit juror who was out of the county will not affect the array.

4. Defendant's confession is admissible against him if no hope or fear operated upon his mind, and nothing was done or said to extort the confession from him.

5. It was not error to permit the state to reopen its case to prove that deceased could not write, after defendant introduced in evidence a threatening letter purporting to have been written by deceased.

6. A charge on a murder trial "that the evidence is circumstantial and corroborative circumstantial" is not error where it was in conformity with the evidence.

7. Where a confession of murder embraced circumstances testified to by other witnesses, it was correct to charge "that, when confessions are corroborated by the circumstances, the jury should consider them as they consider other testimony."

8. A charge that, "if there be an element in the confessions showing that they do not comport with the facts surrounding the confessions," the jury could "give them as much credence as they believed," was not prejudicial to defendant.

9. A charge that "the state does not ask for the blood of any man, but the common mother has a hand over us all. She asks not for revenge, but she asks that the law be complied with, and that security and protection hover over us all," did not indicate the court's opinion as to defendant's guilt.

10. An assignment of error "that the verdict was contrary to law and evidence" is too general.

Appeal from general sessions circuit court of Abbeville county; O. W. Buchanan, Judge.

Walter Derrick was convicted of murder, and appeals. Affirmed.

D. H. Magill, for appellant. M. F. Ansel, for the State.

POPE, J. The defendant was convicted of the crime of murder at the January, 1895, term of the court of general sessions for Abbeville county; and after his honor, Judge Buchanan, as presiding judge, had pronounced the sentence of death upon him, an appeal was taken to this court. The solemn duty now awaits this court to dispose of the various propositions raised by the zealous and able counsel for the unfortunate man at the bar of this court in behalf of the appellant. Without reproducing the text of these grounds of appeal in every instance, we will first dispose of those relating to the

grand jury that found the bill of indictment and to the petit jury that rendered the verdict of guilty.

As soon as the cause was called up, the defendant moved to quash the indictment (a) because it does not appear on the writ of venire facias that the sheriff made service of said writ upon the jury commissioners in obedience to the mandate of said writ; or (b) because it does not appear that said jury commissioners were served with any writ. The "case" shows that said writ was duly issued under the hand and seal of the clerk of the circuit court of Abbeville county on the 15th day of May, 1894, requiring the sheriff to serve the three jury commissioners, and requiring them to draw and annex to the panel of this writ 18 good and lawful men, whom the said sheriff was required immediately thereafter to summons to be and appear at the court of general sessions for Abbeville county on the 4th day of June thereafter, to serve as grand jurors. The case also shows that the three jury commissioners, on the 18th day of May, 1894, in obedience to the writ of venire facias, did draw and annex the names of 18 good and true men as said grand jurors. The case also shows that the sheriff of Abbeville county made his certificate that he did serve a summons upon each one of the 18 good and true men as such grand jurors. And, lastly, the case shows that these 18 men responded to said summons, and did act as said grand jurors at the June term, 1894, and also at the October term, 1894, at which latter term the said grand jury found a true bill on the indictment preferred against the defendant for murder. Will the failure to have the service upon the jury commissioners entered on the writ when the record shows that the writ to them was duly issued, and that all three of them acted in obedience to said writ, render the indictment found by a grand jury drawn by such jury commissioners null and void? We do not think so. It is better practice that the sheriff should conform to the letter of the law. But in the case from Edgefield of *State v. Toland*, 36 S. C. 522, 15 S. E. 599, when the jury commissioners accepted service on the back of the writ, and made out their return that, in obedience to the writ, they had drawn the 18 men as grand jurors, we held that it was sufficient.

But, again, the defendant insists that the bill of indictment should be quashed because it does not appear that the sheriff made his return of service upon the grand jurors under oath, and, also, that it does not appear from the oath of the deputies of the sheriff how they served the summons upon such grand jurors who were served by them. At best, these are mere irregularities, and cannot have the effect to impeach the legality of the grand jury, who were legally drawn by the jury commissioners, and who actually attended in obedience to the summons they received. The remarks of Mr.

Justice McGowan in the case of *State v. Smith*, 38 S. C. 271, 16 S. E. 997, are very appropriate just here. The learned justice was discussing some exceptions to the grand jury which had found the bill in that case, and said: "It is true, courts are particular in requiring care in the organization of juries, but there is a limit, and we cannot think that the direction in the act as to the number of days' notice required to be given was essential to the validity of the acts done by the jury for nearly a year. There is certainly nothing of substance in the objection, *as the jurors summoned appeared and discharged their duty.* [Italics ours.] The objection made to the organization of juries are numerous and various, and therefore we think the rule is properly stated in the 9th volume, p. 3, of the *Encyclopedia of Law*, as follows: 'Slight irregularities in selecting, drawing, and summoning, and in the names, of grand jurors, where none of the substantial rights of the accused are affected, do not affect the validity of the panel;' citing numerous cases."

We will next notice the grounds of appeal relating to the petit jury. It appears from the case that only one juror, J. W. Shaw, did not attend the court as required by law of jurors, and this juror was not served with a summons to attend, for the very good reason, as set out by the sheriff, that he had left the county. The same objections were raised in the challenge to the array of the petit jurors that was raised on the basis for the motion to quash the indictment, viz.: No service upon the jury commissioners of the writ of *venire facias* regularly issued under the seal of the clerk of court on the 5th day of January, 1895, requiring them to select 36 petit jurors, although it appeared that the said jury commissioners, in obedience to said writ, did draw the said 36 petit jurors whose names were entered on the panel attached to the writ, and although it appeared that the sheriff certified that he had served the 36 persons so drawn except the juror J. W. Shaw, who was absent from the state. There was no showing made at the trial that J. W. Shaw was in the state. It will be seen that the objections are the same as those we have previously disposed of in connection with the grand jury. Our conclusions there announced will dispose of those grounds of appeal here raised. Accordingly, we overrule each of these.

The next group of exceptions are those pertaining to the competency of certain testimony: "(5) Because it was error to admit the confession of the defendant, for the reason that the same was induced by fear improperly excited. (6) Because it was error to refuse to strike out the said confession at the close of the testimony." We were struck with the care evinced by the circuit judge when the witness J. S. Boller was about detailing the confession of the defendant, for he allowed the defendant's counsel to inter-

rogate him fully in regard to the way in which and by which the confession was made; and it was only after this witness had positively denied that any hope or fear operated upon the prisoner's mind, or that anything was done or said to extort the confession, that the circuit judge admitted the testimony of the confession to be introduced. The law, primarily, imposes this duty upon the circuit judge. It is a heavy responsibility, but it has to be met. In this case, no doubt, the circuit judge was in a measure relieved by the number of corroborating circumstances brought to his view. From a careful study of these circumstances, we cannot say that the circuit judge erred in admitting the confession originally, or in refusing to strike it from the testimony after all the facts were in evidence. We have been called upon so often to consider this subject that we feel that we have fully covered the law on this subject in our decisions in *State v. Howard*, 35 S. C. 205, 14 S. E. 481, and *State v. Carson*, 36 S. C. 524, 15 S. E. 588. In this last case the separate opinion of Mr. Chief Justice McIver is well worthy a close perusal, suggesting that there may be a difficulty in any review by this court of the decision of the circuit judge as to the admissibility of confessions. Other cases, since the cases cited were decided, fully state the views of this court on this subject.

The seventh exception complains that the solicitor, after he had announced that the state had closed its testimony, was allowed, against the objection of defendant, to introduce the wife of the deceased, Dora Robinson, to prove that the deceased could not write. It seems that the defendant had introduced what purported to be a letter from Sam Robinson, the deceased, addressed to the prisoner, wherein the prisoner was notified that he would "turn him out as sure as he saw his face." The solicitor learned that Sam Robinson could not write, and hence, of course, he was anxious to expose this device. The circuit judge allowed the question after a full consideration. He was entirely justified in this course. The object of all investigation in courts of justice is the attainment of truth, to the end that human rights may be protected; and for this purpose the judges are invested, of necessity, with power essential to such result. This exception must be overruled.

We will next consider those grounds which relate to the error of the circuit judge in his charge to the jury.

The eighth ground of appeal is in these words: "Because his honor erred in charging the jury that in this case the evidence is circumstantial and corroborative circumstantial." No human eye witnessed the shooting of Sam Robinson by the defendant. The testimony relied upon was necessarily circumstantial. There were circumstances in corroboration of this circumstantial testimony. These matters were in the mind of his honor in the use of the language in his charge to

the jury as quoted in the exception. We see no error of law here.

The ninth ground of appeal is in these words: "Because his honor erred in charging the jury that, when confessions are corroborated by the circumstances, the jury should consider them as they considered other testimony." When the confession was being considered by the court, it appeared in testimony that the defendant had borrowed a gun on the afternoon of the homicide; not only so, but that, while with his gun in his hands, he had met some women, to whom he declared his purpose of taking the life of Sam Robinson; also that, when he first approached the house of Sam Robinson, some little boys were playing at the window through which Sam Robinson was, not long afterwards, shot, which caused the defendant to go back to a ditch some 200 yards distant, pull off his shoes, and leaving them in the ditch; and that, after the dreadful deed was committed, the defendant went back down this same ditch to where he had left his shoes. All these facts, so far as borrowing the gun, talking to women of his purpose, the playing of the little boys at the window, tracks made by a man first with shoes on, afterwards with bare feet up to the window, back and forth to the ditch, were proved by witnesses. The confession was made by the defendant, covering all these several matters. Hence, when the circuit judge referred to this part of the cause, he used the remarks quoted in the exception. In these matters he did not err. Of course, the jury were bound to consider these distinct statements which corroborated the confession as made.

The tenth ground of appeal is: "Because the following words of his honor's charge were calculated to mislead the jury: 'If there be an element in the confession showing that they do not comport with the facts surrounding the confession, you, gentlemen, are at liberty, and it is your bounden duty, to give them just as much credence as you believe, and just as you would other testimony.'" We cannot see that these words are calculated to mislead a jury. That they might have been made plainer may be, but, still, there is nothing calculated to do any possible harm to the defendant thereby.

As to the eleventh ground of appeal, which is as follows: "Because the following words of his honor's charge indicate to the jury his opinion as to the guilt of the defendant: 'The state does not ask for the blood of any man, but the common mother has a hand over us all. She asks not for revenge, but she asks that the law be complied with, and that security and protection hover over us all.'" We can see no possible harm to the prisoner (defendant) in these words of his honor. They are general in their application. If anything, the use of these words indicate the desire of his honor that the jury will not be misled by any suggestion of revenge,—"a life for a life," as some express it,—but that the jury are called

upon to remember that the citizen who is at the bar charged with crime is still a citizen of this commonwealth, and, as such, is entitled to all the protection that our laws accord one in such a position. This ground of appeal is not well taken.

Lastly, it is suggested, in the twelfth ground of appeal, "that the verdict was contrary to law and the evidence." This is too general to warrant any consideration at our hands, and must therefore be dismissed.

It is the judgment of this court that the judgment appealed from be affirmed, and that the cause be remitted to the circuit court, to the end that a new day be fixed and assigned for the execution of the sentence theretofore imposed upon the defendant.

(44 S. C. 338)

STATE v. CHILES.

(Supreme Court of South Carolina. July 5, 1895.)

PROSECUTION FOR MURDER—INDICTMENT—CAUSE OF DEATH—EXPERT EVIDENCE—INSTRUCTIONS.

1. Under 19 St. at Large, 830, providing that every indictment for murder shall be sufficient which, together with a plain statement of the manner in which the death was caused, charges that defendant did feloniously, etc., murder the deceased, an indictment charging that defendant "feloniously," etc., "with switches and sticks, did strike and beat and wound, giving to the said M. * * * one mortal wound, of which mortal wound the said M. * * * died," etc., is sufficient, though the evidence showed that defendant, in beating the deceased, inflicted many wounds.

2. Defendant whipped his wife, and two days after went for a doctor to attend her, who, three days thereafter, discovered that she had pneumonia, from which disease she died. He was informed, in answer to inquiries, that previous to the whipping she had been able to attend to her usual duties. *Held*, that it was proper to allow the doctor, who testified as an expert, to state as his opinion that the cause of death was pneumonia, and that the whipping was the immediate cause of the pneumonia.

3. Where defendant's counsel asked an expert witness, on cross-examination, whether in all his other practice he had ever known a whipping to bring on pneumonia, as he stated that it did in the case of deceased, it was proper to allow the state's solicitor to ask, in reply, if in all his experience as a physician he had ever seen a case in which there was as much whipping as in this case.

4. Where murder by whipping was charged, an instruction that "if this woman's death was hastened by that whipping, and you believe that beyond a reasonable doubt you could find defendant guilty of manslaughter," was correct, when combined with sound definitions of murder, manslaughter, and reasonable doubt contained in the general charge.

5. The appellate court will not interfere with a refusal of the trial court to grant a new trial, solely on the ground that the verdict was not sustained by the evidence.

Appeal from general sessions circuit court of Abbeville county; R. C. Watts, Judge.

Allen Chiles was convicted of manslaughter, and appeals. Affirmed.

Graydon & Graydon, for appellant. M. F. Ansel, for the State.

POPE, J. The appellant was convicted of manslaughter by the jury at a trial had in the court of general sessions for Abbeville county, in this state, at the October, 1894, term thereof, and after his honor, Judge Watts, had sentenced him to punishment by confinement in the state penitentiary for seven years, he appealed therefrom to this court. We will now dispose of the five grounds of appeal.

The fifth ground of appeal imputes error to his honor, the presiding judge, "in charging the jury that they might find the defendant guilty of murder or manslaughter, when there was a total failure of proof of the allegation of the indictment that the death of the deceased was caused by one mortal wound inflicted by the defendant." The appellant, in effect, assails the indictment as fatally defective, in that the instrument charges that the accused inflicted upon the body of the deceased one mortal wound, of which mortal wound the deceased died, whereas, under the testimony in the case, it appears that the accused had inflicted many wounds. Here is the indictment, omitting the formal parts: "That Allen Chiles, on the thirteenth day of July, in the year of our Lord one thousand eight hundred and ninety-four, with force and arms, at Abbeville courthouse, in the county of Abbeville, and state of South Carolina, in and upon one Margaret Chiles, feloniously, willfully, and of his malice aforethought, did make an assault, and that the said Allen Chiles her, the said Margaret Chiles, then and there feloniously, willfully, and of his malice aforethought, with switches and sticks, did strike and beat and wound, giving to the said Margaret Chiles thereby, in and upon the body of the said Margaret Chiles, one mortal wound, of which mortal wound the said Margaret Chiles then and there on the fifth day of September, A. D. 1894, died, and so the jurors aforesaid," etc. The testimony all tended to establish the fact that Allen Chiles did administer to his wife, on the 13th day of July, 1894, a whipping, using sycamore switches, from which she was bruised from head to foot, in some cases cutting through the skin, and in other cases merely bruising the skin, and that this whipping caused the poor woman such intense suffering that the creature, called a man, and her husband, himself went for a physician, who prescribed calomel and administered an anodyne, and, on the Wednesday afterwards, pneumonia ensued. Do the allegations in the indictment answer the demands of the law when a man is arraigned for crime? The late Chief Justice O'Neill, in the case of *State v. Schroder*, 3 Hill (S. C.) 65, laid down the rule for testing the sufficiency of an indictment thus: "The general rule in framing an indictment is that the offense should be so described that the defendant may know how to answer it; the court, what judgment to pronounce; and that a

conviction or acquittal on it may be pleaded in bar to any subsequent or other indictment for the same offense." This court, in the case of *State v. Shlirer*, 20 S. C. 408, recognized the rule laid down in *State v. Schroder*, supra, as "a guide." But the general assembly of this state, in 1887, by the section of an act entitled "An act to regulate criminal practice in the courts of general sessions in this state" (19 St. at Large, 830), provided: "That every indictment for murder shall be deemed and adjudged sufficient and good in law which, in addition to setting forth the time and place, together with a plain statement, divested of all useless phraseology, of the manner in which the death of the deceased was caused, charges that the defendant did feloniously, willfully and of his malice aforethought, kill and murder the deceased." It seems to us that the indictment here preferred answers all of these requirements, and that it sufficiently apprises the defendant of what he was to answer. It can make no difference that the bruises on the body are described as a "wound," from which the deceased died. This being so, there was no error in the circuit judge in his charge, as here complained of.

Having disposed of this objection to the indictment, we are now logically led to the consideration of the objections to the competency of certain testimony as found in the first and second grounds of appeal. The appellant's first ground of appeal is as follows: His honor erred "in allowing the solicitor to ask, and the witness Dr. H. Drennan to answer, the following questions, notwithstanding the objections of the defendant, the questions and answers being as follows: 'Q. What brought on the pneumonia? What was the cause of the pneumonia? A. Well, the history of the case goes very much into the diagnosis. Previous to that day of the whipping, she was in ordinary health, going about doing her work, and after that time she was not able to do anything, and the immediate cause of the pneumonia was the result of this exposure and whipping— Q. Go on A. I say that the pneumonia was the result of this inordinate whipping. But I want to say that I believe that this whipping was the immediate cause of the pneumonia.'" It is well to bear in mind that the defendant himself called on Dr. Drennan to visit his wife as a physician. It was the defendant who told Dr. Drennan that he himself had flogged his wife with sycamore switches to the extent of 20 or 25 lashes, and it was to the defendant, just after Dr. Drennan had completed the examination of the wife, who is now deceased, that the doctor remarked "that they were pretty heavy licks." All this occurred on the Sunday succeeding the whipping, which occurred a day or two before the doctor made the examination. In order that a physician may correctly diagnose a case to which he is called, it is almost

a necessity that he should learn the previous state of health of the patient. Dr. Drennan testifies that to his inquiries in this direction he was informed that before she was beaten the wife was able to go about and attend to her usual duties, but that on the Sunday he saw the patient she was not able to do so. Thereupon, as a physician, he determined that this severe beating was the cause of this change in the patient. On Wednesday after the Sunday he first examined her, she came to him, and he discovered that she had pneumonia. She died on the 5th day of September, 1894. Therefore, when he was called upon at the trial, as an expert, to testify, in his medical opinion, what caused her death, it was necessary and proper that he should testify as to the facts of his diagnosis of her case, both on the Sunday he first saw her and on the Wednesday after. In the light of these matters surrounding this witness, we do not think the circuit judge erred in admitting this testimony. In so holding we do not think there is the slightest departure from the ordinary rule that an expert ought not to be allowed to testify as to facts outside of his own knowledge. This witness merely reproduced to the court and jury what circumstances entered in to make up his diagnosis of the woman's condition on the two days he saw her after she had been beaten. He then declared it to be his opinion as a medical expert that the death of the woman was the result of the pneumonia, which had been caused by the defendant's beating. This ground of appeal must be dismissed.

Appellant's second ground of appeal imputes error to the circuit judge in allowing the solicitor to ask, and the witness Dr. Drennan to answer, the following questions, notwithstanding the objections of defendant, the questions and answers being as follows: "Q. Have you ever, in all your experience as a physician, seen a case when there was as much whipping as in this case? Have you ever seen such a case? A. I never have." When the witness was under the cross-examination of defendant's counsel, he was interrogated as to whipping his son, and was asked if the whipping brought on pneumonia. He was asked generally if in all his practice, apart from this case, he had ever known a whipping to bring on pneumonia. So, when the solicitor handled this witness in reply, he asked the two questions complained of. They were strictly in reply to the defendant's examination of this state's witness, and were competent. This ground of appeal must be dismissed.

We come now, logically, to consider the ground of appeal which imputes error to the circuit judge in his charge to the jury. It is alleged that the error was in charging: "If the testimony here satisfies you beyond a reasonable doubt that this woman died of pneumonia, and that that pneumonia resulted from that whipping given her by the defendant, and you are so satisfied beyond a

reasonable doubt, why, you can find him guilty of murder or manslaughter, as you may see fit. But you must be satisfied beyond a reasonable doubt that her death resulted in consequence of that whipping. I charge you, also, that if this woman's death was hastened by that whipping, and you believe that beyond a reasonable doubt, you could find the defendant guilty of manslaughter." We have examined the entire charge of the circuit judge, and are pleased to say that he evinced the utmost care in defining each grade of homicide; pointing out distinctly the characteristics of each grade; warning the jury, at intervals, of its being the duty of the state to prove the offense beyond a reasonable doubt; and also of their duty to acquit the defendant if the state failed to prove defendant's guilt, of either the crime of murder or that of manslaughter, beyond a reasonable doubt in each instance. Now the extract from the charge embodied in this ground of appeal is based upon sound law, especially in view of the wholesome definitions of the crimes of murder and manslaughter contained in the general charge of the judge. Let this ground of appeal be overruled.

Lastly, the defendant appeals because the circuit judge overruled the defendant's motion for a new trial, "when there was no testimony whatsoever that the deceased died from a wound, as alleged in the indictment, and when the evidence plainly showed that the wounds from the whipping had all disappeared, without leaving even a scar, before her death, and that she died nearly two months after the whipping, not of one mortal wound, as alleged in the indictment, but of pneumonia or consumption, which did not set in until four days after the whipping, and with which the whipping did not have any necessary, direct, and causal connection." Ever since *State v. Cardoza*, 11 S. C. 195, this court has continuously held that this court cannot set aside the verdict of the jury on the ground that it was not sustained by facts proved, nor will it interfere with the refusal of the circuit judge to grant a new trial, unless some error of law was committed by him in making known his refusal. In the appeal at bar, there is nothing but alleged insufficiency in the testimony. This ground of appeal must also be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(43 S. C. 547)

CITY OF COLUMBIA v. TINDAL, Secretary of State.

(Supreme Court of South Carolina. April 15, 1895.)

EXEMPTIONS FROM TAXATION—CITY HALL.

Under Rev. St. § 222, exempting from taxation municipal property used exclusively for public purposes, the provisions of Act Dec. 24, 1892, authorizing the sheriff to sell property

on which taxes have not been paid, and give to the purchaser a fee-simple title thereto, cannot be enforced against a city hall, part of which is used exclusively for public purposes.

Petition by the city of Columbia for an injunction to restrain James E. Tindal, as secretary of state, from proceeding to enforce the collection of a tax. Granted.

The complaint and answer referred to in the opinion are as follows:

"The petition of the city of Columbia respectfully sheweth to your honors: First. That your petitioner is a municipal corporation of the state of South Carolina, having been originally chartered by the legislature of said state as the town of Columbia, in the year 1824 (6 St. at Large, p. 240), and said charter having been from time to time renewed and amended, and its present charter, under the name of the 'City of Columbia,' having been granted by said legislature on the 21st day of December, A. D. 1854. 12 St. at Large, p. 333. Second. That a lot of land within the limits of said city, on the northwest corner of Main and Washington streets, was vested in said municipality by authority of an act of the legislature in 1818 (6 St. at Large, p. 102), and by other acts of assembly, and has since been a part of its property. The said town of Columbia caused to be erected on said lot of land, many years ago, its guard house and fire engine house, and also another building, known as the 'Town Hall,' but which was used, also, on its ground floor, as the public market of the town. The large hall on the second floor was used for public town meetings, and was also rented out from time to time for exhibitions and entertainments. In this building were also the council chamber and clerk's office, and in its tower was the town clock, and lookout for the watchmen of the town. All of these buildings on said lot of land were totally destroyed by fire on the night of February 17-18, 1865. Third. In the year 1866, the legislature confirmed to the city of Columbia its title to the lot of land aforesaid, and also vested in said city another lot of land, adjoining on the west, known as the 'Jail Lot,' upon a condition which was fully complied with by said city; but from the year 1865 to the year 1871 the said city council was without any public buildings of its own, to its very great inconvenience and expense. In the year last named a resolution was adopted by the city council of Columbia, looking to the erection of a city hall, and a committee was appointed, with instructions to call for plans for such a building. Plans were accordingly furnished by an architect, and under said plans the building hereinafter described as the 'City Hall' was erected, and now stands upon said lot of land, and is the property of the said municipality, the city of Columbia. At or about the same time a public market house for said city was erected at another spot, to wit, in one of the public

streets of said city. Fourth. The said city council not having in hand the funds necessary for the erection of the desired buildings, and the cost thereof being in excess of any proper tax levy, in addition to what was required for the ordinary expenses of government, the said city council passed its resolution providing for a loan of \$75,000, to be used in the erection of said city hall, and directed the issue of \$250,000 in bonds of said city, to be used as a collateral pledge for the repayment of said loan. Fifth. On March 13, 1872, the general assembly of the state of South Carolina passed an act authorizing the issue of bonds, which, with the bonds then outstanding, and including the said city hall bonds, should not exceed the sum of \$600,000, for the purpose of constructing the city hall and new market (15 St. at Large, p. 220); and by the tenth section of said act it was provided and declared that the income derived by the city of Columbia from rentals of any portion of said city hall should be appropriated as a sinking fund for the ultimate redemption of the bonds so issued under said act. Sixth. The bonds so directed and authorized by the act of assembly were accordingly issued, and the provisions of the said tenth section of the act of 1872 were printed on the back of each and every of said bonds. And the bonds provided for by the said resolution of city council were taken up and retired, and all the moneys received from the sale or hypothecation of said statutory bonds were used in the erection of said city hall, and all bonds hypothecated were sold by the pledgors for the payment of the loans for which they were hypothecated. Seventh. The city hall so erected contains the following rooms and apartments, to wit: (1) The council chamber of the city council, and so used. (2) The office of the clerk of council, and so used. (3) The office of the chief of police, and so used. (4) The police court room, and so used. (5) The tower constantly used by the day and night watchmen of the city, and in which is hung a large bell used for striking the hours and for a fire alarm. And from none of the rooms or apartments aforesaid has any rent ever been received. (6) A large room used for some time as the office of the city engineer and of the board of trustees of the Columbia Canal, but now rented to a military company of this city as an armory. (7) Four stores on the ground floor, which are and have been rented out. (8) A small hall on the upper floor, occupied and rented by an association known as the 'Knights of Pythias.' (9) A large room on the upper floor, rented to a military company of this city as an armory. (10) A large room, known as the 'Opera House,' with rooms appurtenant for players, and for the lessee and his family. This last-named hall is rented for a consideration; the city reserving the right of its use to its citizens, when required by them for any public or charitable meet-

ings or educational celebrations of the citizens, on paying for lights. Eighth. That the said building was erected by the city of Columbia of very lasting materials, at great cost, and with the hope and belief that the future growth of the city would demand larger accommodations for the city government, and with an earnest conviction that the city hall of the capital city of the state should be an ornament to the state, as well as to the city; and the construction and addition of rooms and apartments beyond the present demands of the city, for the proper accommodation of the city government, was only incidental to its declared purpose of erecting a city hall for the public uses of the city government. Ninth. That some of the rooms and apartments in said building have been completed by the lessees thereof, as the consideration for their lease, and parts of the interior of said building are still unfinished. During the whole time that the city has been in receipt of rents therefrom, the aggregate sum received up to December 31, 1893, inclusive, amounted to \$48,694.50, and the aggregate disbursements on account of repairs and improvements have amounted to \$48,270.85,—an excess of \$423.65 of receipts over disbursements. Tenth. That your petitioner never paid any state or county taxes on the buildings on said lot which were destroyed by fire in February, 1865, and no such payment was ever demanded, and has never paid any state or county taxes on said city hall building, conceiving that the said building was not specifically subject to taxation under any statute of this state, and not generally liable, as the said building was the property of one of the agencies of the state government. And your petitioners aver that it is not so subject to taxation. Eleventh. But the Honorable J. E. Tindal, who is secretary of the state of South Carolina, and agent of the commissioners of the sinking fund, being advised that the said city hall building is liable to the payment of state and county taxes during all the years that it has so failed to pay any taxes, has given notice to the said city of Columbia that there is due to the state of South Carolina, for state and county taxes, the tax levy of the year 1877, and every year thereafter, together with the legal penalty for nonpayment, and threatens to collect the same by causing the said building to be seized and sold under the terms of the act of 1892, entitled 'An act to provide an additional remedy for the collection of taxes, costs, and penalties upon lands past due and unpaid for eight months.' 21 St. at Large, p. 82. Whereas, your petitioner avers that the said building is not subject to taxation, and that there is nothing in the said act of 1892, or any other statute, which authorizes the secretary of state, as agent of the commissioners of the sinking fund, or any other officer of the state government, to take any steps whatsoever looking to the assessment and collection of any tax whatso-

ever on the said city hall building, or any portion thereof. Twelfth. That any further proceedings under the act of 1892 against the said property will deprive petitioner of possession thereof, and will cause irreparable injury to your petitioner, and cast a cloud upon its title, and involve it in vexatious litigation; and your petitioner has no remedy in law in the premises, but only by writ of injunction in equity. Wherefore, your petitioner, the said city of Columbia, prays that the said J. E. Tindal, as secretary of state of the state of South Carolina, and agent of the commissioners of the sinking fund, his successors in office, his and their agents and servants, be perpetually enjoined from proceeding any further under the said act of 1892, or any other now existing statute, to assess or collect any taxes for state and county purposes on the said city hall building of the said city of Columbia, and that the said building be declared by this honorable court not subject to taxation under the laws of this state. And your petitioner, as in duty bound, will ever pray, and so forth."

Return to rule to show cause:

"To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the State of South Carolina: James E. Tindal, as secretary of state and ex officio agent of the commissioners of the sinking fund, upon whom has been served an order requiring him to show cause why the injunction prayed for by the petitioner herein should not be granted, respectfully makes return to said rule, and for cause shows: (1) That your respondent admits the truth of the statements of fact contained in paragraphs 1, 2, 3, and 7 of the petition herein. (2) That your respondent has no knowledge, or information sufficient to form a belief, as to the truth of the statements of fact contained in paragraphs 4, 6, 8, and 9 of said petition, and therefore denies the same. (3) That, as to the statements contained in paragraph 5 of said petition, your respondent admits that by section 10 of the act of the general assembly approved March 13, 1872 (15 St. at Large, p. 220), it is provided 'that, upon the completion and occupation of the said city hall, the mayor and aldermen shall, at once, by ordinance, make provision for a sinking fund, to be based upon the net annual income derived from such parts of the said city hall as may be leased from them, the proceeds of which sinking fund shall be solemnly set apart for the payment of the debt and the interest thereon, contracted in the erection of the said city hall'; but your respondent has no knowledge of any such ordinance as that contemplated by said section having been passed, and therefore denies that the requirements of said section have been complied with. (4) That, as to paragraphs 10 and 11 of said petition, your respondent denies so much of said paragraphs as alleges that said city hall building is not subject to taxation, and that the secretary of state, as agent of

the commissioners of the sinking fund, is not authorized to collect any tax on said building. (5) That, as your respondent is informed and verily believes, the city hall building of the city of Columbia, referred to in said petition, is liable to the payment of state and county taxes, and is not exempt from taxation by the constitution or statutes of this state, the said building not being 'owned and used exclusively for public purposes.' (6) That, as admitted in said petition, the city of Columbia has never paid any state or county taxes on said city hall building, and, as your respondent is informed and verily believes, there is now due to the state of South Carolina, for state and county taxes, on said city hall building, the tax levy of the year 1877, and every year thereafter. (7) That the notice referred to in paragraph 11 of said petition was given under and pursuant to an act of the general assembly of this state entitled 'An act to provide an additional remedy for the collection of taxes, costs, and penalties upon lands past due and unpaid for eight months,' approved December 24, 1892, a copy of which said act is attached to and made a part of this return, and your respondent prays reference thereto as often as may be necessary. (8) That at the time of the service of the notice above referred to it was, and still is, the purpose of your respondent to conform strictly to the requirements and provisions of the said act of the general assembly, and other statutes of this state. Wherefore, the respondent, having made full return to the rule herein, prays that the same may be discharged, with costs."

John P. Thomas, Jr., and Robt. W. Shand, for plaintiff. Wm. A. Barber, Atty. Gen., for defendant.

POPE, J. The defendant, in pursuance of the provisions of an act of the general assembly of this state entitled "An act to provide an additional remedy for the collection of taxes, costs and penalties upon lands past due and unpaid for eight months," approved December 24, 1892 (see 21 St. at Large, p. 82), was proceeding to collect, by levy and sale by the sheriff of Richland county, what he claimed was taxes due by the plaintiff to the state and county of Richland since the year 1877, whereupon the plaintiff started this action, in the original jurisdiction of this court, to secure a perpetual injunction against the defendant, as secretary of state, etc., against any interference with the property known as plaintiff's "City Hall," alleging that no taxes had ever been assessed under the laws of this state against such property, and, further, that the constitution did not require such assessment for taxes to be made upon such city hall. The defendant admitted in his answer that he was proceeding to collect taxes for the state and county purposes on such city hall property of the plaintiff, beginning with the year 1877, under and in pursuance of the provisions of the said act of 1892,

and he alleged that such taxes were due, that their assessment was under the statute of this state, and, further, that the constitution of the state did authorize the levying and collecting of taxes upon such property of the plaintiff. It is distinctly admitted that no question is intended to be raised as to what the amount of such taxes may be, nor is any issue made as to the power of this court to grant such an injunction as is here prayed for. (The complaint and answer must appear in the report of the case.) There being a necessity for some testimony, it was referred, under an order from this court, to John J. McMahan, Esq., as special referee, to take such testimony. So that the hearing before this court was, upon the pleadings and the testimony, taken before such special referee.

The fundamental facts of this controversy may be thus briefly stated: In the year 1818 the state vested a certain piece of land in the city of Columbia. Upon this piece of land the city of Columbia erected a brick building, the lower part of which was used as a public market, and the upper part of which was used as a town hall, wherein the city officers had their offices, and wherein the public assembled for public purposes, and wherein, occasionally, opera, and theatrical troupes performed, paying rent for such privilege. Also in this building was built the watch tower, wherein a large bell was used to sound the hours, day and night, and from which point the night watchman kept watch while the people slept. But on February 17-18, 1865, this property was burned down by the United States soldiers. So that when the war ended the city government was homeless, just as so many of its citizens were rendered homeless, by that exhibition of useless and pitiless spite against the whole people whose beautiful capital Columbia was. The citizens of Columbia in 1872 determined to rebuild their city hall, and, with their characteristic faith in the future growth and development of their city, they began to erect a city hall on the old site heretofore referred to, and, needing more money than a prudent levy of taxes for that purpose would yield, they procured legislative authority to create a public debt for this purpose, by issuing bonds, whose proceeds should be applied to this purpose. On account of supposed defects and alleged irregularities in this issue of bonds for this purpose, an action was commenced to test these matters. *State v. City of Columbia*, 12 S. C. 370. And the result of that litigation was that such bonds were declared valid. In 1877 the city government of the city of Columbia occupied such city hall, but, inasmuch as some of the building was not needed for public purposes, the city council rented out, for profit, such parts of the building as were not used. To be accurate at this point, the following is the agreed statement as to how this building is used: (1) The council chamber of the city council, and so used. (2) The office of the clerk of coun-

oil, and so used. (3) The office of the chief of police, and so used. (4) The police court room, and so used. (5) The tower constantly used by the day and night watchmen of the city, and in which is hung a large bell, used for striking the hours and for a fire alarm. And from none of the rooms or apartments aforesaid has any rent ever been received. (6) A large room used for some time as the office of the city engineer, and the trustees of the Columbia Canal, but now rented to a military company of this city, as an armory. (7) Four stores on the ground floor, which are and have been rented out. (8) A small hall on the upper floor, occupied and rented by an association known as the "Knights of Pythias." (9) A large room on the upper floor, rented to a military company of this city as an armory. (10) A large room known as the "Opera House," with rooms appurtenant for players, and for the lessee and his family. This last-named hall is rented for a consideration, the city reserving the right of use to its citizens when required by them for any public or charitable meetings or educational celebrations of the citizens, on paying for the lights. In view of the partial use of the city hall for private purposes, the secretary of state, and ex officio agent of the commissioners of the sinking fund, has sought to set in motion the machinery provided under the act of 1892, previously noticed by its title, to collect state and county taxes on this city hall property for every year since 1877 up to the present time.

It is alleged by the attorney general, in his able argument, that: "The constitution of South Carolina (article 1, § 36) provides that 'all property subject to taxation shall be taxed in proportion to its value.' Following this is the statute (1 Rev. St. § 218) providing that 'every person shall be liable to pay taxes and assessments on the real estate of which he or she may stand seized in fee.' Section 218 contains the word 'person,' to include firm, companies, associations, and corporations. Now, as to the exceptions, so far as applicable to this case: Const. art. 9, § 1, provides: 'The general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory except receiving claims, the proceeds of which alone shall be taxed; and also excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes.' Pursuant to this constitutional provision is section 222, Rev. St., which reads as follows: 'The following property shall be exempt from taxation, to wit: * * * 12th. All city, town and village halls owned and used exclusively for public purposes by any city, town or village.'" We propose to go directly to the point of this case. All parties concede that this city hall property of the city of Columbia, the plaintiff, is partly, at least, ex-

clusively used by the city of Columbia for public purposes. The attorney general, in his argument, has conceded that as to property held by a municipal corporation strictly as a governmental agency, for public purposes, and used exclusively as such, such property is not taxable. The act of 1892, under which the defendant is proposing to act, requires the sheriff to sell the piece of property upon which taxes have not been paid, and convey a fee-simple title therefor to the purchaser. Then, if this act allows the sheriff to sell plaintiff's property, part of which is confessedly not liable to pay taxes, have we not a case demanding a remedy in equity? It seems so to us. We do not deny that the general assembly has the right to tax the property of municipal corporations, nor, on the other hand, that it can provide a tax on part of such property, exempting another part. But we do mean to say that the provisions of the act of 1892, under which the defendant now proposes to act, cannot be enforced, under the circumstances developed in this case. We prefer to go no further in this discussion. It follows, therefore, that the remedy, as prayed for by the plaintiff, should be applied by this court. Therefore, it is the judgment of this court that the defendant, his successors in office, his agents and servants, be, and they are hereby, perpetually enjoined from proceeding under the act of the general assembly passed on December 24, 1892, to collect any taxes from the plaintiff on its property known as the "City Hall."

(44 S. C. 351)

CITY COUNCIL OF GREENVILLE v. EICHELBERGER.

(Supreme Court of South Carolina. July 8, 1895.)

CRIMINAL LAW—APPEAL FROM MAYOR'S COURT—MODIFICATION OF SENTENCE.

Under the city charter of Greenville (19 St. at Large, p. 109), vesting the mayor and aldermen with all the powers of trial justices, to try persons charged with violations of the city ordinances; Code Cr. St. § 66, providing for appeals from trial justices' courts on conviction for any offense; and Id. § 71, providing that the court of general sessions may modify a sentence of a justice of the peace as to said court may seem meet and conformable to law,—the circuit court may reduce the fine imposed by a judgment of the mayor's court of such city for violation of a city ordinance, when there was nothing in the case showing that the modification did not seem "meet and conformable to law." McIver, C. J., dissenting.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Andrew V. Eichelberger was convicted in the mayor's court of violating an ordinance of the city of Greenville, and appealed to the circuit court. From a judgment of the circuit court modifying the judgment of the mayor's court, the city council of Greenville appeals. Affirmed.

Joseph A. McCullough, for appellant. J. Walter Gray, for respondent.

GARY, J. The defendant was tried in the mayor's court of the city of Greenville for violating an ordinance of said city entitled "An ordinance to fine and imprison persons found guilty of riotous conduct." The punishment provided for in said ordinance is a fine not exceeding \$50, or imprisonment not exceeding 20 days, at the discretion of the mayor, or both fine and imprisonment, within the above limits, at the discretion of the mayor. Under the testimony he was found guilty, and fined in the sum of \$50, or ——— days' imprisonment. From this sentence the defendant appealed to the circuit court, upon several exceptions, one of which was because the fine imposed was excessive, even if there was a violation of the ordinance, in view of the mitigating circumstances of the case. The appeal was heard by his honor, Judge Watts, at the November term of the circuit court for said county, who, after hearing read the testimony in the case, and argument of counsel, ordered that \$45 of the fine imposed be remitted, and that the judgment of the city council be modified to that extent. The city council of Greenville appealed from said order upon the following exceptions: (1) "Because his honor erred in ordering that 'forty-five dollars of the fine imposed in this case be and is hereby remitted, and that the judgment of city council be modified to that extent,' in that having concurred with the mayor that the defendant was guilty of violating the aforesaid ordinance, the amount of the fine was purely discretionary with said mayor, with the exercise of which his honor had no right or authority of law to interfere." (2) "Because his honor should either have affirmed or reversed the judgment of the mayor, and had no right or authority of law to modify said judgment as stated in said order."

None of the testimony is set forth in the statement of the case. The correctness of the order appealed from depended upon the facts in the case, unless it should be held that the law does not authorize the circuit judge, under any circumstances, to modify the sentence imposed by the mayor. In *Columbia Water-Power Co. v. Columbia Street-Railway, Light & Power Co.* (S. C.) 20 S. E. 1002, the court says: "This court must assume that the circuit judge properly decided all the questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part in his finding of facts, it is not the subject of review by this court in a law case." If the law authorizes the circuit judge, under any circumstances, to modify the sentence imposed by the mayor, then this court, in the absence of all testimony, must assume that the facts and circumstances were such as to justify the granting of the order making such modification of the sentence. Let us, then, consider whether the circuit judge had the power to modify the sentence imposed by the mayor. In the charter of the city of Greenville (19 St. at Large, p. 100), it is provided that "the mayor and aldermen of said city,

are hereby severally and respectively vested with all the powers of trial justices in this state, within the limits of said city, to try and punish all persons charged with the violation of the ordinances of said city." Under the case of *City Council v. Brown* (S. C.) 20 S. E. 56, and the authorities upon which that case was decided, it clearly appears that the mayor exercised the powers of a trial justice when he tried said case. The extent of the punishment which he had the power to inflict was limited by the ordinance aforesaid. Section 66, Code Cr. St., provides that: "Every person convicted before a trial justice of any offense whatever and sentenced, may appeal from the sentence to the next term of court of general sessions for the county. All appeals from trial justices' courts in criminal causes shall be taken and prosecuted as hereinafter prescribed." Section 71, Id., provides that: "The said appeal shall be heard by the court of general sessions upon the grounds of exception made; and upon the papers hereinbefore required, and without the examination of witnesses in said court. And the said court may either confirm the sentence appealed from, reverse or modify the same, or grant a new trial, as to the said court may seem meet and conformable to law." It thus appears that the statute, in express terms, confers upon the circuit judge the power to modify the sentence appealed from. The only limitation upon his power is that it must be "as to the said court may seem meet and conformable to law." There is nothing in the case showing that the modification of the sentence by the circuit judge did not seem to him "meet and conformable to law." It is the judgment of this court that the order appealed from be affirmed.

POPE, J. It seems from the case that the defendant was tried before the mayor of the city of Greenville for the violation of a city ordinance. He was convicted, whereupon he was sentenced to pay a fine of \$50, or suffer ——— days' imprisonment. From this judgment of the said mayor the defendant appealed to the circuit court. When the appeal came on for a hearing before his honor, Judge Watts, he modified the mayor's sentence by reducing the fine imposed from \$50 to \$5. It seems that, under the charter granted by the general assembly of this state to said city of Greenville, one of the provisions of the organic law of said municipality is that the mayor and aldermen of said city, severally or jointly, shall be clothed with all the powers of a trial justice in this state, within the limits of said city, to try and punish all persons charged with a violation of the ordinances of said city. 19 St. at Large, p. 109. This court has had occasion recently, in the case of *City Council v. Brown*, 20 S. E. 56, to construe the law under which city officials perform those duties of courts, and we held that, when the general assem-

bly clothed such officials with the power of trial justices, they were subject to all the restrictions of the law pertaining to and governing trial justices, so far as the powers conferred by the terms of the act on such officials are concerned. Under this view of the law, we have held that a person on trial before the court of the city recorder of Charleston may demand his right to a trial by the jury fixed by law for a trial justice's court. It seems to my mind very clear, therefore, that the mayor's judgment here was reviewable by the circuit court just as any trial justice's judgment would be. It would be an alarming condition of things to allow a mayor or alderman, or both together, power inconsistent with this view. I know this court went to the full extent when it denied the right of appeal to a citizen from a mayor's court, as was done in *Ex parte Schmidt*, 24 S. C. 363. Until that decision is reversed, it is my duty, as it is my pleasure, to uphold it, but not to stretch it one inch. The judgment of our court in the case last cited was justified, it is claimed, by the absence, in the act of the legislature vesting the city council of Columbia with power to try offenders against its city ordinances, of any such restrictions as are set out plainly and unmistakably in the act regulating the power of the mayor and aldermen of Greenville. If, then, they have the power only of trial justices, then their judgments are reversible by the higher court,—the court of general sessions. *Town Council of Beaufort v. Ohlandt*, 24 S. C. 158; *Town of Lexington v. Wise*, Id. 163. When Judge Watts heard this appeal, he had before him all the testimony taken in the court below at the trial of the defendant. Under our statutes regulating appeals from the sentences of trial justices' courts, the judges of the courts of general sessions are expressly empowered to reverse or modify the sentence appealed from, or grant a new trial, as to the said judges may seem meet and conformable to law. See section 71 of the Criminal Statutes of South Carolina. The text of that section reads: "The said appeal shall be heard by the court of general sessions upon the grounds of exception made and upon the papers hereinbefore required [the testimony below was one of the papers. See section 68], and without the examination of witnesses in said court. And the said court may either confirm the sentence [italics mine] appealed from, reverse or modify the same, or grant a new trial, as to the said court may seem meet and conformable to law." This section shows very plainly that the legislature of this state never intended to give such unlimited power to these officials as would enable them to impose sentences, upon persons charged before them with infractions of city ordinances, out of all proportion to the offense as made out by the testimony; in other words, to clothe them with unbridled discretion as to their senten-

ces. Judge Watts had all this testimony before him, and he but exercised one of the rightful powers of his high office when he reduced this sentence, if the testimony convinced him that the mayor's sentence was excessive. I agree with Mr. Justice GARY that the judgment below should be affirmed.

McIVER, C. J. (dissenting). As I cannot concur in the conclusion reached in this case, I propose to state briefly the grounds of my dissent. The circuit judge having found no error, either of law or fact, in the judgment appealed from, it must be regarded as conclusively determined that the defendant was guilty of having violated the ordinance under which he was prosecuted. The only question, therefore, was as to the amount of the punishment which should be imposed. That was a matter which, by the express terms of the ordinance, was left to the discretion of the mayor, within certain prescribed limits; and as it is not, and cannot be, pretended that the mayor transcended those limits, I do not see how it can possibly be said that there was any error of law or fact in the judgment of the mayor. Even conceding that the mayor, in rendering that judgment, was acting as a trial justice (a matter which may admit of question), and that in appeals from a trial justice the court of sessions "may either confirm the sentence appealed from, reverse or modify the same, or grant a new trial, as to the said court may seem meet and conformable to law" (section 71, Code Cr. St.), yet I do not think the language quoted which is relied upon to sustain the action of the circuit judge in this case, can be properly construed as conferring a right of appeal from the exercise of mere discretion by the inferior tribunal within the limits prescribed by law. The well-settled rule, undoubtedly, is that there is no appeal from the exercise of discretion conferred upon the tribunal from which an appeal is sought to be taken. *Truett v. Rains*, 17 S. C. 453. Indeed, I do not see how the exercise of discretion, within the limits prescribed by law, can afford any ground of appeal; for, as is said in the case just cited, "it is bounded by no rule except the good sense and integrity of the party empowered to exercise it." I must think, therefore, that the power conferred by the statute above referred to should be construed, not as conferring the power to substitute the discretion of the court of sessions, in measuring the amount of punishment to be imposed, for that of the inferior tribunal from which the appeal is taken, but simply a power to modify the sentence so as to make it "conformable to law"; and, as the sentence appealed from in this case was already in conformity to law, there was no ground for the appeal to the court of sessions, and the same should have been dismissed.

(91 Va. 537)

CLAIBORNE v. RADFORD et al.¹

(Supreme Court of Appeals of Virginia. June 20, 1895.)

MARRIAGE SETTLEMENT—ATTEMPTED REVOCATION.

One E., in anticipation of marriage, conveyed to a trustee, in the usual form of a trust deed, certain stocks and bonds, with authority to the trustee to collect interest thereon, and pay the same to her during her life, "and at the death of said E. the property hereby conveyed shall pass to the children of the said E., if she leave any, but if she leave no children the same shall pass to her heirs at law, as though the same were real estate." *Hdd.* that the instrument was neither a power of attorney nor a will, and was irrevocable.

Appeal from circuit court, Bedford county; Dupuy, Judge.

Bill by Ellen Du Val Claiborne against Du Val Radford and others. From a decree for defendants, complainant appeals. Affirmed.

Griffin & Glasgow, W. W. Haden, R. G. H. Kean, and Bolling & Stanley, for appellant. Kirkpatrick & Blackford and M. P. Burks, for appellees.

KEITH, P. The appellant, Ellen Du Val Claiborne, who was Ellen Du Val Radford, filed her bill in the circuit court for the county of Bedford, making Du Val Radford (in his own name, and as administrator of R. C. W. Radford, deceased, and as administrator d. b. n. of Octavia Du Val Radford, deceased), Thomas S. Radford, and others, defendants, in which she asks that a decree may be entered requiring Du Val Radford to pay over to her the sum of \$10,000, which she claims as being in his hands, and as belonging to her. The defendant answered the bill, and, among other defenses, set out the fact that the complainant had, by deed, conveyed her interest in the money which she demanded of him to W. V. Wilson, upon a certain trust, and avers that the property demanded of him is claimed by the said W. V. Wilson, as trustee, and prays that the complainant may be required to amend her bill so as to bring her trustee before the court. This amended bill was filed, and the trustee made a party. In the amended bill the complainant presents for the consideration of the court the construction of the paper, in form a deed, dated the 2d of July, 1891, and which is as follows:

"This deed, made this the 2nd day of July, in the year of our Lord 1891, between Ellen Du Val Radford, party of the first part, and Wm. V. Wilson, Jr., trustee, party of the second part, witnesseth, that for and in consideration of the sum of five dollars, the receipt of which is hereby acknowledged, the said party of the first part does hereby grant, bargain, sell, and convey unto the said party of the second part, all of her stock, bonds, and other evidences of debt, to be held by him, the said party of the second part, and his qualified successors, upon the following

trusts, for the sole use and benefit of the said Ellen Du Val Radford for and during her life: The said trustee shall have power and authority to collect any and all outstanding debts whenever he may think proper to do so, and relend the principal, upon good city real-estate security. The interest and dividends on all the property hereby conveyed shall be collected by the said trustee, and paid over to the said Ellen Du Val Radford, and after deducting from the same reasonable compensation for the said trustee for his services. The stocks and railroad bonds now owned by the said party of the first part, and by this deed conveyed, shall not be sold by the trustee without the written consent of the said Ellen Du Val Radford, and in case of such sale the proceeds shall be reinvested or loaned out as heretofore provided by the said trustee. All of the said property hereby conveyed that is held by any bank or individual as collateral security for any debt of the said party of the first part shall be loaned for such debt, and the said trustee shall have the power to make the proper transfers, if necessary, for the settlement of such debt, but the same shall not be liable for any debt hereafter created by either of the parties of this deed. And at the death of the said party of the first part the property hereby conveyed shall pass to the children of the said party of the first part, if she leave any, but if she leave no children the same shall pass to her heirs at law, as though the same were real estate. Witness the following signature and seals: [Signed] Ellen Du Val Radford. [Seal.] Wm. V. Wilson, Jr. [Seal], Trustee.

"State of Virginia, City of Lynchburg, to wit: I, Thos. D. Christian, a notary public in and for the city and state aforesaid, do certify that Ellen Du Val Radford and Wm. V. Wilson, Jr., whose names are signed to the writing above, bearing date on the 2nd day of July, 1891, have acknowledged the same before me in my city aforesaid. Given under my hand this, the 2nd day of July, 1891. [Signed] Thos. D. Christian, Notary Public.

"Virginia. In the clerk's office for the corporation court for the city of Lynchburg, the 3rd day of August, A. D. 1891. This deed was presented, and, upon the annexed certificates of acknowledgments, admitted to record. Teste: [Signed] S. G. Wingfield, Clerk."

Complainant claims that this paper is not a deed, by which her interest in the property mentioned was divested, but that it is a power of attorney creating W. V. Wilson an agent for the management of the property mentioned therein, and that the concluding clause is testamentary in its character, and that the whole instrument, whether regarded as a power of attorney or a paper testamentary, is revocable; and, proceeding upon this idea, she, on the 5th day of October, 1892, executed another paper, under seal, by which she undertakes wholly to revoke and annul the aforesaid instrument, and to terminate the authority and interest of William V. Wil-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

son as trustee. The record presents two questions for our decision; one arising upon the original bill, and to which I shall no further advert than to say that, as the whole matter in controversy is settled by the disposition which we have made of the amended bill, no reference need be made to it in this opinion. We will address ourselves, therefore, to ascertaining the construction to be placed upon the paper purporting to be a deed, and dated the 2d of July, 1891. The arguments of counsel on both sides have been exhaustive of every phase of the subject, and the citation of authorities has presented for our consideration a great number of adjudged cases, many of which are not accessible to us here. In our view of the case, however, it is wholly free from doubt and difficulty, and may be determined by reference to well-established elementary principles. To us, the attempt to treat this paper either as a power of attorney or as a will seems to rest upon an entirely erroneous conception. As is said in the case of *Ewing v. Jones* (Ind. Sup.) 29 N. E. 1037, there is nothing in the paper, from beginning to end, to indicate that it is a will, or partakes of the character of a will. "In form, in substance, in recital, and declaration, it is a deed of trust." It is true that some of the instructions given the trustee as to the management of the property during the lifetime of the grantor would have been entirely appropriate in an instrument creating a mere agency, but there are also terms employed unusual, unnecessary, inappropriate, and improper for such purpose; and, taken as an entirety, it may be safely affirmed that no precedent can be produced of a power of attorney or will, or writing partaking of the double nature of power of attorney and will, presenting the characteristics of that under consideration. It grants, bargains, sells, and conveys absolutely, and without reservation or conditions, all the stocks and bonds, and other evidences of indebtedness, the property of the grantor, Ellen Du Val Radford, to William V. Wilson and his qualified successors, in trust for the sole use and benefit of the said Ellen during her lifetime. Is this the language of a power of attorney, or of an instrument creating a trust? It operates to vest in Wilson whatever interest Miss Radford may have had in the property described. Its operation is not postponed until her death, but it takes effect upon the instant of the execution of the paper. This deed was written, signed, and acknowledged before a notary on the 2d day of July, 1891. On the 3d day of August of the same year it was admitted to record in the office of the corporation court of the city of Lynchburg, and the grantor was married on the 8th day of the same month. The deed transfers all her personality to her trustee. It uses apt words for the creation of an equitable separate estate. It excludes the marital rights of the husband in the life estate which it creates, and carefully guards against his enjoyment of it after

her death by providing that it shall pass to her children, if she shall have any, or, if there are no children, that it shall pass to her heirs at law, as real estate. Looking to the surrounding circumstances, and to the language of the deed, it may fairly be considered that the contemplated marriage furnished the motive for the instrument, and that it was the purpose of the grantor to guard against the improvidence or the ill fortune of her future husband. Counsel for the appellant seize upon the phrase, "at the death of the party of the first part the property hereby conveyed shall pass to the children of the party of the first part, if she have any," etc., as clearly impressing a testamentary character upon the paper, but we cannot concur in this view. As we have seen, the property, upon the execution of the deed, vested at once in the trustee, and the direction of the clause just quoted is that it "shall pass," not from the grantor,—for it has already passed from the grantor, by virtue of the preceding part of the paper,—but that it "shall pass" from the trustee in whom it had vested, as directed, at her death. The Code has provided for the protection of the property of married women by creating what, for the sake of brevity, has been designated as "statutory separate estate," but by section 2294 of the Code the right to create equitable separate estates is preserved unaffected by the statute law. We are of opinion, therefore, that whether the deed of July 2, 1891, be regarded as an ordinary trust, or as a settlement made in contemplation of marriage, and creating a separate equitable estate in the grantor for life (in which aspect we are disposed, under all the circumstances of the case, to view it), we consider it as a valid, subsisting, irrevocable instrument. We are of opinion that there is no error in the decree complained of, and that it must be affirmed.

(91 Va. 796)

WEATHERMAN v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. June 20, 1895.)

RECORD OF PROCEEDING—SIGNATURE BY JUDGE—CRIMINAL PROCEDURE.

1. Code 1887, § 3114, requires that the proceedings of court for each day shall be drawn up at large, entered in a book, and read in open court, except on the last day of the term, when they shall be drawn up and read the same day; and that, after being corrected, the record shall be signed by the presiding judge. *Held*, that where the proceedings of the last day of the term are signed by the judge, his failure to sign the orders on the day a verdict of guilty was rendered will not avoid the verdict and judgment entered thereon.

2. A judge may sign a day's proceedings in the order book at the next term nunc pro tunc.

3. The signature by the judge of any day's proceedings in the order book need not be in the presence of one against whom a verdict of guilty was rendered on such day.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

On rehearing. For opinion on appeal, see 19 S. E. 778.

W. D. Tompkins, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

RIELY, J. This case is before us upon a rehearing, which was granted upon an assignment of error that was not passed upon in the opinion of the court delivered at the June term, 1894. We concur in the opinion of the court, delivered by Judge Lacy, upon the former hearing, which affirmed the judgment of the circuit court; and it is only necessary, therefore, to pass upon the single error assigned in the petition for a rehearing.

It appears that the judge of the circuit court omitted to sign during the term the orders of the court of the day on which the jury returned their verdict of guilty against the accused, and this is the ground of error on which the petition for the rehearing is based. It appears from the record that all the steps taken and proceedings had in the trial of the accused on that day, as well as on the other days during which the trial progressed, are wholly regular and in due form, and the only irregularity is the omission of the judge to affix his signature to the record of that day's proceedings. Is this an error for which the judgment of the circuit court should be reversed? Section 3114 of the Code is as follows: "The proceedings of every court shall be entered in a book, and read in open court by the clerk thereof. The proceedings of each day shall be drawn up at large, and read during that term, except those of the last day of a term, which shall be drawn up and read the same day. After being corrected, where it is necessary, the record shall be signed by the presiding judge." The statute does not in express terms prescribe that the orders of each day of a term of the court shall be separately signed, but that is the reasonable inference to be deduced from its language, and this is the general practice of the courts. The orders and proceedings of each day in a case are entered by the clerk in the order book under the direction of the court. These entries constitute the evidence of such of the proceedings as have taken place, and such of the orders as have been made by the court during the progress of the trial, as it is necessary should appear in the record, and the signature of the judge to the record authenticates them and establishes their genuineness. This, we apprehend, is likewise the effect upon all of the proceedings and orders of the term of the signature of the judge to the proceedings of the last day thereof. All entries made in the order book during the term which precede the signature of the judge are thereby authenticated. And as the proceedings on the subsequent days, including the last day, of the term at which the accused in the case at bar was convicted were duly signed, the

omission of the judge to sign separately the record of the proceedings of the day on which the verdict of the jury was returned to the court and recorded cannot invalidate the verdict of the jury or the judgment of the court. No order made by the court or proceeding had in a case during a term, and entered by the clerk in the record book, should be allowed to become invalid or to fail of effect by the omission of the judge, through inadvertence or neglect, to sign the record of the orders and proceedings of the day on which it was made or took place. Judge Staples in commenting on the statute prior to its amendment, in *Quinn v. Com.*, 20 Grat. 143, said: "But the failure of the judge to comply with the directions of the statute could not impair the rights of the commonwealth or those of a citizen in the record, as an instrument of evidence, or a muniment of title, or an absolute guaranty against a second prosecution and conviction for an offense already passed upon by a jury. Had the petitioners been acquitted, they could never have been questioned a second time for the same offense, although the judge had failed to sign the record. In the event of such failure, or a refusal on his part to do so, he might be compelled by mandamus to perform that duty." It is the apparent intention of the statute that each day's proceedings, when read and corrected, where it is necessary (which, under the statute, may be done during the term), should be separately signed; and while we do not deem this essential to the validity of the proceedings where the record is signed by the judge at the close of the term, yet there should be no laxity in this respect, but the intention of the statute, for good and obvious reasons, should be rigorously observed and obeyed. That which was intimated in the quotation from the opinion in *Quinn v. Com.*, supra, that where the judge has failed to sign the record he might be compelled by mandamus to do so, the judge of the circuit court did voluntarily in the case at bar. At the next succeeding term of the court, upon his attention being called to the omission, he then, with the following recorded statement, "Having inadvertently failed to sign this day's orders, and my attention being now for the first time called to the fact of the omission, I now, on this 9th day of November, 1892, sign the same now for then," affixed his signature thereto nunc pro tunc. There could certainly be no illegality in doing voluntarily what he could have been compelled to do.

The power of the courts to make entries of judgments and orders nunc pro tunc in proper cases, and in furtherance of the ends of justice, has been recognized and exercised from the earliest times; and the period in which the power may be exercised is not limited. *Freem. Judgm.* § 56; 1 *Black, Judgm.* §§ 126, 131; 16 *Am. & Eng. Enc. Law*, 1005, and note thereto; *Mitchell v. Overman*, 103 U. S. 62; and *Allen v. Bradford*, 37 *Am. Dec.*

689. And this power may be exercised as well in criminal prosecutions as in civil cases. *Freem. Judgm.* note to section 56; *Burnett v. State*, 65 Am. Dec. 131. If a court would have the right to enter a judgment and authenticate the record thereof now for then, it follows, as clearly as the greater includes the less, the whole a part, that the judge may sign in like manner the record of a judgment rendered or a proceeding had at a previous term and duly entered by the clerk upon the order book.

But it is further objected that the orders were signed by the judge in the absence of the accused. This was not error. Signing the record of the proceedings of the court was not a step in the prosecution of the accused, or any part of his trial. It was simply the authentication by the signature of the judge of the orders and proceedings that were made and had that day in the trial of the accused, when, as the record clearly shows, he was present in person. There is no error in the judgment of the circuit court, and it must be affirmed.

(91 Va. 808)

PITSNOGLE v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. June 20, 1895.)

INDICTMENT—DESCRIPTION OF PERSON — LARCENY — EVIDENCE.

1. An indictment alleged the larceny of a watch belonging to "Edmond Bolden," while the evidence showed it to be the property of "Ed Bolen." *Held*, that the names were idem sonans.

2. Where an indictment alleged the larceny of a "gold watch," evidence of the owner that he gave \$30 for it, and that when he purchased it it was represented to be gold, is sufficient to sustain conviction.

3. By Code 1887, § 3716, embezzlement is larceny.

4. Upon an indictment simply charging larceny, the commonwealth may show either that the subject of larceny was received knowing it to be stolen, or that it was obtained by a false token or pretense, or that it was embezzled.

5. The defendant lent B. six dollars on his watch, as security, and gave a receipt correctly showing the transaction, but, by fraudulently substituting another paper for the one he gave, attempted to convert the transaction into a sale. *Held*, that a verdict of guilty of larceny was sustained.

Error to hustings court of Roanoke; John H. Woods, Judge.

E. B. Pitsnogle was found guilty of larceny, and brings error. Affirmed.

Jas. T. Hinton, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

KEITH, P. E. B. Pitsnogle was indicted in the hustings court of the city of Roanoke for the larceny of a gold watch of the value of \$30, the property of Edmond Bolden. For this offense he was, at a subsequent term, tried before a jury, found guilty as indicted, and his punishment fixed at 15 days in jail and a fine of \$15.

The first assignment of error is that the court erred in overruling the demurrer of petitioner to the indictment. The indictment is in the usual form, and this objection cannot be sustained.

The second error assigned is that the court erred in overruling the defendant's motion to set aside the verdict on the ground that it was contrary to the law and evidence. First, because, as it is alleged, there is a variance between the allegations of the indictment and the proof, inasmuch as the indictment states that the watch was stolen from "Edmond Bolden," while the evidence is that the party whose property was stolen was named "Ed Bolen." The rule, as stated in 1 Bish. Cr. Proc. § 689, is that "if the names may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial." In the 16th volume of Am. & Eng. Enc. Law, p. 126, it is said that "whether or not two or more names are idem sonans may be determined by the court upon a mere comparison, where the issue is free from doubt; but the modern and approved practice is to submit the question to a jury whenever there is opportunity to do so, and where the correct sound appears at all doubtful or dependent upon particular circumstances." In our judgment, the court might very safely have disposed of this objection without the assistance of the jury, but as it seems to have taken the even more unexceptionable mode of determining the question (that of leaving it to the jury), the result is still less the subject of complaint or of error.

It is alleged in the indictment that a gold watch was stolen, and it is claimed that there is no proof that it was of gold. Bolen, its owner, testifies that he gave \$30 for the watch; that it was represented, when purchased by him, as a gold watch; and while there was no analysis or chemical test as to the metal of which it was made, this evidence would seem to be sufficient to justify the verdict of the jury upon this point.

The petitioner, however, relies more particularly upon the fact that the commonwealth has failed to show the essential elements which constitute the crime of larceny. Much of the oral argument was devoted to the attempt to show that proof of embezzlement would not sustain a common-law indictment for larceny. Whatever doubt may have existed upon this subject formerly, and however the rule may be in other courts, it is too well established in Virginia to be any longer the subject of controversy. Section 3716 of the Code says that if "any person

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

embezzle any money, note, bill, check, order, draft, bond, receipt, bill of lading, or any other property which he shall have received from another, * * * he shall be deemed guilty of the larceny thereof." In sections 3714 and 3722 identical language ("mutatis mutandis") is used with respect to receiving stolen goods and obtaining money under false pretenses. In *Anable's Case*, 24 Grat. 503, it was held that upon an indictment for larceny proof that the accused obtained money by false pretenses would sustain the indictment. It was argued there that the statute declaring that a person who obtained money or other goods under false pretenses should be deemed guilty of larceny ought to be construed as fixing the punishment of the offense, and not as changing the mode of the procedure or the form of the indictment; but Judge Christian, in his opinion, said: "Whatever may be the view of the court upon that question as an original proposition, it cannot now be reopened, and must be considered as *res adjudicata*." This principle was settled in *Dowdy's Case*, 9 Grat. 727, was followed in *Leftwich's Case*, 20 Grat. 716, and *Pierce's Case*, 21 Grat. 722, thus fixing the judicial interpretation of the statute. Since then it has been followed in *Fay's Case*, 28 Grnt. 912, in *Dull's Case*, 25 Grat. 965, and in *Shinn's Case*, 32 Grat. 899. The laws of Virginia have, since these decisions, been codified, and the statutes in question re-enacted, with this interpretation of the courts impressed upon them, and it must therefore now be considered as the settled law of this state that upon an indictment simply charging larceny the commonwealth may show either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense, or that it was embezzled. Upon another point in *Anable's Case* Judge Moncure dissented, but upon this point the court was unanimous, and in his dissenting opinion he declares that with respect to false pretenses, receiving stolen property, knowing it to be stolen and embezzled,—the statutes using identically the same language,—it is manifest that it was used in the same sense, and must receive the same construction in all. We are of opinion, therefore, that upon the indictment for larceny proof of embezzlement is sufficient to sustain the charge.

But it is contended that the proof of embezzlement is insufficient. It appears that the defendant lent Edmond Bolden \$6 for 30 days, and that, as security for the loan, he received in pawn Bolden's watch. The testimony of the defendant contradicts that of the commonwealth in certain particulars, but the great weight of evidence sustains the contention of the commonwealth, and from that it appears that Bolden pawned his watch with the defendant, who at the time gave a receipt which correctly stated the transaction; that he appropriated the watch to his own use;

and, by falsely and fraudulently substituting another and different paper for the one originally executed, that he attempted to convert a transaction which was originally a loan into a sale, and thereby vest the property of the watch in himself. I cannot conceive of evidence more conclusive of his guilt, if the witnesses who testify are worthy of belief. Their credibility was submitted to a jury, and the jury having found a verdict in accordance with their testimony, it is beyond the power of this court to disturb it. We are of opinion that the judgment is without error, and that it must be affirmed.

(91 Va. 801)

PORTERFIELD v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. June 20, 1895.)

GRAND JURY — INDICTMENT — PROSECUTION FOR BURGLARY — PRESUMPTIONS — POSSESSION OF STOLEN GOODS — REASONABLE DOUBT.

1. The failure to charge the grand jury as provided by Code 1887, § 3982, is not ground for reversing a conviction under an indictment found by them.

2. The fact that the charge to the jury was given partly by the clerk, partly by the court, and partly by the commonwealth's attorney, is not ground for reversal, when the defendant is not harmed thereby, and the jury are fully informed as to their duties.

3. On a prosecution for feloniously entering a barroom, with intent to commit grand larceny, a portion of a knife blade, tending to connect the accused with the crime, which was found in the barroom, was offered in evidence. *Held*, that it was error to refuse an instruction requiring the blade to be identified as belonging to the prisoner beyond a reasonable doubt before it should be considered as evidence against him, in the absence of any charge that every material circumstance must be proved beyond a reasonable doubt.

4. It is proper to charge that the exclusive possession of money recently stolen, unaccompanied by a reasonable account of how the possession was acquired, creates the presumption that the possessor is the thief, but that such possession is not *prima facie* evidence of housebreaking.

5. The possession of stolen goods is a circumstance which the jury may consider, in connection with other facts, in determining whether the possessor is guilty of housebreaking.

6. If any change in the substance of the verdict is to be made after its return by the jury, the jury should be sent back to their room, so that they may discuss the change uninfluenced by others.

Error to hustings court of city of Radford; George E. Cassell, Judge.

A. F. Porterfield was found guilty of grand larceny and housebreaking, and brings error. Reversed.

Martin Williams, A. R. Heflin, and Hoge & Hoge, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

BUCHANAN, J. The first assignment of error in this case is that the court failed to

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

charge the grand jury after they were sworn, and before they were sent to their room, as is provided by section 3982 of the Code.

The record shows that the grand jury were sworn, and were sent to their room, and afterwards brought in the indictment upon which the plaintiff in error was tried and convicted. There is no pretense that the grand jury was not properly organized, or that the indictment is not good, but the contention is that the failure of the record to show that the grand jury were charged by the court as to their duties vitiates the whole proceeding. The failure of the court to charge the grand jury as provided by statute did not cause any advantage to be lost, right destroyed, or benefit sacrificed to which the accused was entitled. Where no prejudice can result from the failure of the officers of the law to comply strictly with the provision of a statute, such provision is usually held to be directory. *Cooley, Const. Lim. p. 88, etc.* Section 3984 of the Code provides that the names of the witness upon whose evidence the grand jury make their indictment shall be written at the foot of the indictment or presentment. Section 3991 provides that in misdemeanors the name of the prosecutor, if there be one, shall be written at the foot of the indictment, when made. In each of these cases it has been held that the provisions are merely directory, and not mandatory, and the ground upon which such decision is based is that the failure to comply with the provision does not prejudice the accused. *Com. v. Dever, 10 Leigh, 685; Com. v. Williams, 5 Grat. 702; Shelton v. Com., 89 Va. 450, 16 S. E. 355.* This assignment of error must be overruled.

Another assignment of error is that the charge given to the jury which tried the accused was improper, because partly given by the clerk, partly by the court, and partly by the commonwealth's attorney. The proceeding complained of was irregular, and contrary to the usual practice. The court should see that its clerk, under its direction, informs the jury plainly what offenses are charged and embraced in the indictment, and the punishment that may be inflicted for each offense. While the charge complained of was contrary to the usual practice, the jury were fully informed as to their duties, and no prejudice resulted to the accused from such irregularity. This assignment of error must be overruled.

The refusal of the court to give instruction No. 1 asked for by the accused is assigned as error. The instruction asked is as follows:

"The court instructs the jury that, unless they believe from the evidence that the portion of the knife blade found in the store-room has been identified beyond all reasonable doubt as the same blade which was in the possession of the prisoner previous to the offense, they cannot consider or treat it as a circumstance against the accused." The accused was indicted for feloniously entering a barroom, with intent to commit grand larceny, and with the commission of that of-

fense. The evidence introduced by the commonwealth is wholly circumstantial. One of the circumstances relied on by the prosecution was that a portion of a knife blade was found in the barroom the morning after the alleged offense was committed, which it was claimed was part of the blade of a knife shown to have been in the possession of the accused very recently before the commission of the offense charged. The evidence upon this point, it was claimed by the accused, did not prove its identity with that certainty required by law, and could not, therefore, be relied upon by the jury in order to convict.

It is elementary that the guilt of the accused must be shown beyond a reasonable doubt, whether the evidence relied upon be direct or circumstantial.

In order to warrant a conviction for crime on circumstantial evidence, every essential fact or circumstance upon which conviction depends must be proved by competent evidence beyond a reasonable doubt. Chief Justice Shaw, in *Webster's Case*, laid down the rule on the subject as follows: "The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred, and they are to be proved by competent evidence, and by the same weight and force of evidence as if each were itself the main fact." 5 Cush. 295; *Starkie*, in his work on Evidence (9 Am. Ed. p. 856), says: "The party upon whom the burden of proof rests is bound to prove every single circumstance which is essential to the conclusion, in the same manner and to the same extent as if the whole issue had rested upon the proof of each individual and essential circumstance. 3 Rice, Ev. § 346. This rule must, from the very nature of the case, be correct; for how is it possible to reach a conclusion that the main fact is true beyond a reasonable doubt, when the material and essential facts from which it is to be inferred are not shown to be true with a like degree of certainty? The evidence introduced by the commonwealth as to the knife blade was clearly for the purpose of connecting the accused with the offense charged, and, if it were true, it was a very material circumstance against him. The object of the instruction asked for and refused was to inform the jury that they must be satisfied that the identity of the knife blade had been established beyond a reasonable doubt before they could rely upon that circumstance to convict the accused. The instruction does not state that, unless they believe that the circumstance in question was proved beyond a reasonable doubt, they must acquit the accused. It only cautions them that they must not consider it as evidence against the accused, unless so proved. If it was not so proved the jury ought not to have relied upon it as a circumstance showing his guilt, and if they had no right to rely upon it, because not sufficiently proved, there could be no objection to the court's so instructing them.

It was the duty of the court to have given the instruction as offered, or to have given a general instruction that every material circumstance in the case must be proved beyond a reasonable doubt, and if any such circumstance was not proved it was the duty of the jury to discard such circumstance in making up their verdict. The court erred in refusing to give the instruction asked for, and for that error its judgment must be reversed.

The court gave two instructions to the jury, upon motion of the commonwealth, to which the accused objected. The first was as follows: "The court instructs the jury that the exclusive possession of money recently stolen, unaccompanied by a reasonable account of how the possession was acquired, creates a presumption that the possessor is the thief, but such possession is not *prima facie* evidence of housebreaking." It is well settled in this state that if property be stolen, and recently thereafter be found in the exclusive possession of the accused, such possession, of itself, affords sufficient ground for a presumption of fact that he was the thief, and in order to repel such presumption it is incumbent on him, on being called upon for the purpose, to account for such possession consistently with his innocence. *Price's Case*, 21 Grat. 846, and authorities cited. The instruction complained of, while not in the usual form, we think, correctly states the law.

By the other instruction to which the accused objected the jury were informed that, while the possession of stolen goods was not *prima facie* evidence of the housebreaking charged in the indictment, it was a circumstance which they might consider, in connection with other facts, in determining whether he was guilty of that offense. This instruction was not to the prejudice of the accused, and is fully sustained by the decisions of this court in the case of *Walker v. Com.*, 28 Grat. 969, and *Gravelly v. Com.*, 86 Va. 396, 10 S. E. 431.

The jury brought in their verdict in the following words: "We, the jury, find the defendant, A. F. Porterfield, guilty of grand larceny, as charged in the indictment, and fix his punishment at confinement in the state penitentiary for the period of two years and six months." This verdict was amended by the commonwealth's attorney so as to read as follows: "We, the jury, find the defendant, A. F. Porterfield, guilty as charged in the within indictment, and fix his punishment at confinement in the state penitentiary for the period of two years and six months," and, as amended and assented to by each member of the jury, was received by the court, over the objection of the accused.

The practice of allowing the verdict of a jury to be put in form in open court is a proper, and in many cases a necessary, practice, but the amendment made in this verdict was not as to a matter of form, but of substance. By the verdict returned by the jury the accused was acquitted of feloniously en-

tering the barroom, and found guilty of grand larceny. By the amended verdict he is found guilty as charged in the indictment, which embraces both the offense of entering the barroom and of grand larceny. The fact that the jury was polled, and each member assented to the amended verdict, would perhaps cure the irregularity; but, as the cause has to be reversed upon other grounds, it is unnecessary to decide that question, and we are not to be understood as expressing any opinion upon it. The proper practice in such cases is for the trial court to see that the verdicts of the juries are put in proper form before they are discharged, but, if any change in the substance of the verdict is to be made, the jury should be sent back to their room, where they can, untrammelled by the presence or influence of others, find such verdict as they deem proper.

Other errors are assigned, but they are not of sufficient importance to require special notice.

The judgment of the corporation court of the city of Radford must be reversed, the verdict set aside, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

(81 Va. 548)

FISHBURNE et al. v. ENGLEDOVE.¹

(Supreme Court of Appeals of Virginia. June 27, 1895.)

DISTRESS WARRANT—ACTION FOR WRONGFUL LEVY—DAMAGES—JUDGMENT AS EVIDENCE.

1. In order that a judgment may be evidence against a party in another suit upon a different cause of action, it must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases, and must have been determined upon its merits.

2. In an action for damages occasioned by taking out a distress warrant against the plaintiff for rent due in March, 1891, judgment between the same parties in an action of unlawful detainer, rendered in November, 1890, is no evidence as to whether rent was due at the date of said warrant.

3. Where a trespass is committed without fraud, malice, or oppression, or other special aggravation, only compensatory damages can be given.

4. In an action under Code 1887, § 2898, for damages on account of an illegal distress for rent, the declaration alleged that defendant levied on \$975 of goods to satisfy a claim for rent amounting to \$400, and that in fact there was no rent due, and that, through the taking of the property, plaintiff incurred expense and had been deprived of great gains in his business, and had suffered heavy losses therein. *Held* that, there being no allegation showing circumstances of aggravation, only compensatory damages could be recovered.

5. Authority given to an agent to receive tenants for a building, receive rents, and to make contracts for repairs and insurance does not authorize him to have a distress warrant levied on a lessee's property.

Error to circuit court of city of Roanoke; Dupuy, Judge.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

The plaintiff below secured a verdict and judgment against the defendants, to which they bring error. Reversed.

Penn & Cocke, Scott & Staples, and Smith & King, for plaintiffs in error. Griffin & Glasgow, for defendant in error.

BUCHANAN, J. The defendant in error brought an action of trespass on the case against the plaintiffs in error in the circuit court of the city of Roanoke, to recover damages from them on the ground that they had sued out a distress warrant and had it levied upon his property for rent alleged to be due, when in fact there was no rent due and in arrears. Upon a trial of the cause, judgment was rendered in favor of the plaintiff for \$4,000. To that judgment the defendants obtained a writ of error, which is now to be disposed of.

Many errors are assigned to the action of the trial court, but in the view we take of the case it will be unnecessary for us to dispose of all of them in detail.

The first assignment of error is that the trial court erred in admitting in evidence the records in the action of unlawful detainer brought for the recovery of the leased premises, for the rent of which the distress warrant was sued out. The parties to the writs of unlawful detainer and the parties to the action of trespass were the same. The records in the unlawful detainer cases were objected to when offered in evidence, but the objections were overruled and the records admitted. Afterwards the court instructed the jury that they could not consider these records as evidence in fixing the damages in the case, but that they could consider them in determining the question whether or not any rent was due when the distress warrant was levied. Admitting, as is contended by the counsel of the defendant in error, that the question whether or not any rent was due at the time each of the actions of unlawful detainer was instituted was in issue in those cases, still those records were inadmissible as evidence in this case.

In order that a judgment may be evidence against a party in another suit upon a different cause of action, it must be rendered in a proceeding between the same parties or their privies, and the point must be involved in both cases, and must have been determined upon its merits. If the first action is disposed of upon any ground that does not go to its merits, the judgment rendered will not conclude the party. 7 Rob. Prac. 190; Bigelow, Estop. 38, 39; Black, Judgm. §§ 504-506.

The first of these actions of unlawful detainer was instituted in December, 1890. The distress warrant was taken out in March, 1891. Although the parties do not agree as to the terms of the lease, there is no question that it was for at least one year, beginning in June, 1890, and that the

rent was payable monthly in advance. The determination of the unlawful detainer case brought in December, 1890, admitting that the question whether or not any rent was then due was involved in that case, could not possibly determine or be evidence as to the question whether or not any rent was due in March, 1891, nearly three months afterwards, when by the terms of the lease the rents became due monthly during that period.

The second action of unlawful detainer was instituted in May, 1891, and was dismissed before the appearance of the defendants. There was no disposition of it upon its merits. By it nothing was determined or concluded between the parties. These records were therefore clearly inadmissible in evidence for the purpose for which the court allowed them to be introduced, or for any other purpose, and for such error the judgment complained of will have to be reversed.

Another assignment of error is that the damages assessed by the jury were excessive.

The determination of that question will require an examination of the declaration and the character of the damages that could be proved under it.

The action brought was not for maliciously taking out a distress warrant without probable cause, and having it levied upon the plaintiff's property when there was no rent due, but it was sued out under section 2308 of the Code, which provides that: "If property be distrained for any rent not due, or attached for any rent not accruing, or taken under any attachment sued out without good cause, the owner of such property may, in an action against the party suing out the warrant of distress or attachment, recover damages for the wrongful seizure, and also if the property be sold, for the sale thereof."

The declaration alleges that the rent claimed to be due, and for which the distress warrant was taken out, was \$400; that the property levied on was of the value of \$975; that in fact there was no rent due; and that by reason of the taking of the property the plaintiff was obliged to incur, and did incur, great expense, and has been deprived of great gains in his business, and has suffered and sustained great and heavy losses thereon.

There are no allegations in the declaration of such facts as would show that the alleged trespass was accompanied by circumstances of aggravation, nor is there the general allegation of *alla enormia*, under which circumstances of aggravation might be proved as they may when they do not afford a substantial ground of action, but are mere incidents to the trespass complained of. *Faulkner v. Alderson*, Gilmer, 226, 227; *Peshine v. Shep-person*, 17 Grat. 472, 473, 489. Even if it were true, as contended by counsel of de-

defendant in error, that the warrant of distress, the writs of unlawful detainer, and the threats of breaking up his business, were parts of a scheme to drive the defendant out of business, the frame of the declaration would not allow such facts to be proved to, or be considered by, the jury. When a trespass is committed without fraud, malice, oppression, or other special aggravation (and this alleged trespass must be so treated under the pleadings in the cause), the object of the law is to give compensation for the injury suffered, and damages are restricted to that object. *Id.* at page 484.

Tested by this rule, the damages assessed by the jury were plainly excessive.

As the judgment must be reversed and a new trial awarded for other errors, it is not necessary, and is perhaps best for us not to go into a detailed statement of the evidence to show that the damages allowed are excessive. It will be sufficient to say that the evidence wholly fails to show that the damages which were the natural and proximate result of the trespass complained of amounted to the sum of \$4,000, and that the jury, in reaching their verdict, must have been influenced by the improper evidence admitted, and by the erroneous view that there were aggravating circumstances accompanying the alleged trespass which they had the right to consider.

The plaintiff's instruction No. 4 and the defendants' instruction No. 4, which were given, and the defendants' instructions Nos. 8, 9, 11, and 12, which the court refused to give, all referred to the question whether, under the contract of lease, the cost of the permanent improvements, which the plaintiff was authorized to make, was to be treated as a set-off against the rent, or whether the tenant had the right to appropriate the rent as it became due to the satisfaction and payment of the cost of improvements. The contract of renting was not reduced to writing. The parties differed as to what it was. The plaintiff claimed that he was authorized to make the permanent improvements and pay for them out of the rent as it became due from month to month. The defendants claimed that the plaintiff was to make the improvements at his own expense if he occupied the leased property more than one year, and if he only occupied it one year, then the defendants were to pay for the improvements.

The plaintiff's instruction No. 4 correctly stated the law if the jury were satisfied that the terms of the contract of lease were as contended for by the plaintiff. On the other hand, the instruction of the defendants numbered 4 was a correct statement of the law if the jury believed that the terms of the contract were as the defendants claimed. The court properly gave both instructions, and properly refused to give the defendants' instructions Nos. 8, 9, 11, and 12.

The court did not err in refusing to give instruction No. 10, asked for by the defendant Coon.

Instruction No. 1, given for the defendants, correctly stated the law that the defendants, nor either of them, were liable for damages in this case unless they or he, as the case might be, directed or approved the proceedings had under the distress warrant, or failed to repudiate the proceedings after full knowledge thereof. If defendant Coon desired a separate instruction upon this point, he was entitled to it, as he had put in a separate plea, but the instruction he asked for did not state the law correctly, and was properly refused.

Another error assigned is that the court, in giving an instruction for the plaintiff, assumed that his business was a profitable one, instead of leaving that question to the jury.

The language complained of is: "Yet the jury may consider the evidence as to what the profits had been for a reasonable time before the levy of the said warrant of distress, in determining the character and extent of the plaintiff's injury, and the amount of damages, if any, to which the plaintiff is entitled." If the instruction does not assume that the defendants' business was profitable, it is at least ambiguous, and upon the next trial, if an instruction be requested upon the same point, it should be so framed as to leave the question of whether the business was profitable or not to the jury.

The assignment of error that the verdict of the jury did not respond to all the issues in the cause cannot be sustained. There was only one issue submitted to the jury, and that was whether the defendants were guilty of the trespass alleged in the declaration. The trespass was alleged to have been committed by them jointly. Whether they pleaded jointly or separately that they were not guilty did not change the issue. If the jury found all guilty, as they did, the verdict was sufficient as they found it, viz.: "We, the jury, find for the plaintiff, and assess his damages at \$4,000." If they had found that any of the defendants were guilty, the verdict should have been for the plaintiff, and damages assessed against those who were so found, and in favor of such defendant or defendants as were found not guilty. 2 Tuck. Bl. Comm. 92.

The authority given by the defendants to the Fidelity Trust Company, as its agent, "to receive tenants for, receive rents, make contracts for (and pay off same) repairs to and insurance upon said building, provided that the said company shall not lease said building or any part thereof for more than one year without first obtaining the consent of the majority of the owners in interest," did not authorize that company to take out the distress warrant and have it levied upon the plaintiff's property. *Mechem, Ag. § 396.* The defendants' instruction No. 1, as given by the court, correctly stated the law as to what was necessary to make the defendants, or either of them, responsible for the taking

out of the distress warrant by the Fidelity Trust Company.

Whether the contract of lease between the plaintiff and the defendants was for one year or for five years is not material in determining what, if any, damages the plaintiff is entitled to in this case, and as the question involved is an important one, and it is not necessary to decide it in order to dispose of this case, we express no opinion upon it.

Without expressing an opinion upon other questions discussed in the petition and brief of the plaintiffs in error, and which may not arise upon another trial, the judgment must be reversed, the verdict set aside, and a new trial awarded to be had in accordance with this opinion.

(91 Va. 384)

LANGHORNE v. RICHMOND CITY RY. CO.¹

(Supreme Court of Appeals of Virginia. April 18, 1895.)

AMENDING PLEADINGS AT TRIAL.

Where, in an action against a railroad company for personal injury, after plaintiff's evidence was in, defendant introduced written evidence which showed that at the time of the accident the property and franchise of defendant was owned by another company, the refusal to allow plaintiff to amend the writ and declaration so as to show that the two companies were the same was error, as Code 1887, § 3384, authorizes the court to allow amendments, where there is a variance between the allegations and the proof, in order to promote justice.

Error to circuit court of city of Richmond; B. R. Wellford, Judge.

Action for personal injuries by Charles M. Langhorne, an infant, by his guardian, against the Richmond City Railway Company. Defendant had judgment, and plaintiff brings error. Reversed.

James Lyons and W. P. De Saussure, for plaintiff in error. Wyndham R. Meredith and Christian & Christian, for defendant in error.

BUCHANAN, J. This case was decided by this court at its March term, 1894, and the judgment of the circuit court of the city of Richmond, to which the writ of error was awarded, was reversed.² A rehearing was granted, and in this way the case is again before this court.

In the year 1890 the plaintiff in error brought an action of trespass on the case against the Richmond Railway Company, in the circuit court for the city of Richmond, to recover damages for injuries alleged to have been done him by the defendant company while traveling as a passenger on its road. The case was tried in the year 1891, and a verdict and judgment rendered in favor of the defendant.

There are several assignments of error, but, in the view we take of the case, it will only

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

² There was no opinion filed.

be necessary for us to consider one of them, and that is, did the court err in overruling the plaintiff's motion to amend his pleadings during the trial of the cause?

After the plaintiff had introduced his evidence, which tended to show the injuries done him, and his right to recover damages, the defendant introduced certain written evidence, which tended to show that the defendant, the Richmond City Railway Company, had become the owner, by purchase, of the property, rights, and franchises of the Richmond Railway Company, the corporation owning and operating the street railway at the time the injury complained of was done, and that it was not responsible to the plaintiff for the injuries done him. The plaintiff, after offering in evidence, in rebuttal, an older deed of trust upon a portion of the property of the Richmond Railway Company than the trusts under which its property had been sold, as claimed by the defendant, moved the court to allow him to amend the writ and declaration in the case. The object of the amendment which he asked to be allowed to make was to put in issue the question whether or not the Richmond Railway Company and the Richmond City Railway Company were one and the same corporation, known by both names. There was no allegation in the declaration that such was the fact. The counsel for the defendant insist that proof was admissible to show such identity without such an allegation, and that there was no necessity for the amendment, if it were otherwise proper, which they deny. That view cannot be sustained. The evidence must be confined to the issues made by the pleadings. This is the general and well-settled rule. But for the earnestness of counsel in presenting the opposite view, we would not consider it necessary to cite authority upon this question. A corporation may be known by several names, as well as a natural person, and a recovery may be had against it in its true name, provided its identity "be averred in pleading, and apparent in proof." In *McGregor v. Implement Co.*, 72 Iowa, 143, 33 N. W. 464, it was held, in an action on an account, that the value of services rendered to one corporation cannot be recovered in a suit against another corporation on the ground that the two corporations are identical, and that there was only a change of name, unless the fact thus relied upon is distinctly alleged in the plaintiff's pleading. *Ang. & A. Corp.* § 234; 2 *Beach, Priv. Corp.* § 864; *Daniel, Neg. Inst.* § 399; 4 *Am. & Eng. Enc. Law*, 204, note 3.

When the motion to amend was made there was a variance between the allegation and the proof, and unless the amendment was allowed, and the plaintiff given an opportunity to show the identity of the Richmond Railway Company and the Richmond City Railway Company, he must fail in his action. Section 3384 of the Code provides that, "if at the trial of any action there appears to be

a variance between the evidence and allegations, or recitals, the court if it consider that substantial justice will be promoted, and that the opposite party will not be prejudiced thereby, may allow the pleadings to be amended on such terms as to the payment of costs, or postponement of the trial, or both as it may deem reasonable."

Statutes allowing amendments are favored, and, although resting in the sound discretion of the court, the authorities, without exception, it is said, declare that such statutes are remedial, and must be construed liberally. *Enc. Pl. & Prac.* 516, 517. Section 3384 of the Code was clearly intended to provide for such cases as the one under consideration. By allowing the pleadings to be amended so as to put in issue the identity of the Richmond Railway Company and the defendant company, the whole controversy between the parties could have been settled. By refusing it the court compelled the plaintiff to take a nonsuit, or to submit to a verdict in favor of the defendant, not upon the merits of the case, but because, as it appeared from the evidence then before the jury, one corporation had done the injury complained of, and another corporation had been sued; and that, too, when the plaintiff was insisting that this was not the fact, but that they were one corporation known by both names, and asking the court for leave to amend his declaration, that he might have an opportunity to introduce evidence to show it. There is no suggestion of laches on the part of the plaintiff in not amending, or asking leave to amend, his pleadings earlier. Neither does it appear that the defendant would have been prejudiced thereby, except in being prevented from taking advantage of the variance between the pleading and proof in the cause, which advantage it was one of the expressed objects of section 3384 of the Code to prevent.

The circuit court, we think, erred in refusing to allow the declaration in the case to be amended, and for that error its judgment will have to be reversed, the verdict set aside, and a new trial awarded, with leave to the plaintiff to amend his declaration. And as the evidence may be different upon the next trial, upon the amended pleadings, it is unnecessary to pass upon the other assignments of error, which are based upon the court's action in giving and refusing instructions.

(91 Va. 534)

RENSCH v. ROANOKE COLD STORAGE CO.¹

(Supreme Court of Appeals of Virginia. June 20, 1895.)

ACTION FOR LIBEL — SPECIAL DAMAGES — INJURY TO BUSINESS — PRIVILEGED COMMUNICATIONS — HEARSAY EVIDENCE — RES GESTAE.

1. Where the only special damage claimed in an action of libel is for a loss of customers,

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

but no names of customers are pleaded, there can be no proof of the loss of particular customers.

2. The defendant notified a hotel company to hold back \$312 owing by the latter to plaintiff, that being the amount due by him to the defendant for meat furnished to the hotel on the faith of receiving the money from the latter, "and upon your [hotel's] assurance that your company would see it paid; hence you are notified, as a protection to yourself, not to pay the sum over to any one" but the defendant. *Held* that this was a privileged communication.

3. An admission by the general manager of a defendant in a libel suit, made two weeks after the alleged libel, that his company had no right to stop plaintiff's money, and that the letter had been written to injure the plaintiff's business, is not competent evidence, being hearsay, and too far removed in time from the writing to be part of the *res gestae*.

Error to circuit court of city of Roanoke; Dupuy, Judge.

Action by N. Rensch against the Roanoke Cold Storage Company for libel. To a judgment in favor of defendant, plaintiff brings error. Affirmed.

Wright & Hoge, for plaintiff in error. Penn & Cocke, for defendant in error.

HARRISON, J. This is an action for libel under the statute, which is set forth in the Code in section 2897. The following letter constituted the basis of said action: "To the Virginia Company: You are hereby notified to hold out of any funds due by you to Mr. N. Rensch, of Roanoke, the sum of \$312.60, being the amount due by him to the Roanoke Cold Storage Company for meat furnished to you on the faith of receiving the money from you, and upon your assurance that your company would see it paid; hence you are notified, as a protection to yourself, not to pay the sum over to any one but this company. [Signed] Roanoke Cold Storage Company. By Herman Crueger, President. Roanoke, Va., Nov. 21st, 1891."

It appears from the record that the plaintiff in error, N. Rensch, was a butcher in the city of Roanoke, and furnished the Hotel Roanoke, which was owned by the Virginia Company, with meats, and that he procured the meats thus furnished from the Roanoke Cold Storage Company.

The declaration charges that the defendant wrote and published the letter referred to, falsely, maliciously, and with the intention to insult the said plaintiff; that the words used were scandalous, malicious, defamatory, and insulting, and from their common acceptance are construed as insults, and tend to violence and a breach of the peace; and that by the means thereof he has been greatly injured and damaged in his good name, fame, and credit, and brought in public scandal, infamy, and disgrace with and among his neighbors, inasmuch that those who formerly dealt with him refuse to have any further business transactions with him.

If any special damage is claimed in the declaration, it is for loss of customers. There is no person mentioned in the declaration

whose custom the plaintiff has lost; and there can be no proof received except as to those named in the declaration. Newell, Defam. p. 780, § 26. There is no evidence, however, in the record showing any loss of customers by the plaintiff, nor is there evidence tending to sustain the sweeping charge of wrong and injury alleged to have been suffered by him. The court below properly held that the letter complained of was a privileged communication, and properly submitted to the jury the question whether the defendant had been guilty of malice in its publication. The verdict returned was for the defendant. There is no legal evidence in the record to suggest malice in publishing this letter. The only testimony on the subject is that of Mr. Herman Crueger, the president of the Roanoke Cold Storage Company, who says that he hardly knew the plaintiff personally, and did not then have, and had never had, any ill will against him; that he had no purpose in writing the letter but to collect the money he believed to be due the company.

The plaintiff assigns as error that the court below excluded from the consideration of the jury the testimony of John H. Wright. This witness testified that, several weeks after the letter was written, he had a conversation with H. D. Coyner, the general manager of the defendant company, in which said Coyner admitted that his company had no right to stop the plaintiff's money in the hands of the Virginia Company, and that the purpose in writing the letter was to cause the Hotel Roanoke to stop dealing with Rensch. This evidence was hearsay, and properly excluded. If these alleged admissions were true, and properly proven, it could not be considered as evidence against the defendant company, because they were made several weeks after the letter complained of was written, and such evidence to be admissible must form part of the *res gestae*. *Railroad Co. v. Sayers*, 26 Grat. 328.

A further assignment of error is the refusal of the court to give five instructions offered by the plaintiff. There was no evidence upon which to base the instructions asked for, and they were properly refused.

The two instructions given by the court correctly expounded the law of the case, and were all it was proper to give.

The defendant in the court below demurred to the declaration, and the demurrer was overruled. It is insisted that this was error. This raises the question of the right to hold a corporation responsible for libel under our statute as at common law, for the reason that a corporation cannot be guilty of the offense for which this statute is intended to afford a remedy. The view already taken of this case makes it unnecessary to consider this question.

There is no merit in the case presented by the plaintiff in error, and the judgment of the circuit court is affirmed.

ROBERTSON v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. June 20, 1895.)

PROSECUTION FOR MURDER—EVIDENCE—DISCREDITING WITNESS—REVIEW ON APPEAL.

1. It is proper to refuse to allow a witness for the defense to contradict a witness for the commonwealth who states that another witness for the commonwealth had not told him that he could not tell the same tale he had told before the justice, as this introduces a purely collateral issue.

2. On an assignment of error based on a refusal to set aside the verdict as contrary to law and evidence, the case on appeal stands as upon a demurrer to the evidence, and the judgment will be reversed only if the jury plainly decided against the evidence, or without evidence.

3. Defendant, while returning from church with deceased and others, in the nighttime, became quarrelsome and profane, and finally got into a fight with deceased, during which he gave deceased a mortal wound. It did not appear whether deceased struck the first blow, but it appeared that he did not have a deadly weapon in his hand. A few minutes before, defendant had remarked that his knife, with which he cut deceased, "had never gone back on him yet." *Held*, that a verdict of murder in the second degree would not be disturbed.

Error to circuit court, Franklin county; George D. Peters, Judge.

Joseph B. Robertson was found guilty of murder in the second degree, and brings error. *Affirmed*.

Anderson & Hairston, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

CARDWELL, J. Joseph B. Robertson, under an indictment in the county court of Franklin county for the murder of Malcolm Cundiff, was on November 9, 1893, convicted of murder in the second degree, and sentenced to the penitentiary for a term of eight years. From this judgment of the county court a writ of error was obtained to this court, having been refused by the circuit court of Franklin county. The three bills of exceptions to the rulings of the trial court are very imperfectly and irregularly prepared, and in such a manner that we cannot say that the evidence at the trial is properly before this court; but, as an examination of the evidence does not affect the result of our consideration of the case, we will take no further notice of the irregularity.

The first exception is to the ruling of the trial court in refusing to allow John Hunt, a witness for the defense, to contradict a witness for the commonwealth who stated that another witness for the commonwealth had not told him that he could not tell the same tale he had told before the justice. This evidence was an attempt to prove a matter purely collateral and irrelevant to the issue, and was, in our opinion, properly rejected by the court.

Second. Exception is taken to the action of the court in overruling the prisoner's motion

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

in arrest of judgment on the ground that there was error apparent on the face of the record, and it is in this bill of exceptions that the evidence at the trial is certified, and no reference is made in the third bill of exceptions to this bill. We have been unable to find the alleged errors apparent on the face of the record. Therefore, this exception is without merit.

The third and last bill of exceptions is to the ruling of the court in refusing to set aside the verdict of the jury as contrary to the law and the evidence. The case stands here as upon a demurrer to the commonwealth's evidence (section 3484 of the Code, as amended), and this court will set aside a verdict on such a motion only in a case where the jury have plainly decided against the evidence, or without evidence. *Blosser v. Harshbarger*, 21 Grat. 214, and cases cited; *Cash v. Com.* (Va.) 20 Grat. 893; and *Nicholas v. Com.* (Va.) 21 S. E. 368,—the two last cases decided by this court at a recent term. The evidence in this case shows that the plaintiff in error, with a number of others, including the deceased, was, in the nighttime of the 13th of August, 1893, going from preaching at Doe Run church or schoolhouse, in Franklin county; that he was cursing and swearing at the crowd, and particularly trying to create a difficulty with one John Altie; that he (the plaintiff in error) continued with the crowd beyond the road that he usually went to his own home, and continued to curse and swear in a violent manner, and finally pulled off his coat, and, with profane language, invited a difficulty with any and every man in the crowd; that the deceased was only heard to ask him to stop cursing and swearing; and that when he did this a difficulty began between plaintiff in error and the deceased, which terminated in a brief space of time, but not before the plaintiff in error had rent the left breast of deceased's vest, cut through the crown of his hat with a knife, or some sharp instrument, and inflicted a ghastly wound upon his neck, from which he died within a week. From this testimony there can be no doubt but that, when the difficulty was invited by the plaintiff in error, he had his knife ready for use, and began to use it from the first, and not, as claimed, in self-defense. He had but a few minutes before spoken of his knife, and said, that "it had never gone back on him yet." It is true that the evidence in the case is conflicting, especially so as to whether or not deceased struck the first blow; but if this be granted, the evidence fails to show that he had a deadly weapon in his hand,—it shows the contrary,—and utterly fails to show that the plaintiff in error had reasonable grounds to fear any great bodily injury when he inflicted the fatal cut. For these reasons, we are clearly of the opinion that there is no error in any of the rulings of the county court of Franklin county, and its judgment must be affirmed.

(91 Va. 562)

ASBERRY et al. v. CITY OF ROANOKE.¹
(Supreme Court of Appeals of Virginia. June 27, 1895.)

CONSTITUTIONAL LAW — ASSESSMENTS FOR PUBLIC IMPROVEMENTS — PERSONAL DEBT.

Section 7 of chapter 3 of the charter of Roanoke, in so far as it authorizes the creation of a personal debt against property holders for the amount of assessments for local improvements, and which debt may be enforced by bill in chancery, suit, or motion, is unconstitutional.

Error to circuit court of city of Roanoke; Dupuy, Judge.

A. S. Asberry and others bring error to a judgment against them and in favor of the city of Roanoke. Reversed.

Scott & Staples, Phlegar & Johnson, and W. W. Berkeley, for plaintiffs in error. W. A. Glasgow, Jr., for defendant in error.

CARDWELL, J. This was a motion under the statute, in the court below, for a judgment against A. S. Asberry and J. W. Coon, plaintiffs in error here, for the sum of \$101.75; being the amount assessed against them as owners of a lot of land situated on Campbell avenue, in the city of Roanoke, on account of the costs of paving Campbell avenue. Judgment was awarded the city of Roanoke, in the trial court, for the amount claimed in the notice, and to this judgment a writ of error was awarded the defendants by this court.

As this action, as we have seen, was brought to recover a personal judgment against the defendants for the amount assessed against them, or their property on Campbell avenue, and not to enforce a lien on the property by virtue of the assessment, the sole question upon which the case is to be disposed of here is whether or not section 7 of chapter 3 of the charter of Roanoke city, which authorizes the creation of a personal debt against the defendants for the amount assessed against them on account of the cost of paving Campbell avenue in front of their property, and which lien or debt may, under said section of the charter, be enforced by a bill in chancery, suit, or motion, is a constitutional and valid act of legislation.

Section 7, c. 3, of the charter of the city of Roanoke, is as follows: "Whenever any new street shall be laid out, or street paved or graded, culverts or sewers built, or any other public improvements whatsoever made, the council shall determine what portion, if any, of the expense thereof shall be paid out of the city treasury, and what portion, if any, by the owners of the real estate benefited thereby; and for whatever amount the council shall decide shall be paid by the owners of the real estate bounding and abutting on said street, or benefited by any such improvements, an assessment shall be levied by the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

council by the front foot bounding or abutting or benefited as aforesaid, which said assessment shall be payable within ninety days from the date it is made, and shall be a lien upon the property upon which it is assessed from the date of such assessment, and shall also be a personal debt of the owner of the property, which lien and debt may be enforced by a bill in chancery, suit, or motion; . . ."

The question of personal liability for local assessments is a new one in Virginia. In fact, it has been raised and discussed in but few of the states of the Union, and is considered as not well settled even in those states. 24 Am. & Eng. Enc. Law, 77.

It is argued by the learned counsel for the city of Roanoke that by inference to be drawn from the opinion of this court, by Lewis, P., in *Green v. Ward*, 82 Va. 324, the court has determined that, where the charter of a city plainly permits the assessment for local improvements to be made a personal charge upon the abutting lot owner, the authority to do so cannot be questioned, but we do not understand that such an inference can be rightly drawn from that decision. The only language used by the learned judge, in the opinion delivered in that case, tending to warrant this inference, is, "In no case, therefore, can such an assessment be held a personal charge, except where plainly permitted by legislative authority, and there is no such authority in the present case"; that is to say, that the charter of the city of Alexandria, under which the case then under consideration arose, did not confer the authority. But just preceding the language of Lewis, P., quoted, he clearly indicates that such a provision in the charter would have met with little favor with the court, and would have been regarded as productive of hardship and injustice, and violative of the principle upon which local assessments are made.

It is furthermore argued in support of this provision of the charter of Roanoke that the right conferred to enforce the local assessments made in that city for improving the streets, against the abutting lot owner, as a personal charge or debt, is only an additional, convenient, or more expeditious remedy for the collection of such assessments. Can such a contention be maintained, and is this the only effect of that provision in the charter? We think not. In our opinion, when the legislative act authorizes the authorities of the city to create a personal charge or debt against an abutting lot owner for the assessment levied upon his property for the entire cost of improvements to the street in front thereof, the theory, and the only theory, upon which the assessment can be upheld, if at all, is abandoned, and the act at once authorizes a system of taxation for city or local purposes that is unequal, and without uniformity, as required by section 1, art. 10, of the constitution of Virginia. "These assessments are not founded upon any idea of rev-

enue, but upon the theory of benefits conferred by such improvements upon the adjacent lots." *City of Norfolk v. Ellis*, 28 Grat. 227. Strike out the element of benefit, and a special assessment loses its foundation. *Elliott, Roads & S.* 405. So long as the lot owner is the recipient of benefits to his property by improvements to the streets, or otherwise, over and above the general benefits to all property owners in the vicinity, the theory of benefits may be considered as maintained, as he bears no greater burden than other taxpayers similarly situated; but, when an act of the legislature undertakes to confer upon the authorities of a city power to place him in any worse position, such an act must be held as unconstitutional and inoperative. *Hare, Const. Law*, 291. "If there be a personal assessment, or the owner can be made personally liable for the tax thus imposed, then we have a remarkable result,—that, for a tax which is imposed upon a lot of land upon the theory that its pecuniary value is increased by the improvement, the lot may be sold, and if there is a deficiency the owner may be required to pay it; or in other words, for the benefit conferred on the property the property may be confiscated, and the owner, for the privilege of having it confiscated, may be required to pay a tax into the treasury of the city." *Burroughs, Tax'n*, 475. In the case of ordinary taxes, no sufficient reason exists why those on land should not be made a personal charge against the owner, if he is a resident, and has the usual opportunity to be heard. The taxes are not so much assessed in respect to the particular land, as the value of the particular land is taken as the measure of the owner's duty to the state. He is not taxed in consideration of state protection to that particular item of property, but he is taxed for the general protection which the state affords to his life, his liberty, his family, and social relations, his property, and the various privileges the law grants to him. If the tax measured by the property should, in its enforcement, take from him more than that property is worth, it would not follow that the state had taken beyond the equivalent rendered. Indeed, the contrary would be almost certainly the fact. It is different in a case of an assessment made upon the basis of a benefit. Such an assessment regards nothing but the benefits to be conferred upon the particular estate. The levy is made on the supposition that that estate, having received the benefits of a public improvement, ought to relieve the public from the expense of making them. In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, it is conclusively shown he has not received, and he then be held liable for the deficiency in the assessment, the injustice, not to say the tyranny, is manifest. But such a case is liable to occur if assessments are made a personal charge, and cases like it in principle, though

less extreme in the injury they inflict, are certain to occur. Cooley, Tax'n, 471, 472. It has, however, been suggested in argument that no such results as are mentioned in the authorities quoted could follow in the case here, as the amount assessed against the plaintiffs in error, and sought to be collected in this action, is but a small part of the value of the property assessed,—not more than a month's rent. But it is not with reference to this case only that we are called upon to pass upon the constitutionality of the act in question. We must view it with reference to the practical results that may follow its enforcement.

Without, as before intimated, expressing any opinion as to the constitutionality of section 7, c. 3, of the charter of Roanoke, in so far as it confers upon the council of said city the power to assess abutting lot owners by the front foot with the entire cost of paving or otherwise improving the street in front of the lots so assessed, we are of opinion that section 7, c. 3, of the charter of Roanoke, in so far as it authorizes a creation of a personal debt or liability upon an abutting lot owner for assessments levied to meet costs of street improvement, is in conflict with section 1, art. 10, of the constitution of Virginia, and inoperative. Therefore the judgment of the circuit court of Roanoke city against the plaintiffs in error must be reversed and annulled, and this court will enter such order in this cause as the circuit court should have entered, dismissing the motion upon which this action was brought, with costs to the plaintiffs in error.

(91 Va. 575)

EWING v. LITCHFIELD et al.¹

(Supreme Court of Appeals of Virginia. June 27, 1895.)

SPECIFIC PERFORMANCE—AGREEMENT FOR LIQUIDATED DAMAGES—ENFORCEMENT OF PENALTY.

1. E. agreed with L. to construct or procure the construction of a railroad into coal fields of the V. & T. Co., in which company L. was a large stockholder, and L. agreed to procure for E. the controlling interest in the stock of said company at certain rates. Upon the failure of E. to perform his part, L. was to receive of him \$50,000 of the stock of said company, or \$5,000 in money in lieu thereof, by way of ascertained and liquidated damages. *Held*, that a bill in equity by L. to enforce the assignment of said \$50,000 of stock, on E.'s failure to carry out his agreement, was demurrable, as being in effect a bill to enforce payment of liquidated damages or a penalty.

2. Equity will not compel a specific performance of a contract to build a railroad.

Appeal from circuit court, Washington county; Sheffey, Judge.

Bill by one Litchfield and others against Thomas Ewing. Decree for complainants, and defendant appeals. Reversed.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

White & Penn, for appellant. Daniel Trigg, for appellees.

KEITH, P. This bill was filed in the circuit court of Washington county by Litchfield and others, and sets forth the following facts: In January, 1890, the plaintiffs entered into a contract with J. D. Imboden, by which the plaintiffs and the said Imboden agreed to procure \$100,000 of the stock of the Virginia & Tennessee Coal & Iron Company at the price of \$10 or less per share of \$100 each. These shares, together with 15,000 shares owned by the plaintiffs, were to be voted in a stockholders' meeting, to be held within a period named, and upon a notice prescribed in the contract, so as to acquire the control of \$1,950,000 of the stock which remained in the treasury of the Virginia & Tennessee Coal & Iron Company. This block of 19,500 shares of stock was to be sold to Imboden at \$10 per share, and in consideration of his purchase of the said treasury stock at this reduced rate he undertook to secure and cause to be submitted to the said meeting of stockholders, for their ratification, a contract, by and on behalf of the Danville & East Tennessee Railroad Company and the Atlantic & Danville Railroad Company with the Virginia & Tennessee Coal & Iron Company, binding the railroad companies to extend their roads into the lands and coal fields of the coal and iron company, or to make connections therewith satisfactory to the said parties by means of other railroads, by the 1st of January, 1893, and to complete and have in operation the line of said railroad companies from Abingdon to Damascus on or before the 1st day of January, 1891, and to complete and have in operation all that part of the line of said railroads and their connections, so as to connect Abingdon and the coal fields, by the 1st of January, 1893, and then binding the said railroad companies, under certain terms therein named, for the transportation of the product of the coal fields, owned by the Virginia & Tennessee Coal & Iron Company. It is further provided that, unless the party of the first part, J. D. Imboden, or his assignees, shall, at the meeting of the stockholders provided in the contract, purchase the treasury stock and deliver or cause to be delivered the contract of the railroad companies, as hereinbefore provided, or in the event of the failure of the first party to notify the parties of the second part of his readiness to conform to and to comply with the provisions of this agreement, then the contract entered into was to be null and void, except that the parties of the second part "shall be entitled to demand and receive from the party of the first part the amount of \$50,000 of the stock of the Virginia & Tennessee Coal & Iron Company, or \$5,000 in lieu thereof by way of ascertained and liquidated damages on account of the breach of this contract." There are details of the contract entered into between the parties which I have thought it unnecessary to set

out, but have contented myself with reciting what I conceived to be the features of the contract upon which this controversy depends. The \$50,000 of stock was to be deposited with the Exchange National Bank of Lynchburg by the party of the first part, to be held in accordance with the provisions of the contract, and it was also provided that the party of the first part should have the right to elect to pay either the stock or the money in cash as damages, in the event of his failure to comply with his contract. Subsequently an amended bill was filed, and Thomas Ewing was made a party defendant, it appearing that J. D. Imboden, in executing the contract set out in the original bill, was acting as the agent of Ewing, and that Imboden had no personal interest in it. To this bill there was a demurrer, which the circuit court overruled, and such proceedings were had that a final decree was entered in the cause, from which Thomas Ewing has appealed, and his appeal presents for our consideration at the outset the propriety of the decree of the circuit court upon the demurrer to the bill.

It will be observed that this suit is not brought to enforce the specific performance of that which the defendant contracted to do,—that is, to procure contracts from certain railroad corporations to build a line of railway into the coal fields controlled by the plaintiffs within a stipulated period; in other words, it is not a suit for the specific performance of the principal contract entered into between the parties. Stated broadly, that was a contract upon the part of Ewing to construct, or for him to procure others to construct, certain lines of road to certain points named in the contract, the object being to develop the coal fields owned by the Virginia & Tennessee Coal & Iron Company, in which company the plaintiffs were large stockholders. Upon the part of the plaintiffs, in consideration of Ewing procuring this road to be built, or procuring a satisfactory contract upon the part of others to build it, they were to unite with him, who, in the meantime, with their aid, was to secure \$100,000 of the stock of the Virginia & Tennessee Coal & Iron Company, thus constituting a controlling interest in the company, and thereby give to the appellant the control of 19,500 shares of stock, at \$10 per share. In a proper case a court of equity delights specifically to enforce contracts where the parties have no other remedy, or the remedy afforded elsewhere is less complete or satisfactory; but here the undertaking of the defendant is to build a railroad, or to procure others to build it, and courts of equity will not enforce contracts for that purpose. This seems to be well settled.

The object, and the only object, of this bill is to recover what the parties have agreed upon, either as a penalty or forfeiture, or as liquidated damages. The breach of the contract is recognized as the foundation of the

relief sought, and the plaintiffs have resorted to this court, and invoked its aid to enable them to gather in the form of damages the fruits of a mere breach of contract. There are cases in which courts of equity will award damages, but they are cases where, having obtained jurisdiction over the subject and of the parties, under some of the well-recognized sources of equity jurisdiction, it is found necessary to award damages in order to do full and complete justice by way of compensation, as when, in the enforcement of a contract for the sale of land, the court finds itself unable to give the party seeking and entitled to its aid all that, under his contract, he should recover. In such a case the court will, as far as possible, specifically execute the contract, and then ascertain the damages accruing by reason of its inability in the particular case thus to afford complete relief. The giving of the damages is ancillary or auxiliary to the jurisdiction specifically to enforce the performance of the contract. See *Nagle v. Newton*, 22 Grat. 814. The case before us being in its essence for the recovery of damages for a breach of contract, a court of equity is not to be beguiled into granting the relief sought because it is ingeniously and artfully concealed under cover of a prayer to compel the assignment of certain shares of stock. The great weight of authority in this country is that a court of equity will not entertain a bill for such a purpose, though in England it seems to be otherwise. Had the subject and object of the principal contract between the parties in this case been the sale and purchase of the \$50,000 of the stock in question, a court of equity would have left them to their remedy at law, and will certainly not barken to their prayer when it appears that the stock, the assignment of which is sought, is itself but one form of the penalty or liquidated damages agreed upon as the measure of the injury sustained by the breach of the contract entered into. Much of the argument addressed to us had for its object to enable us to determine whether or not the stock, or in lieu thereof the \$5,000 in money, agreed to be transferred or paid by the appellant in case of a failure to perform the contract, was to be considered as a penalty or as liquidated damages. This is a feature of the controversy which it is not necessary for us to determine, because in neither aspect of it are the plaintiffs entitled to the relief sought. A court of equity will neither enforce a penalty or forfeiture, nor permit it to be enforced in a court of law. It will go even further than this. It will not permit a party, by the voluntary payment of the agreed penalty, to defeat the enforcement of the alternative contract. It will not entertain a suit for the recovery of damages merely, nor will it undertake to give damages save, as before observed, as ancillary or auxiliary to some one of its recognized subjects of jurisdiction; and so far from liquidated damages constituting an exception to the rule

that courts of equity will not entertain suits for damages for breach of contract, it seems that, if the damages for the breach of a contract have been liquidated by the parties to the contract (that is, ascertained and agreed upon), that fact, so far from inviting the assistance of a court of equity, is sufficient to repel it. Indeed, this must of necessity be so, for, as the jurisdiction of the court to enforce contracts specifically rests upon the insufficiency of damages as a redress or remedy for failure to comply with a contract, the very foundation of jurisdiction seems wanting in those cases where the parties themselves have otherwise determined, and have fixed a money value in the form of liquidated damages upon the injury sustained by its breach. In this view is found an explanation of the leaning shown by courts of equity, in doubtful cases, to construe such agreements as we are here considering as creating a penalty or forfeiture rather than liquidated damages. For, if it be determined that it is but liquidated damages, the jurisdiction of a court of equity is at an end, but if it be construed as a forfeiture or penalty, then it affords no obstruction to the interpretation of the court of equity, because it will prohibit either the enforcement or the voluntary payment of the penalty or forfeiture, and will compel the performance of the alternative contract if a proper case be made. Courts of equity, therefore, always strongly incline to that construction which declares it to be a forfeiture or penalty rather than liquidated damages. In this case, however, a court of equity is without motive to prefer the one to the other construction. The alternative for which the penalty is given, if it be a penalty, is the securing of a contract for the building of a railroad. It is obviously impossible to compel the defendant either to build it himself or to procure others to build it. It will leave the parties, in the forum appropriate for that relief, to recover damages for its breach,—liquidated damages, if a court of law shall be of opinion that the parties so intended the stipulation in the contract, or damages in ordinary cases, if a court of law shall be of opinion that the stock or money stipulated to be paid was a penalty. We have not referred to cases. Cases upon the subject of the specific performance of contracts and other subjects discussed are too numerous even for citation. The whole subject has been treated with great fullness and ability in Pomeroy's Equity, and we shall content ourselves with referring to the appropriate chapters in that work, and especially to sections 446, 447, 1401-1403, and to Lawson, Rights, Rem. & Prac. pp. 2588, 2590, 2591, as sustaining the views here presented.

We are of opinion that the demurrer to the bill should have been sustained, and the bill dismissed, and therefore enter a decree reversing the decree of the circuit court.

BUCHANAN, J., absent.

(93 Va. 786)

MANGUS v. McCLELLAND.¹

(Supreme Court of Appeals of Virginia. June 27, 1895.)

ACTION ON PURCHASE-MONEY NOTES — PLEAS — RESCISSION FOR FRAUD — CONSTRUCTION OF STATUTE—ADOPTION BY LEGISLATURE.

1. A defendant who is sued at law upon notes for the price of land cannot, under Code 1887, § 3299, file pleas alleging fraudulent representations by the plaintiff in the sale of the land, by which he was damaged, and asking that the sale be rescinded and the vendor reinvested with the title to the property.

2. Where a statute has been construed by the courts, and is re-enacted by the legislature, the latter is presumed to have adopted the construction given by the courts.

Error to circuit court of city of Roanoke; Dupuy, Judge.

Action by Robert McClelland against J. M. Mangus. Judgment for plaintiff, and defendant brings error. Affirmed.

G. W. & L. C. Hansbrough, for plaintiff in error. Watts, Robertson & Robertson, for defendant in error.

KEITH, P. J. M. Mangus purchased of Robert McClelland certain real estate, at the price of \$2,000, payable one-third cash, and for the residue gave notes in equal installments at one and two years, with interest from date. It appears that the plaintiff executed a deed for the real estate sold by him, and that Mangus, the defendant, gave a deed of trust upon the property to secure the deferred payments. The plaintiff, Robert McClelland, brought his action, by notice under the statute, to recover the balance remaining unpaid upon this transaction; and the defendant filed four special pleas in writing, of which it is sufficient to say that they all set out certain representations of fact alleged to have been made by the agent of the plaintiff, which representations induced the defendant to make the purchase and give the notes upon which the plaintiff sues. The pleas allege that these representations are false, and by reason of them the defendant has been damaged to the full amount of the contract, to wit, the sum of \$2,000. The defendant, waiving all claim to the four lots, says, that by reason of these representations he has incurred damages to the amount of \$2,000, which remain wholly unpaid, and which he is ready and willing to set off against the amount claimed, and he asks for a judgment against the plaintiff for the excess of the damages so sustained by him over and above the amount claimed of him by the plaintiff. In the record is filed a deed from the defendant reconveying the several lots to the plaintiff, and waiving and relinquishing all claim upon them on the part of the defendant. These pleas were demurred to in the circuit court, and the demurrer sustained, upon the ground that section 3299

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

of the Code of 1887 does not authorize a court of law to give the relief asked for.

The object of the pleas would seem to be, not only the recovery of damages for the false representations made to the defendant, but to have the contract between the parties rescinded, and to reinvest the vendor with the title to the lots which he had conveyed to the defendant, and the price of which constitutes the subject of this controversy. The section referred to is substantially in the same terms in which it appears in the act of 1831, which was construed in the case of *Shiffett v. Society*, 7 Grat. 297; and it was there held that the relief asked for, involving a rescission of the contract and a reinvestment of the vendor with the title to the property, could not be had in an action at law, but could only be afforded in a court of equity. This decision is referred to in the case of *Watkins v. Hopkin's Ex'r*, 13 Grat. 745, and is accepted by Mr. Minor as a correct exposition of the law. See 4 Minor, Inst. pt. 1, p. 796. He says, "Where the failure is based on equitable grounds, which require a rescission of the contract and a reinvestment of the vendor with the title, this sort of plea is not available, because in such a case the court of law is incompetent to do complete justice between the parties, and the recourse, in the nature of things, must be to equity." During all these years, although this statute has been frequently amended and re-enacted, no change in it has been made which affects the construction given to it by the authorities cited. It is a familiar rule of construction that where a statute has been construed by the courts, and is then re-enacted by the legislature, the construction given to it is presumed to be sanctioned by the legislature, and thenceforth becomes obligatory upon the courts. See *Anable's Case*, 24 Grat. 563, where this rule of construction was held to be binding upon courts, even in a criminal case, and a fortiori is binding upon them in civil cases. The reason upon which the construction rests also seems to be entirely satisfactory. A court of law, in giving relief, is limited to a judgment of the court upon a verdict of a jury adjudging the plaintiff entitled to the specific property, real or personal, demanded in the action, or to damages in money for the breach of the contract or for the wrong committed, and the judgment of the court must follow strictly the terms of the verdict. Where a jury is dispensed with the court is equally trammelled and confined in the character of the judgment which it is authorized to give. In a court of equity it is different. There all the parties in interest may be convened, the right of all may be considered, and by reason of the greater elasticity of equity procedure the interests of all may be carefully adjusted and protected. For these reasons, we think that the view taken of these pleas by the judge of the circuit court was correct,

and that his judgment must be affirmed; but this affirmance is without prejudice to the right of the defendant to go into a court of equity for such relief, if any, as the circumstances of his case may entitle him to in that tribunal.

(91 Va. 568)

POWELL et al. v. BERRY et al.¹

(Supreme Court of Appeals of Virginia. June 27, 1895.)

SPECIFIC PERFORMANCE—LACHES—CONTRACT FOR SALE OF LAND—GROUNDS FOR RESCISSION.

1. A party seeking specific performance must have shown himself ready, prompt, and eager to perform the contract on his part.

2. In November, 1890, B. sold to P. certain lots for part cash, balance on time. P. paid the cash, and delivered his bonds for the deferred payment, but B. never made him a deed, nor tendered one until May, 1892, alleging as his excuse the failure of P. to send a deed of trust to secure the bonds. B. agreed to grade streets through the property, so that it would be accessible to purchasers, which was never done. The sale was made during a period of great speculation, when it was important that the vendees should be in a position to resell without delay. *Held*, that B. was not entitled to specific performance of the contract of sale.

3. The fact that the vendor delayed to tender a deed for nearly 18 months, and failed to grade streets through the property as he agreed to do, did not entitle the vendee to a rescission of the contract of sale.

Appeal from circuit court, Bedford county; Dupuy, Judge.

Bill by J. M. Berry against Powell, Whitehurst & Co. for specific performance of a contract for the purchase of land. A bill was also filed by said Powell, Whitehurst & Co. against said Berry and others, seeking to enjoin a sale of the land by a commissioner, and asking for a rescission of the contract of sale. There was a decree for the complainant in the former proceeding, and for the defendants in the latter proceeding, and said Powell, Whitehurst & Co. appeal. Modified.

Wright & Hoge, for appellants. M. P. Burks and J. Lawrence Campbell, for appellees.

HARRISON, J. The first question presented for determination in this case is whether or not the appellee is entitled to demand of the appellants the specific performance of their contract of purchase of certain lots mentioned in the bill.

No principle is better settled than that which requires that the party seeking specific performance must have shown himself ready, prompt, and eager to perform the contract on his part.

Mr. Barton says: "Owing to the general rule that specific performance of a contract will not be enforced in equity unless the party seeking it has not been in default, but, on the other hand, has shown himself to be ready, eager, prompt, and desirous of main-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

taining his rights, the rule of laches is more strictly applied in cases of this character than in ordinary suits for account, etc.; and hence, although in some instances a long delay has been held insufficient to bar the complainant's rights, yet in others a very short time has sufficed for that purpose." *Bart. Ch. Prac.* 121, and cases there cited.

In *Bowles v. Woodson*, 6 *Grat.* 78, Judge Allen said: "As the application for a specific performance is addressed to the sound discretion of the court, he who asks it must have shown himself prompt and willing to comply with the obligation of the contract on his part; and the prayer will not be granted if it would be inequitable towards the party against whom the prayer is made."

These are familiar and well-settled principles, and guided by them there can be little difficulty in reaching a sound and just conclusion in the case under consideration.

This transaction took place in November, 1890. The lots were sold by N. D. Hawkins & Co., real-estate agents, representing the vendor, J. M. Berry, to Powell, Whitehurst & Co., the vendees. The cash payment of \$1,950 was promptly made, and in February, 1891, the vendees delivered their bonds at 6, 12, and 18 months for the deferred payments, amounting to \$4,550.

It appears from the record that after the cash payment was made, and the bonds delivered, the vendees repeatedly demanded that J. M. Berry, the vendor, should execute and deliver them a deed. It appears that the vendor not only had the cash payment, but had assigned the deferred purchase-money bonds to third parties, and yet was guilty of the grossest laches and neglect in making his vendees a deed to the lots, no deed ever having been tendered until May, 1892, when it was filed as an exhibit with the bill in this case demanding specific performance of the contract of sale. The only excuse disclosed by the record for this delay in making the deed is the statement of Berry that he told his vendees, when they sent the bonds, to send a deed of trust securing them on the lots, and he would then make a deed. This was an unreasonable demand. The executions of the deed of conveyance and the deed of trust should have been contemporaneous transactions. It was the duty of the vendor in this case to have been active and diligent in performing his part of the contract. He should have executed his deed, tendered it, and asked that the transaction be closed by the contemporaneous delivery to him of the deed of trust. It was not the duty of the purchasers to deliver the deed of trust first; non constat but that the vendor would be unable to make a good title. The vendees had already done more than could be reasonably required of them in making the cash payment and executing and delivering their bonds before the deed was made. It appears from the record that this sale was made at a time when there

was great activity in the sale of real estate,—when towns and cities were being laid out without number. Lots were not bought for permanent investment. The record shows that these lots were bought for speculation. Immediate resales was the order of the day; lots changed hands with great rapidity. Hence it was more important than under ordinary circumstances that a vendor should, in the language of the law, be ready, eager, and prompt in the complete discharge of every part of his undertaking, so that his vendee would be at no disadvantage in making sales if he should desire to sell. It is insisted by appellee that the appellants have not been injured by his laches, because there was no time after their purchase that they could have sold. On the other hand, the vendees insist that but for the delay they could have sold; that they had offers for lots, and could not sell because they had no title. It is unnecessary to discuss or consider this question. Whether the vendees were injured or not makes no difference. The vendor had a duty to perform under his contract of sale. He alone is responsible for his failure to perform it; and he cannot escape the consequences of his neglect by speculating as to whether or not his vendees have suffered in consequence of his default.

It further appears from the record that one of the obligations resting upon the vendor under his contract of sale of these lots was to lay the land upon which they were situated off into well-graded streets, so that the lots would be accessible and more easily sold. It is admitted that this was never done, and the appellants insist that they were greatly damaged by this neglect of the vendor to perform his contract; that they were unable to show the lots to persons wishing to buy, until the streets were graded and the lots defined. The circuit court recognized this duty and obligation of the vendor by providing in its decree that no sale should be made until the land from which said lots were sold had been laid off by J. M. Berry, the vendor, into well-graded streets, and the lots bought by the vendees well defined, so that they might be accessible. These lots, 13 in number, were sold under the decree of the circuit court, and bought in by the vendor for the net sum of \$294.90, which was credited on the deferred purchase-money bonds sued on, and a decree rendered against the vendees for the residue, so that the lots sold by J. M. Berry to Powell, Whitehurst & Co. for \$6,500 are, under the decree complained of, again made the property of said Berry, at \$294.90, and he also has the \$6,500 of his vendees. Whether or not this is the result entirely of the gross laches and neglect of the vendor in performing his part of the contract of sale it is unnecessary to consider. Enough has been said to show that the vendor has fallen far short of performing his part of the contract with that degree of promptness, readiness, and eagerness, which is required of

him, when he comes into a court of equity to demand specific performance of his vendee. He who demands the execution of an agreement ought to show that there has been no default in him in performing all that was to be done on his part. A court of equity will closely scrutinize the conduct of the party insisting on specific performance, and if he be in default it will leave him to such remedy as he may have in a court of law.

For the foregoing reasons, the court is of opinion that the appellee is not entitled to have specific performance in equity of the contract sued on; that the circuit court should have dismissed the bill filed for that purpose, and left the complainant to such remedy as he might have in a court of law.

The second question to be determined arises upon the bill of injunction filed by the appellants, enjoining and restraining the commissioner from selling the lots under the decree of sale in the original suit. To this injunction bill all the complainants in the first-mentioned suit are made parties defendant, and the plaintiffs ask that their contract of purchase of these lots be rescinded, their vendors required to refund the \$1,950 paid in cash to them, and that the purchase-money bonds executed and delivered be also returned. These two causes, the original suit and injunction suit, were heard together, and the court refused to rescind the contract, and dismissed said injunction bill. The application to a court of equity to rescind or cancel contracts for lands, like that for their specific execution, is addressed to the sound judicial discretion of the court; and in the exercise of that discretion the court not infrequently refuses to rescind when it would also refuse to decree the contract to be performed, thus leaving the parties to their remedies at law. 2 Minor, Inst. 895. The cases in which rescission usually takes place seem to be limited to those where there is either a palpable and material mistake in the substance of the thing contracted for, or where fraud and misrepresentation has been perpetrated upon the applicant for the aid of the court.

In the case before us, no sufficient grounds are alleged in the bill, or proven, upon which to base a rescission of this contract. It is true that the vendor agreed to lay the land upon which these lots were situated off into well-graded streets, but this formed a part of his contract which, as we have already seen, he failed to perform. This was not that character of false representation that is a basis for rescission. It was a breach of contract, that can be compensated in damages.

We are of opinion, therefore, that the circuit court properly refused the relief prayed for and dismissed the bill.

The relief asked for in both these bills is a purely equitable remedy, and where the court cannot, in the exercise of that sound discretion required of it, grant the prayer of the applicant for its aid, there is nothing for it to do but to dismiss the bill and leave the

parties to seek such other remedies as they may have.

It is not one of that class of cases where a court of equity, having all the parties before it, can go on and afford complete justice.

It follows from what has been said that the decree complained of must be affirmed in so far as it refused to rescind said contract and dismissed the bill of injunction filed by the appellants. But in granting the appellee, J. M. Berry, specific performance of the contract sued on in the original suit said decree is erroneous, and must be reversed and set aside, and this court will enter such decree as said circuit court ought to have entered.

(31 Va. 539)

NORFOLK & W. R. CO. v. NEELY.¹

(Supreme Court of Appeals of Virginia. June 27, 1895.)

EJECTION OF PASSENGER—PUNITIVE DAMAGES—INSTRUCTIONS.

1. If there is no evidence tending to prove hypothetical facts stated in an instruction, it is reversible error to give it.

2. Plaintiff bought a ticket from R. to B., which the conductor collected before the train reached S., an intervening station. The conductor, thinking that the ticket only read to S., demanded extra fare after leaving S., which plaintiff refused to give, saying that his ticket was to B., which another passenger corroborated. The conductor put plaintiff off without violence or abuse. After reaching B., the conductor discovered the mistake, and tried to make arrangements to send a conveyance back for plaintiff, but could not find one. The court gave the jury an instruction allowing them to give punitive damages if the act was wanton, or in utter disregard of plaintiff's rights, and if, after the defendant company knew of such act, they ratified it. *Held*, that the facts did not warrant such an instruction.

3. A tort committed by mistake, in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of damages for punishment.

4. A verdict for \$1,000 for such ejection was excessive.

Error to circuit court of city of Roanoke; Dupuy, Judge.

The Norfolk & Western Railroad Company bring error to a judgment against them and in favor of J. M. Neely.

The instructions asked for by the plaintiff and defendant, and those given by the court, and referred to in the opinion, are as follows:

Plaintiff's instruction: "If the jury believe from the evidence that the defendant company wrongfully and unlawfully put the plaintiff off its train, as charged in the declaration, then they must find for the plaintiff; and in estimating his damages they should take into consideration all the circumstances attending said expulsion, and may consider the insult and indignity attending said act, if any was offered by the defendant's officers to the plaintiff, and award such damages as

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

will compensate him for his loss and inconvenience, and for such insult or indignity; and if they believe from the evidence that the conductor in charge of said train acted wantonly or with gross negligence or gross disregard of the rights of the plaintiff, then they may, in ascertaining the amount of damages, include such sum as will tend to prevent the defendant from the repetition of a like offense."

And the defendant offered the following instructions: "Instruction No. 1: The court instructs the jury that if they believe from the evidence that the plaintiff, Neely, on the 28th day of May, 1893, purchased from the defendant company a transportation ticket on its road from its station at Roanoke to its station of Boone's Mill, and that, while the plaintiff was on his journey on the defendant company's train, the conductor of said train ejected the said plaintiff before he reached his point of destination, the defendant company is responsible to the plaintiff for the actual damages resulting directly from the said removal and no more. Instruction No. 2: In considering what constitute actual damages, the jury should consider any acts of humiliation, if any such are offered, which are calculated to injure the plaintiff in his character and good standing, and any personal inconvenience, trouble, and loss of time to which the plaintiff has been subjected on account of the acts of the defendant, and allow him such sum as will compensate him for such injury, if they believe he has sustained the same. Instruction No. 3: The court instructs the jury that punitive damages are allowed as a punishment for a willful wrong committed by a person as a warning to prevent others from committing a like offense in the future. And where the wrongful act complained of was committed by an officer or agent of a railroad company, said company is not liable for such damages, unless it is shown by the plaintiff that wrongful act complained of was ratified or adopted by the company as its own act. To constitute a ratification it must appear that, after a full knowledge of all the facts in the case, the company approved of or adopted the wrongful act complained of as its own. That the fact that the company failed to discharge the officer, or to reprimand him, or to acknowledge any liability on account of such act, does not amount to a ratification. Instruction No. 4: The court instructs the jury that the plaintiff had no right to do any act which will enhance his damages, and if they believe from the evidence that the plaintiff, by any act on his part (beyond what was necessary to protect his rights), increased the damages, if any he suffered, to the extent of such increase he cannot recover. Instruction No. 5: The court instructs the jury that if they believe from the evidence that the conductor, Stanfield, removed the plaintiff from his train under a bona fide belief that his ticket only entitled him to ride as far as Starkie's, and

that such removal was a mistake on the part of the conductor, and unaccompanied with any more acts of force than were necessary to remove the plaintiff from the defendant company's train, and that the act of said conductor was not wanton or oppressive or malicious, then the plaintiff is only entitled to recover compensatory damages, or, in other words, the actual damages he has sustained on account of such removal. What constitutes actual damages has been set forth in another instruction,—No. 2. Instruction No. 6: The court instructs the jury that, even though they may believe from the evidence that J. B. Stanfield, the conductor of the defendant, wrongfully ejected the plaintiff from the defendant's cars, and that the ejection of the plaintiff was accompanied by wanton and oppressive conduct on the part of said conductor, yet they can allow nothing to the plaintiff by way of exemplary or punitive damages for such conduct, unless they further believe from the evidence that the defendant ratified such acts of wantonness and oppression, and adopted them as its own; that the failure on the part of the defendant company to discharge said conductor from its employment after knowledge of the act and a demand for damages will not amount to a ratification, so as to render the defendant company liable for punitive damages. Instruction No. 7: The court further instructs the jury that, while the retention by the defendant of the conductor after knowledge of his alleged wanton and illegal acts tends to show ratification by the company of such acts, yet the mere fact that the conductor was retained after knowledge is not of itself sufficient to show that the company did ratify the acts in question."

And the court declined to give any of said instructions except No. 5, which was given with the modification of the court stating that what constitutes actual damages will be found in instruction No. 2, and instructed the jury as follows:

"Plaintiff's Instruction No. 1. The court instructs the jury that the law imposes upon railroads, as carriers of passengers, the duty to exercise the highest degree of care, and the utmost diligence on the part of its employes that the passenger shall be carried safely and landed at the place of his destination; and any failure of the employes to meet these requirements within the scope of their employment will render the railroad company liable to the passenger for the injury received. But the measure of damages shall be such as is set forth in other instructions given in this case,—in instructions for plaintiff Nos. 2 and 3.

"Plaintiff's Instruction No. 2. If the jury believe that the plaintiff, on the 28th day of May, 1893, purchased a ticket over defendant's road from Roanoke to Boone's Mill, and that, while the plaintiff was on his journey between those stations, a conductor of the train upon which the plaintiff was passenger eject-

ed him before he reached Boone's Mill, then the defendant company is liable to the plaintiff in this action for such actual damages as the jury may believe he sustained. In considering what constitutes actual damages, the jury may consider any personal inconvenience, loss of time, and trouble to which they may believe the plaintiff was subjected. In addition to this the jury may consider the humiliation, outrage, or insult, if any, to which the plaintiff may have been subjected by being ejected from the car.

"Plaintiff's Instruction No. 3. Should the jury further believe from the evidence that the act of the said conductor was not only illegal, but was also wanton or oppressive, or in utter disregard of the rights of the plaintiff, and that after the defendant company had knowledge of such act it participated in or ratified it expressly or by implication, then the jury may add to actual damages something by way of punitive damages against the defendant. Punitive damages are damages allowed against a party who has wronged another in a wanton, willful, or oppressive manner in disregard of his rights, as a warning to him and others to prevent them from committing like offenses in the future.

"Plaintiff's Instruction No. 4. If the jury believe from the evidence that a complaint was made within a few days after the expulsion of Neely by the conductor, in which the facts in reference to said expulsion were fully set forth to Joseph H. Sands, vice president and general manager of the Norfolk & Western Railroad Co., and that the said railroad company has continued to employ the conductor, Stanfield, in the same capacity, and has refused to recognize any liability upon it on account of such expulsion, then such conduct on the part of the company may be considered by the jury as tending to show a ratification of the act of the conductor by the company; but the mere failure to discharge said conductor after knowledge of his act is not of itself a ratification of his act."

Defendant's Instruction No. 5. Same as instruction No. 5, supra.

Watts, Robertson & Robertson, for plaintiff in error. Scott & Staples, for defendant in error.

RIELY, J. This was an action of trespass on the case to recover damages for being expelled from a passenger car by the conductor. There were two trials in the court below. On the first trial the jury rendered a verdict for \$1,000, which, on the motion of the defendant, was set aside, and a new trial awarded; and on the second trial a verdict of \$800 was rendered, which the court refused to set aside, but gave judgment thereon. It was conceded that the plaintiff in the suit, J. M. Neely, had a right of action against the defendant company to recover damages for his expulsion from the car, and the real point of controversy was the measure of recovery for the unlaw-

ful act. Was he entitled, under the circumstances of the case, as shown by the evidence, to actual or compensatory damages only, or was he entitled to recover in addition exemplary or punitive damages? Actual or compensatory damages are the measure of the loss or injury sustained, while exemplary or punitive damages are "something in addition to full compensation, and something not given as his due, but for the protection of the public." The law awards the former only where in the unlawful act there is an absence of intentional wrong, fraud, or malice, or the act is not oppressively or recklessly committed; while the latter are given where the wrongful act is done with a bad motive, or with such gross negligence as to amount to positive misconduct, or in a manner so wanton or reckless as to manifest a willful disregard of the rights of others. On the first trial the plaintiff asked for two instructions, which were given by the court; and on the last trial the court, at the instance of the plaintiff, gave four instructions, the second and third of which are the same as the two given for the plaintiff on the first trial. On the first trial the defendant asked five instructions, all of which were refused. They were the same as the first five of the seven instructions asked by the defendant on the last trial. The court, on the last trial, refused all of the defendant's instructions except the fifth, which it gave, with an explanatory amendment. The consideration of these instructions and of the action of the court in respect to them involves the determination of the question at issue, and of the errors assigned in the petition for the writ of error awarded by this court. As all of the instructions asked for and refused or given on the first trial were renewed on the second trial, it is only necessary to consider those presented on the latter trial. We perceive no error in the first and second instructions given for the plaintiff, or in the fifth instruction of the defendant, which was likewise given. Nor did the court err in rejecting the other instructions asked for by the defendant. This leaves for consideration the correctness of the third and fourth instructions given to the jury at the instance of the plaintiff.

The third instruction was as follows: "Should the jury further believe from the evidence that the act of the said conductor was not only illegal, but was also wanton or oppressive, or in utter disregard of the rights of the plaintiff, and that, after the defendant company had knowledge of such act, it participated in or ratified it expressly or by implication, then the jury may add to actual damages something by way of punitive damages against the defendant. Punitive damages are damages against a party who has wronged another in a wanton, willful, or oppressive manner, in disregard of his rights, as a warning to him and others to prevent them from committing like offenses in the future." This instruction assumes that there

was evidence before the jury not only of an illegal act, but evidence that tended to prove that the act was done in a wanton and oppressive manner, and in utter disregard of the rights of the plaintiff, and also evidence that the defendant company, with knowledge thereof, ratified what its agent, the conductor, had done. The instruction informed the jury that if satisfied that these facts were proved by the evidence, they had the right to inflict on the defendant company exemplary or punitive damages. The propriety of this instruction depends upon the evidence before the jury. If there was evidence tending to prove the acts hypothetically stated in the instruction, then its sufficiency to establish them was for the determination of the jury, and it was right to give the instruction; but, if there was no evidence to that end,—which was a matter for the court to decide,—it should not have been given; for where there is no evidence to support an instruction that is asked for, it should not be given, and, if given, it is reversible error. *Borland v. Barrett*, 76 Va. 133; *Rea's Adm'x v. Trotter*, 26 Gratt. 585; *Railroad Co. v. Scurr*, 42 Am. Rep. 376; 2 Thomp. Neg. 2246, and *Railroad Co. v. Armstrong*, 91 U. S. 489. The defendant company operates, as lessee, the branch line of railroad running from Roanoke city, Va., to Winston, N. C., and known as the Roanoke & Southern road. The nearest station to Roanoke city, and distant six miles, is called "Starkie," and eight miles further on is the next station, known as "Boone's Mill." The plaintiff lived at Roanoke city; and on May 28, 1893, which was Sunday, he decided to pay a social visit to some friends who resided at Boone's Mill. He bought from the ticket agent of the defendant company at Roanoke a ticket to Boone's Mill, which he showed to a Mr. Armentrout, his friend and business partner, who was with him. They entered the car, and took a seat together. After the train had started, and before it reached Starkie, the conductor came through the car to take up the tickets of the passengers. When he reached Neely and Armentrout, who were seated near the rear end of the car, he took up the ticket of Neely, and also took out of the mileage book of Armentrout the mileage to Boone's Mill, to which place the latter was also going. After the train had proceeded a mile or so beyond Starkie, the conductor again came through the car, and asked Neely for his ticket. He answered that he had already given his ticket to him. The conductor replied that he had not done so; that the ticket which he had given to him was for Starkie. Further words passed between them, when the conductor said, "You will have to give a ticket or money or get off." Neely replied, "You will have to put me off, for I won't get off," and turned to Armentrout, and asked him if he had not given his ticket to the conductor.

Armentrout answered that he had. Neely then told the conductor to look through his tickets, and he would find one to Boone's Mill. The conductor responded that he did not have to do so, by which language he meant, as he explained on the trial, that he had already examined them. He explained that in taking up tickets it was his practice to put them in rotation as passengers occupied seats in the car, so as to assist his memory, if he did not recollect the destination of the passengers; that when he first took up the tickets on this occasion after leaving Roanoke city, he tore out of Armentrout's book the necessary mileage to Boone's Mill, and took up Neely's ticket, which he read "Starkie," and that he fixed it in his mind that in this seat there was one passenger for Starkie and one for Boone's Mill, and put the tickets in this rotation; that when he came through the car again he noticed that Neely had left his seat, and on examining his tickets he found a ticket for Starkie corresponding to the seat Neely had first occupied, but which must in fact have represented the seat just opposite. Acting under the belief that Neely's ticket was for Starkie, and Neely failing to give him a ticket after remaining on the train beyond Starkie, or to pay the fare to Boone's Mill, which was 30 cents, he stopped the car, and put him off. In doing so, the evidence shows that the conductor was guilty of no rudeness or violence. The ejection was effected respectfully and quietly. Neely offered no physical resistance, and only required that he be put off, which was done by the conductor taking hold of his arm or coat, and leading him to the rear end of the car, where, Neely still refusing to get off, he led him down the steps of the platform until he was wholly off the train. After Neely had thus been expelled from the car, and before the train arrived at Boone's Mill, the conductor came to where Armentrout was sitting, and began to talk with him about the matter. Armentrout told him that he had made a mistake, that Neely's ticket was for Boone's Mill, and that he was willing to go before a justice of the peace and make oath to that effect. The conductor thereupon said that he supposed then he had made a mistake. When the train arrived at Boone's Mill, the conductor again came to Armentrout, and said: "I guess I made a mistake. Here is \$2.00. You get a carriage, and send back for Mr. Neely; and if you need any more money; you pay it, and when I come to town I will make it good." Armentrout did not succeed in getting a conveyance, and he returned the money to the conductor when he came back with his train the next day to Roanoke city. It is apparent from this recital of the testimony that while the act of the conductor in expelling Neely was unlawful, it proceeded from no ill motive, and was not rudely or recklessly done. It was the result of a mis-

take on the part of the conductor, and due to negligence or absence of mind in reading the ticket of Neely when he took it up. But when he was assured by Armentrout that he had made a mistake, he manifested his penitence, and did all in his power to rectify it. His subsequent conduct was conclusive against any imputation of malice, and repelled all presumption of intentional wrong. It was clearly not a case for exemplary or punitive damages. In *Suth. Dam.* (2d Ed.) § 393, p. 847, the law on this subject is thus stated: "A tort committed by mistake, in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of damages for punishment, where the doctrine of such damages prevails." And to the same effect are *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Railroad Co. v. Scurr*, 42 Am. Rep. 373; *Railroad Co. v. Rice* (Md.) 21 Atl. 97; *Railroad Co. v. Guinan*, 47 Am. Rep. 279; *Railroad Co. v. Ippscumb*, 90 Va. 137, 17 S. E. 809; and *Railroad Co. v. Armstrong*, 91 U. S. 489. The evidence furnished no foundation for instruction No. 3, and the court erred in giving it to the jury.

The plaintiff was unlawfully expelled from the car, and was entitled to be fully recompensed for the injury. He resided at Roanoke city, but was engaged in the tan-bark business, and had his place of business between the stations Starkie and Boone's Mill, about 2 or 2½ miles south of Starkie. It was his habit to go to his place of business on the cars once or twice a week, and to get off sometimes at the one station and sometimes at the other, whence he was accustomed to walk to his place of business. On the day he was expelled from the car he had to walk about half a mile further than he was accustomed to do when he got off the train at Boone's Mill. He did not sustain any physical injury, nor suffer any pecuniary loss. He was not thrust out into inclement weather. The day was fair and warm. He arrived at his destination too late to accompany to church the friends he was going to visit, and in this was disappointed. He was entitled to full compensation for the unlawful act to which he was subjected. He was entitled to compensation for the inconvenience, delay, and fatigue to which he was put, and a suitable recompense for the injury done to his feelings in being expelled from the train; but he was not entitled to recover in addition exemplary or punitive damages as a protection to the public for the unintentional wrong or mistake of the conductor. The verdict of the jury exceeded any compensatory limit, and can only be accounted for upon the theory that the jury, under the erroneous instruction of the court, gave to him exemplary damages.

Instruction No. 4, which was also given at the instance of the plaintiff, was intended to

inform the jury as to what constituted evidence tending to show a ratification by the defendant company of the unlawful act of its conductor, with a view to its consequent liability. A master is liable to the extent of compensatory damages for the unlawful act of his agent committed in the course of his employment, whether ratified or not; and such instruction as the one above referred to would only be proper in a case where the law awarded exemplary damages for the tortious act of the agent. It was intended to be and was supplemental to instruction No. 3, and could only be relevant and proper in case that instruction was proper. We have seen that it was error in the court to give that instruction, and it follows that it was error to give this one.

The court having erred in giving to the jury instructions Nos. 3 and 4, the judgment must be reversed and annulled, the verdict of the jury set aside, and the case remanded to the circuit court for the city of Roanoke for a new trial; upon which new trial, if the evidence should be substantially the same as on the last trial, the said instructions, if asked for, are not to be given, but the jury instructed in accordance with the views expressed in the foregoing opinion.

(44 S. C. 393)

HALE v. UTSEY et al.

(Supreme Court of South Carolina. July 12, 1895.)

CHATTEL MORTGAGES—DEFAULT—DEMAND FOR PAYMENT.

Demand by the mortgagee of payment of a chattel mortgage debt after maturity does not reinvest the mortgagor with title to the mortgaged property.

Appeal from common pleas circuit court of Greenville county; Earnest Gary, Judge.

Action by W. R. Hale against W. B. and J. H. Utsey to recover personal property. From a judgment for defendants, plaintiff appeals. Reversed.

Haynsworth & Parker, for appellant.
Jos. A. McCullough, for respondents.

POPE, J. The complaint in this case was for the recovery of personal property. It seems that W. B. Utsey had mortgaged this property on the 12th day of August, 1893, to secure a note for \$150, due on the 1st day of November, 1893; that, although no payment had been made on the note secured by the mortgage, yet that, after the maturity of the note, the plaintiff had on several times made demand of said W. B. Utsey for payment. The proof offered by the plaintiff at the trial fully sustained the debt, the mortgage being executed to pay it; that the condition of the mortgage had been broken; that the debt was unpaid; that demand had been made for the delivery of the mortgaged property after condition broken, and that this demand had been re-

fused by both defendants, who had the same personal property in their possession. After all these facts had occurred, this action was brought to recover said personal property mortgaged. When the plaintiff's testimony had closed, the defendants moved for a nonsuit on the ground that after the condition broken of the mortgage the mortgagee had demanded payment of the debt secured by the mortgage of the mortgagor. Judge Earnest Gary, as presiding judge, granted the motion, and passed the following order: "The plaintiff in this case having closed his testimony, and having testified that he made frequent demands upon the defendant W. B. Utsey, the mortgagor, for the payment of the money secured by mortgage after maturity of said mortgage, and before seizure of said property, under authority of *Summer v. Kelly*, 38 S. C. 507, 17 S. E. 364, defendants' attorney having moved for nonsuit, I hereby grant said motion. Earnest Gary, Presiding Judge. July 28th, 1891." From this final order, an appeal is now before us.

It is unnecessary to reproduce the grounds of appeal,—four in number,—for they raise the question whether, after mortgage broken, as to personal property, the title to such personal property reverts in the mortgagor if a demand is made by the mortgagee of the mortgagor of the payment of the mortgage debt. It would need but few words to show that the decision of *Summer v. Kelly*, 38 S. C. 507, 17 S. E. 364, does not support the view taken by the circuit judge, if the decision of this court in *State v. Rice*, 20 S. E. 986, had not already settled that question. Chief Justice McIver, in the case just cited, said: "The only remaining exception is the third, which, under the view we have taken of the first exception, presents no material question, and would not be further noticed, except for the purpose of correcting a misapprehension which seems to have arisen in regard to the effect of a former decision of this court in the case of *Summer v. Kelly*, 38 S. C. 507, 17 S. E. 364. That case does not decide that, where a partial payment on a mortgage debt is accepted by the mortgagee, it operates as the waiver of the forfeiture (as it is incorrectly termed), for no such question was then presented; but the question there presented is thus distinctly stated by the justice who prepared the opinion in that case: 'Second. If payments of money arising from sales of mortgaged property by mortgagor be made to mortgagee after a breach of the condition of the mortgage, will such payment, *if in full payment of debt secured by mortgage* [italics mine], cancel such debt, and revert the title of mortgaged property in the mortgagors?' That was the question presented by the evidence, and by the concurrent finding of the referee and circuit judge, for they both found as matter of fact that the whole amount of the mortgage debt had been paid

in full; and hence no question as to the effect of a partial payment of the mortgage debt after condition broken did arise, or could have arisen, in that case. There is, therefore, no warrant for supposing that the case of *Summer v. Kelly* decided that when a mortgagee of personal property accepted a partial payment on the mortgage debt, after condition broken, such acceptance operated as a waiver of the forfeiture (as it is called), and revested the title to the mortgaged property in the mortgagor. All that the case can be properly regarded as having decided is that, 'when the mortgage debt has been fully paid and satisfied, even after condition broken, the legal title to the mortgaged property is thereby revested in the mortgagor.' It is true that some of the language contained in the quotation made in that case from *Herman on Chattel Mortgages* would seem to countenance the idea that the same effect would follow from a partial payment accepted by the mortgagee after condition broken, but the language italicized in that quotation manifestly shows that such authority was cited for the purpose only of showing the effect of a payment in full." The question in the case at bar is not as to a partial payment after condition broken, but is that of a demand for payment of the mortgage debt after condition broken. The principle is the same in both cases. To our minds, the error of the circuit judge is fully made out. It is the judgment of this court that the judgment of the circuit court be reversed, and that the case be remanded to the circuit court for a new trial.

(44 S. C. 396)

WALLINGFORD et al. v. AIKEN.

(Supreme Court of South Carolina. July 12, 1895.)

CHATEL MORTGAGES—PAYMENT AFTER DEFAULT.

Acceptance of a partial payment of a chattel mortgage debt by the mortgagee after condition broken does not revert the title in the mortgaged property in the mortgagor, divested of the lien of the mortgage.

Appeal from common pleas circuit court of Abbeville county; R. C. Watts, Judge.

Action for claim and delivery by Sam Wallingford and another against A. M. Aiken. Defendant's oral demurrer to the complaint was overruled, and he appeals. Dismissed.

Graydon & Graydon & Giles, for appellant. Parker & McGowan, for respondents.

POPE, J. Marchall Carter, in February, 1890, gave his note to the plaintiffs for \$150, due on the 1st November, 1890, and made his mortgage to them to secure said debt, including in said mortgage a mule named "Mike." This mortgage was duly recorded. After the condition of the mortgage had been broken, the said Carter, as mortgagor, made several payments on the mortgage debt to the plain-

tiffs as mortgagees, but still left a considerable part of the mortgage debt unpaid. Carter sold the mule to Aiken after the breach of the mortgage held by plaintiffs. Plaintiffs demanded of Aiken that the mule "Mike" be turned over to them under their unsatisfied mortgage. This demand was refused by Aiken, the defendant, whereupon the plaintiffs instituted in the court of common pleas for Abbeville county an action for claim and delivery, setting out in the complaint the foregoing facts. When the cause was called for trial before his honor, Judge Watts, and, after the complaint had been read, the defendant interposed an oral demurrer, on the ground that it did not state facts sufficient to constitute a cause of action in this; that the complaint showed on its face that the plaintiffs had accepted a part payment on the debt secured by the mortgage, had extended the time of payment, and had thereby shown their intention to waive the forfeiture, and that the lien of the mortgage was thereby discharged. After argument of the counsel, Judge Watts overruled the demurrer, and the defendant gave notice of appeal, and the action was continued pending such appeal. The grounds of appeal—two in number—present as error the overruling the demurrer on the ground that a partial payment of a mortgage debt by the mortgagees of the mortgagor after the condition of their mortgage has been broken revests the title in the mortgaged property in the mortgagor, divested of the lien of the mortgage. Reliance on the case of *Summer v. Kelly*, 38 S. C. 507, 17 S. E. 364, was heard before the circuit judge as the support of the defendant's demurrer. Since the decisions *State v. Rice* (S. C.) 20 S. E. 986, and *Hale v. Utsey* (decision just rendered) 22 S. E. 371, that support is denied the appellant. But the appellant takes the broad ground before us that, independent of and apart from the case of *Summer v. Kelly*, supra, it is an open question in this state that the partial payment of a mortgage debt after condition broken will revert the title to mortgaged personal property in the mortgagor. We cannot think such has ever been the law in this state. No case can be cited, decided within our state borders, that gives support to such a doctrine. Indeed, the current of our state decisions runs directly to the contrary. The appeal must be dismissed. It is the judgment of this court that the order appealed from be sustained, and the appeal therefrom be dismissed, and the cause is remanded to the circuit court for trial.

supreme court cannot set it aside as being contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. Wellborn, Judge.

Action by W. J. T. Hutcheson against John F. Bigbee. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Hutcheson sued Bigbee upon a contract dated August 8, 1891, whereby plaintiff bound himself to clean out to proper grade the canal or ditch that had been used for conveying water to the gold stamp mill owned by defendant; to repair dam on Etowah river sufficiently to force water through said canal or ditch to run said mill at all times of the year; to rebuild all flumes on said canal or ditch; to rebuild all water gates; to put in new forebay; to hew out new mudsills for same if needed, put in new trunk, clean out wheel used for motive power to mill, put in new wooden ink if needed, make all necessary repairs inside gold stamp mill; to furnish battery water, erect boxes; to bring in the same; to clean out ditch for conveying battery water to mill; to open the sand vein in the vance cut as low as where there was a car standing on an old tramway; to show the vein in such manner that ore could be taken out with safety; to deliver all material for said work, and to complete said work in full within 60 days from date, unless on account of some unavoidable hindrance; and to do all said work in a good and workmanlike manner. If plaintiff should well and truly fulfill the foregoing undertakings, defendant bound himself to deed to plaintiff the farming interest in and to certain described lots of land, reserving to defendant the mineral interests, the house occupied by him, the right to use two stalls in stables occupied by both parties, half the garden occupied by plaintiff, and the right to fence a woodland pasture for his own use. Plaintiff alleged that he performed all the work named in the contract in a good workmanlike manner, and in every particular complied with his obligations to defendant thereunder, but that defendant refused to execute to him titles to the farming interest in the lands named; and plaintiff prayed for decree requiring defendant to do this. Defendant answered that plaintiff was not entitled to have the contract specifically performed, because he had failed to do the work he contracted to do, but had done only a part thereof, and that which he did was done out of inferior material, and in a very unskillful manner, thereby damaging defendant, etc. The jury found for the plaintiff, and a decree was entered that defendant specifically perform the contract by making a deed in accordance with its terms. He moved for a new trial on the grounds that the verdict was contrary to law and evidence, against the weight of evidence, and without evidence to

(96 Ga. 745)

BIGBEE v. HUTCHESON.

(Supreme Court of Georgia. March 25, 1895.)

REVIEW ON APPEAL.

There being no alleged error of law for review, and the evidence, though conflicting, being amply sufficient to sustain the verdict, the

support it. The motion was overruled. The evidence upon the disputed points was directly conflicting.

H. Thompson, M. G. Boyd, and S. C. Dunlap, for plaintiff in error. R. H. Baker and Price & Charters, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 195)

ROANE et al. v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

CRIMINAL LAW—JOINT INDICTMENT—ASSAULT—NEW TRIAL.

1. Where several persons jointly indicted for an offense which could be committed by one person alone are tried together, there may, if the evidence so authorizes, be a lawful conviction of one or more of them without convicting all.

2. The evidence in this case warranted the verdict, and there was no merit in the ground of the motion for a new trial relating to newly-discovered evidence.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. J. Kinsey, Judge.

W. F. Roane and Alex Roane and Marvin Roane were indicted for assault and battery. Marvin Roane was acquitted, and the others found guilty, and they bring error. Affirmed.

The following is the official report:

It appears from recitals in the bill of exceptions and transcript that W. F. Roane and his sons, Alex and Marvin, were indicted for assault and battery. The indictment itself is not in the record. Marvin was acquitted, and the other two found guilty. They moved for a new trial on the grounds that the verdict was contrary to law and evidence, and that the court erred in so instructing the jury, as to the form of their verdict, that they could find one or two of the defendants guilty without finding all guilty. The brief of evidence shows that W. F. and Alex testified for each other, and Marvin testified for W. F. and Alex. There was also a ground of newly-discovered evidence. According to the testimony of Moses L. Shirley, he was going on the road to town, and when in the neighborhood of Roane's house he stopped to fix his saddle, the girth of which had broken. While so engaged he heard Alex Roane say, "How're you?" very insultingly. He looked up, and saw Roane and Marvin. Roane said: "Kill him, God damn him. Knock him down, God damn him"; and they began throwing rocks at Shirley. Roane pulled his pistol and began shooting at Shirley. He shot three times, and threw his pistol, which went over Shirley's head. He would have picked it up, but they pushed him so he could not. He stooped down to pick up a rock, and Alex hit him on the head. At last he drew his pistol, and shot at them. They followed him up the road about 150 yards, cursing and abusing him. They threw a half bushel of rocks at him. He turned sick, and sat down

on the side of the road on top of a hill to rest. They followed him, and commenced on him again. They had three skirmishes. They did not know he was coming that way. He had had a dram, but was not drunk. He had stopped on the hill beyond Roane's house with John Donalson and Al. Smith. He went right on from there to where the Roanes were waylaying for him. He did not know how they knew he was coming. Supposes Marvin saw him from the potato patch, and went and told them. He was corroborated in certain particulars of his testimony by John Donalson, Al. Smith, Mrs. Murray, and Mrs. Dickson. The testimony for defendants tended to show that Shirley came by the place hallooing and cursing, and made the first assault, and did the only shooting that was done; that none of the Roanes had a pistol; that Alex hit Shirley with a rock while he was trying to shoot W. F. Roane, etc. It does not appear that Marvin took active part in the difficulty, further than is indicated in the testimony of Shirley. The newly-discovered evidence is to the effect that Shirley talked with one Jones, and left on his mind the impression that the Roanes did not do any of the shooting, but that Shirley did it all himself, and that he was going to swear that the Roanes did part of the shooting, just to see what they would say; and further tended to support the defendants' testimony as to certain circumstances mentioned therein.

Jones & Bowden, Chas. L. Bass, and R. A. E. Hamby, for plaintiffs in error. Howard Thompson, Sol. Gen., and F. M. Johnson, for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 318)

ADAMS v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

CRIMINAL LAW—NEW TRIAL.

The evidence, though somewhat conflicting, was fully sufficient to warrant the verdict, and, the newly-discovered evidence being solely of an impeaching character, there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Carroll; W. F. Brown, Judge.

F. M. Adams was convicted of using abusive language, and brings error. Affirmed.

The following is the official report:

Adams was indicted for having, without provocation, used to and of one Bartlett, and in his presence, the following language: "Get off the wagon, God damn you! I want to give you a whipping." "You are a God damned liar, and a damned son of a bitch." Defendant was found guilty, and, his motion for a new trial being overruled, excepted. The evidence was directly conflicting. One of the witnesses for the state was N. F. Carden, who testified that Bartlett

told defendant he did not make such a contract as was claimed by defendant; that defendant then called Bartlett a liar, and invited him off of the wagon; said he wanted to whip him; called him a damned rascal, and a damn son of a bitch; and that Bartlett did nothing to defendant, and said nothing to cause defendant to use such language to him. The motion for new trial was upon the general grounds that the verdict was contrary to law, evidence, etc. Also because of newly-discovered evidence. In support of the last ground, defendant produced the affidavit of C. H. and I. H. Evans that they heard Carden say that Bartlett gave Adams the lie before Adams cursed him or used any opprobrious words. Also the affidavit of defendant and his counsel that the above "information" was not known at the time of the trial, but ascertained afterwards; and of defendant that due diligence was used by him to discover evidence.

Cobb & Bro. and J. L. Cobb, for plaintiff in error. T. A. Atkinson, Sol. Gen., and Adamson & Jackson, for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 218)

LATIMER v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

CRIMINAL LAW—ASSAULT—SUFFICIENCY OF EVIDENCE—NEW TRIAL.

There was ample evidence to sustain the verdict of guilty, and the ground of the motion for a new trial relating to newly-discovered evidence was without legal merit.

(Syllabus by the Court.)

Error from city court of Carroll; W. F. Brown, Judge.

Willis Latimer was convicted of assault and battery, and brings error. Affirmed.

The following is the official report:

Latimer was indicted for assault and battery upon Burdell. He was found guilty, and moved for a new trial, upon the general grounds and because of newly-discovered evidence. The motion was overruled, and defendant excepted. The evidence for the state tended to show the guilt of defendant, the main witnesses being Burdell and his wife. Each of them swore that Burdell had no knife at the time in question. No witness was introduced by the defendant. He made a statement, in which, among other things, he said that he accused Burdell of telling a lie on him; that Burdell then cut at him with a knife; he jumped back, and struck at Burdell with a stick twice; and Burdell picked up a rock, and he picked up one, and threw it at Burdell. In support of the ground as to newly-discovered evidence defendant produced the affidavit of one Wells: Was standing about 30 feet from defendant and Burdell at the time of the difficulty. Heard defendant say that he lied. Then Burdell struck at defendant with a knife. Defendant jump-

ed back, and struck Burdell with a stick. Deponent could see the knife open in Burdell's hand, and saw him strike at defendant with it before defendant ever struck at all. Saw defendant run off. Also, the affidavit of defendant that he did not know of the evidence contained in the affidavit of Wells until after the trial. Also, similar affidavit of his counsel. Also, affidavit of J. M. Hewitt that before the difficulty, and before the indictment was found, Burdell told deponent that the plan of Sol West and defendant failed; that the reason they did not go that night was that Sol West saw deponent go into the store. Burdell testified on the trial that defendant had asked him to leave open the door of Mr. Stokeley's storehouse, so defendant could get in and get things, and defendant would make it easy for them both to live; that witness told Stokeley about it; that that was what defendant asked witness about on the day of the difficulty; and that witness never heard until the day of trial of anything about a proposition made by witness to defendant for defendant and Sol West to go in and get goods. In his statement, defendant said that Burdell did propose to him that Burdell would leave the store door so defendant and West could get in and steal, and that he told Burdell he would do nothing of the kind. In the record is an affidavit of Hewitt that the facts stated in his affidavit above mentioned were known to defendant before the trial of the case.

J. L. Cobb, for plaintiff in error. T. A. Atkinson, Sol. Gen., and Adamson & Jackson, for the State.

PER CURIAM. Judgment affirmed.

(96 Ga. 755)

MCGHEE et al. v. CLARIDY.

(Supreme Court of Georgia. April 8, 1895.)

INJURY TO EMPLOYE—MEASURE OF DAMAGES—SUFFICIENCY OF EVIDENCE.

The refusals to charge as requested present no cause for a new trial. The charge as to the measure of damages was not perfectly accurate and correct in its terms, but, taken as a whole, it was not calculated to mislead the jury; and the evidence, though complicated, and decidedly conflicting, was sufficient to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Whitfield county.

Action by W. J. Claridy against Charles M. McGhee and another, receivers, for damages for personal injuries. Judgment for plaintiff, and defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Claridy sued McGhee and Fink, receivers of the East Tennessee, Virginia & Georgia Railway Company, operating said company under an order from the federal court appointing them receivers, for damages from personal injuries. The declaration alleged in brief:

On December 6, 1892, petitioner was employed by defendant at Dalton as yard man, and among his duties was the coupling of cars. While in the strict line of his duty in the yard at Dalton, he coupled two cars, and, after making the coupling, and without negligence on his part, his hand was caught between the deadwoods of the cars, mashed to pieces, and had to be amputated between the wrist and elbow. Defendants furnished in this instance woefully defective machinery, which was unknown to him, and he was without opportunity of knowing, until after he had sustained the injury. One of the cars in question had been originally constructed with a Janney or other patent coupler, but, through the fault of defendants, their agents and servants, the patent coupler had been broken, or lost, or taken out of the car, and instead a cast one inserted, commonly called a "drawhead." And the deadwoods put on the car with the patent coupler are and should be different from those used on the ordinary drawheads. They are longer and wider. And in this instance, bringing the cars together to make the coupling, the deadwood on one of the cars was loose, and the deadwoods extended out so far that the moment the coupling was made the deadwoods came together, caught plaintiff's hand, and mashed it off. The condition of the car, the deadwood, and the change made in the drawhead from a patent to the ordinary cast one was unknown to him, and no opportunity offered itself to find out the dangerous features until the running of the cars together; but defendants and those furnishing the cars and defective machinery had ample opportunity to know the danger incident to the use of such machinery, and were grossly negligent in furnishing it to their employes. Petitioner was entirely free from fault; and the defendants, their agents, etc., were also negligent in the manner in which they handled the engines, cars, and machinery of defendants, and the manner in which they rushed the engine back upon petitioner without warning. It was rushed back with great force, driving the drawheads together, and causing the deadwoods to crush together before he had time to extricate himself. His ability to earn anything by manual labor is totally destroyed. He suffered great pain, was long confined to the house, incurred great expense in being waited upon, etc. Defendants pleaded not guilty; that there was no negligence or omission of duty by them or their agents; that, if plaintiff was injured, it was caused by his negligence; that they were operating the railroad as receivers appointed by the United States circuit court, and, as such, are not subject to suits by any of its employes for injuries occurring to them in said service, and not liable to plaintiff for his alleged injury; and that they discharged their full legal duty in furnishing to plaintiff reasonably safe appliances and machinery, and such as was suited to the service of coupling cars; that the

couplers used by plaintiff were reasonably safe, and suited to the purposes for which they were intended. There was a verdict for plaintiff for \$3,850, and, defendants' motion for a new trial being overruled, they excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Further, that the damages awarded were excessive. Also, because the court erred in refusing to charge the following written request of defendants: "The plaintiff in this case is suing the receivers of the railway company for a personal injury to himself as an employe while coupling cars. He cannot recover in this case against the receivers for an injury so received by him as an employe." Movants insist that the evidence showed conclusively that the coupling apparatus and arrangements were reasonably safe; and that, if out of order at all, it was the negligence of the car inspector, Carey, to permit the car to go out in the condition alleged to be defective; and receivers are not liable for an injury resulting to an employe from the negligence of a coemploye. Error in refusing to charge the following written requests of defendants: "The burden is upon the plaintiff to show by evidence that he is entitled to recover. This means that before he can recover the evidence must show some fault or negligence of the railroad sufficient to cause, and that did cause, the injury, and that the injury did not result from the ordinary risks and dangers incident to the employment." "To entitle the plaintiff to recover, the evidence must show not only that the injury was caused by the fault of defendants, but also that the plaintiff was guilty of no fault or oversight that entered as element in causing the injury." Because the verdict is contrary to certain specified portions of the charge. Error in refusing to charge, as orally requested by defendants: "That before the plaintiff can be entitled to recover anything in this case the evidence must show, not only that the injury was caused by defective machinery or appliances as furnished by the company, but also that the plaintiff did not know of those defects at the time, and could not, by ordinary care on his part, have avoided the injury; and that plaintiff is not entitled to recover unless the evidence shows that the injury was caused solely by the negligence of the defendant company, and that the plaintiff did not in any way contribute in causing the injury by any act or negligence of his own." Error in charging upon the measure of damages as follows: "If you find damages in favor of the plaintiff for the loss of his arm, if you find that it was a permanent injury, you look to the evidence, and see what he was worth before the injury and what he has received after the injury, taking into consideration the value of his services to himself since the injury, or what proportion his capacity to labor has been decreased by reason of the injury, and then find his expectancy." Alleged to be error, because

misleading to the jury in this: that it was calculated to impress them that the measure of plaintiff's damages for the loss of his arm was to be determined by ascertaining what plaintiff was actually getting as wages for some given time before the injury, and what he actually received as wages for a like time after his injury, and that the difference between what he actually happened to receive for a like period before and after the injury was the measure upon which they should calculate his damages for the permanent loss of his arm.

McCutchen & Shumate, for plaintiffs in error. Jones & Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 780)

WRIGHT et al. v. BLUTHENTHAL et al.
(Supreme Court of Georgia. April 15, 1895.)

RESTRAINING EXECUTION—SUFFICIENCY OF EVIDENCE.

Under the facts appearing in the record there was no error in denying the injunction prayed for.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by Mary J. Wright and others against Francis Bluthenthal and others for an injunction. Defendants had judgment, and plaintiffs bring error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Mary J. Wright, Duncan, Tumlin, and Jackson filed their petition against Bluthenthal & Bickart and against the sheriff of Haralson county, praying for injunction, etc., for reasons which will hereinafter appear. Upon the hearing, injunction was refused, to which ruling plaintiffs excepted. The petition was filed June 4, 1894.

Plaintiffs introduced certified copy of the records in a suit in Fulton superior court begun on July 27, 1891. The petition in said suit alleged: On January 20, 1877, Mary J. and W. L. Wright were married, and lived together as man and wife until July 20, 1888, when she separated from him because of cruel treatment and his adultery. He fled the state. On December 26, 1888, after the separation, he gave his note to Bluthenthal & Bickart of Fulton county for \$655, payable one day after date, with waiver of homestead. On January 21, 1889, they sued out an attachment for said sum against him on the ground that he had absconded, returnable to the July term, 1889, of Haralson superior court. On January 22, 1889, the deputy sheriff of Haralson county levied the attachment on certain personalty and realty in Haralson county. On January 25, 1890, Bluthenthal & Bickart obtained judgment in the attachment case against said property. Exe-

cution was issued on this judgment, and the property advertised for sale, and will be sold unless defendants are restrained. The petition prayed for total divorce; that all the property set forth in a schedule attached (the property levied on) be made subject to permanent alimony, and set apart to her as such, she having no separate estate, and no children; and that injunction issue against Bluthenthal & Bickart and Johnson, sheriff, restraining them from selling the property under the execution. On this petition Hon. R. H. Clark (who took jurisdiction because of the absence of Hon. M. J. Clarke, judge of Fulton superior court, from his circuit) granted a temporary restraining order enjoining defendants as prayed for, and a rule to show cause before him on August 31, 1891, why the injunction should not be granted as prayed for. On August 12, 1891, Bluthenthal & Bickart were served with the petition and order, and return made that Johnson and Wright were not to be found in Fulton county. On September 22, 1891, the restraining order was rescinded by Hon. R. H. Clark, on the ground that there was no appearance by plaintiff. On June 1, 1892, Mrs. Wright presented an amendment, alleging the granting of the temporary restraining order above mentioned, and the setting of the cause for hearing on August 31, 1891; that the hearing then was postponed without the knowledge and consent of petitioner or her attorney and without notice to either of them, to September 21, 1891, at which time Hon. M. J. Clarke had returned to his circuit, was then presiding and holding Fulton superior court, and hearing cases at chambers on Saturday of each week, under the rules of said court; that Hon. R. H. Clark, without notice to petitioner or her attorney, again postponed the hearing until Tuesday, September 22, 1891, and while Hon. M. J. Clarke was not absent from the circuit, Hon. R. H. Clark, judge of the Stone Mountain circuit, denied the injunction, and rescinded the restraining order; that defendants have not sought to enforce the execution since the restraining order was granted; that petitioner did not know that the restraining order had been rescinded until recently, and believes that defendants know that the order of rescission was not valid; that said Johnson, sheriff, by direction of Bluthenthal & Bickart, has recently advertised the property for sale under the execution, and will sell it on the first Tuesday in June, 1892, unless restrained; that neither petitioner nor her attorney knew that defendants were proceeding with the execution until within the last few days. The amendment prayed for a rule against defendants requiring them to show cause why the order denying injunction should not be set aside, and a temporary restraining order be granted, until the hearing of the rule nisi, and further order restraining defendants from selling or interfering with the property. On June 1, 1892, Hon. M. J. Clarke granted an order that defendants

show cause before him on June 4, 1892, why the order of September 22, 1891, should not be vacated; and that in the meantime, and until the hearing, defendants be restrained from further proceeding under the execution. On June 4, 1892, Hon. M. J. Clarke referred the case to Hon. R. H. Clark for decision. On February 4, 1893, plaintiff, by her counsel, dismissed the petition and case, and the restraining order of June 1, 1892, was rescinded, and the injunction denied. Plaintiff introduced an affidavit of her attorney, John A. Wimpy, that on June 1, 1892, he served the attorneys for Bluthenthal & Bickart with the restraining order of June 1, 1892, and said attorneys took upon themselves to notify the sheriff of Haralson county not to sell the property on the first Tuesday in June, 1892, and sent a telegram to said sheriff a day before the sale, notifying him of the injunction, the telegram being addressed to the sheriff, and signed by said attorneys; and that said attorneys notified deponent that there would be no sale, and, if a sale, they would not claim any benefits under it. Also the affidavit of W. R. Duncan that on July 3, 1892, he went to the courthouse of Haralson county to attend court, and to file a plea in the case of Holcomb, sheriff, for the use of Bluthenthal & Bickart, against Mary J. Wright et al., suit on bond (when attachment was levied, Mary J. Wright claimed the property, and gave a forthcoming bond, with Duncan, Tumlin, and Jackson as her sureties, and on June 28, 1892, a suit was brought on this bond in the superior court of Haralson county, returnable to the July term, 1892, of that court); that the plea was filed on said day; that deponent called the sheriff's attention to the fact that there was an injunction against plaintiff in said suit, enjoining them from proceeding in the case with the *fi. fa.*; that the sheriff saw the judge presiding, who was Judge Maddox, and then informed deponent he could go home, as nothing would be done in the suit on the bond until the injunction was dissolved; that deponent asked the sheriff if he could rely on that, who replied that he could; that deponent returned, and informed his attorney, John A. Wimpy, what the sheriff had said to deponent, and deponent and his attorney relied on this statement, and did not know that judgment had been taken on the bond until a long time afterwards. When this affidavit was made, the presiding judge, Hon. C. G. Janes, stated that he was presiding at the time referred to by Duncan, and had no recollection of the sheriff calling his attention to the matter. Defendants introduced the forthcoming bond, made February 2, 1889, to Holcomb, sheriff. Also the suit on this bond, which suit alleged, among other things, that the property was found subject to the attachment, and duly advertised to be sold on the first Tuesday in June, 1892. This suit was served on defendant July 1, 1892. Also the plea filed by defendants, by their attorney, Wimpy, on July 30, 1892, alleging no indebtedness,

and that in said case plaintiffs were restrained from selling or disposing of the property named in the bond, or interfering with it in any manner, by the judge of Fulton superior court; and that the restraining order was duly served on all the defendants in the petition for injunction before the first Tuesday in June, 1892. On July 28, 1893, verdict was rendered for plaintiffs in the suit on the bond, and judgment entered thereon. On this judgment execution was issued and levied on the property of Tumlin, the sale of which it was sought to enjoin in the present case. Defendants introduced also affidavits of William Johnson and George Bullard that they were sheriff and deputy sheriff on the first Tuesday in June, 1892, and were present when the sheriff sold the property of Wright under the attachment *fi. fa.*; that neither of them received any telegram touching an injunction against the sale until after the sale was made, and that neither of them had any notice or knowledge of the issuing of said injunction. Also certificate of the clerk of the superior court that the suit on the bond was in default, as shown by the entry by the presiding judge on the issue docket where the case was stated, and that there was no order of court taken to open said default before final judgment was entered in the case. Also the affidavit of Holcomb that he never knew of any injunction until he acknowledged service in the present case; that he never at any time agreed to continue the suit on the bond, and that he never had any conversation with Duncan on the subject. Also the advertisement by Johnson, in a public gazette, advertising the property described in the attachment and levy for sale on the first Tuesday in June, 1892, under the attachment in execution. It was admitted that Holcomb was not sheriff on the first Tuesday in June, 1892, his term of office having expired previous to that time; and that Johnson was his successor, and was sheriff on the first Tuesday in June, 1892.

John A. Wimpy, for plaintiffs in error. J. M. McBride and Edwards & Edwards, for defendants in error.

PER CURIAM. Judgment affirmed

(97 Ga. 215)

GARRISON v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

STRIKING NEW JURY—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. That the court, after a jury had been stricken to try the case, which was an indictment for a misdemeanor, ordered another jury to be stricken, and caused the trial to proceed before the latter jury, was not, of itself, cause for a new trial. It not appearing why this action was taken by the court, the presumption is that it was based upon a good and lawful reason.

2. The evidence was sufficient to support the verdict, and there was no merit in the ground

of the motion for a new trial relating to alleged newly-discovered evidence.

(Syllabus by the Court.)

Error from city court of Carroll; W. F. Brown, Judge.

Peter Garrison was convicted of illegal voting, and brings error. Affirmed.

The following is the official report:

Upon the trial there was evidence for the state that defendant voted at the election in question. Hewett testified that he did not know whether or not defendant lived in Georgia in 1893; but that defendant lived in Carroll county, Ga., in 1892. Lowry testified that defendant lived on his land in 1893; that he rented defendant land for that year, and saw defendant on the land in that year; could not say that he was there in March or April, 1893, but he was there in July, 1893; that defendant's family lived on the place all the year 1893; and that defendant had no wife, but his children, who lived with him, lived there all the year 1893. It does not appear from the record where the land of Lowry was situated. It was shown that the tax collector and tax receiver of Carroll county opened their books for the purpose of receiving returns and collecting taxes; that defendant's name appeared on the tax digest of Carroll county for 1893 as a defaulter for that year for a poll tax; that defendant did not return a poll. The tax execution against defendant for 1893 for \$2, double tax, was put in evidence for the state, being taxes for Carroll county. The defendant stated that he did not live in Carroll county, Ga., in 1893, but in Alabama; that he ditched in Alabama that year and gave in his taxes there, and that was his home in 1893; that his daughter's family lived on Lowry's place; that he had a tax receipt signed by W. S. McCarley, of which this is a copy: "Graham, Ala., 1894. Received from Peter Garrison \$1.50 for poll tax for the year 1893. [Signed] W. S. McCarley;" that he rented land from Lowry for his son-in-law, who cultivated it; and that he did not work any of said land in 1893. A witness swore that McCarley was a justice of the peace at Graham, Ala. The motion for new trial was upon the general grounds; also, because the court erred in directing counsel to strike another jury, they having already stricken one jury, and counsel objecting to striking, because the first jury stricken was competent to try the case; because the court erred in failing to instruct the jury as to what the law is in Alabama in reference to paying taxes in that state, when a party gives in taxes and fails to pay for that year, as to who is authorized under the law of Alabama to collect and receipt for taxes; also, because of certain affidavits and papers attached. One of these papers was a certificate of the judge of probate of Randolph county, Ala., that Peter Garrison, a negro, brings a tax receipt to him dated December 8, 1893, and signed by J. M. Kitchens, tax collector of Randolph county, and that to the

best of his knowledge and belief the signature is the genuine signature of Kitchens. The date of the trial does not appear, except that it was at the December term, 1894, of the court. The motion for new trial was filed December 12, 1894. The certificate above mentioned is dated December 13, 1894. The reference thereto in the motion for new trial was introduced by an amendment to the motion. Also, affidavit of one Teal that he is a resident of Alabama, and knows defendant; that defendant lived in Alabama in January to September or October, 1893, and ditched around in Alabama in that year, and ditched for deponent's father in 1893, and that all along defendant claimed that Alabama was his home. Also, affidavit of one Keith that defendant lived in Alabama from January to October, 1893; that deponent lived on and cultivated a crop on the same place where defendant's daughter lived; and that defendant had no family in 1893, but his daughter had a family. Also, the affidavit of defendant that he used due diligence to find testimony, and did not know of the evidence contained in the affidavits of Teal and Keith until after the trial. Also, the affidavit of defendant's counsel that the evidence in the affidavits of Keith and Teal had come to their knowledge since the trial. Among the papers stated in the motion for new trial, as of those which movant asked leave to attach thereto, was: "Tax receipt dated December 8, 1893, signed 'J. M. Kitchens, tax collector Alabama, Randolph county.'" No such paper appears in the record.

Cobb & Bro. and J. L. Cobb, for plaintiff in error. T. A. Atkinson, Sol. Gen., and Adamson & Jackson, for the State.

PER CURIAM. Judgment affirmed.

(96 Ga. 745)

WRIGHT, Comptroller General, v. BOYD.
(Supreme Court of Georgia. March 25, 1895.)

CONTEMPT—PROCEDURE—RE-EXAMINATION.

Where a judgment of contempt has been rendered by the superior court against one of its officers, and the same has not been reviewed and affirmed by the supreme court, the lower court, upon a proper case, may go behind the judgment, and look into the truth of the case, and, in its discretion, re-examine the same. *Kingsbery v. Ryan*, 17 S. E. 689, 92 Ga. 115, and cases there cited.

(Syllabus by the Court.)

Error from superior court, Lumpkin county; C. J. Wellborn, Judge.

Petition by M. G. Boyd against William A. Wright, comptroller general. From the overruling of a demurrer to the same, defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

On April 16, 1894, M. G. Boyd brought his petition, alleging as follows: At the October term, 1888, of the superior court, a rule nisi

was granted against him, as an attorney at law, alleging that there had been placed in his hands as such attorney two *fi. fas.* issued by W. L. Goldsmith, comptroller general of the state, against T. V. McAfee, defaulting tax collector of White county, and W. B. Bell, W. A. Reaves, and E. P. Williams, sureties on his official bond, for taxes collected for 1877, \$656.93, and for 1878, \$1,251.89; and that petitioner had collected on said *fi. fas.* \$1,423.80, and had paid over \$250, leaving a balance of \$1,273.80 due the state. The rule nisi required petitioner to show cause at the April term, 1893, why a rule absolute should not be granted against him, requiring him to pay over the last-named sum to W. A. Wright, comptroller general. At the October term, 1893, a rule absolute was granted, requiring him to pay to said comptroller general \$1,031.50, and that in default of such payment he be attached as for contempt. The sum of \$1,031.50 appears to have been arrived at after deducting certain commissions and charges from said \$1,173.80. The last-mentioned rule was granted without his having filed any defense or answer, and was to that extent and under that view an *ex parte* proceeding. The reason no defense or answer was filed was, that he was unable to attend to said business, owing to his physical and mental imbecility and infirmity at the time and for long thereafter, and that he was not represented by counsel. Said proceedings brought by the comptroller general were unauthorized and illegal. They should have been brought by the governor in behalf of the state; but petitioner does not make this claim as a mere technicality, and for the purpose of evading the payment of any debt owing by him to the state; and he admits that he was then, and still is, due the state some amount by reason of collections made by him on said *fi. fas.*, but denies that he was or is due the amount for which the rule absolute was taken. It is represented in the rule nisi that he had made the following collections: January 30, 1879, \$150; June 30, 1879, \$225; July 12, 1880, \$398.80; October 1, 1880, \$100; October 1, 1880, \$250; November 2, 1880, \$50; November 3, 1880, \$100. In footing up said amounts, the total was made to be \$1,423.80, whereas it should have been only \$1,273.80, being an apparent mistake on the face of the rule nisi of \$150 against petitioner; and the rule absolute, being for an amount, after allowing proper charges, in excess of the sums stated in the rule nisi, is void. The *fi. fa.* for the year 1877 was for the sum of \$656.93, as is shown in the rule nisi, and in fact that was the true sum for which it should have been issued; but from a statement from the comptroller general's office, the same being a final statement, there is now due for the taxes of said year only \$360.39, and petitioner should be credited with the difference between said \$656.93 and \$360.39, or \$296.54. He denies that he has ever collected all of the sums men-

tioned in the rule nisi, but he admits that, at the time the rule absolute was granted, he was liable to the state for \$300 over and above the amount he had accounted for, which sum, with the credit next mentioned, he is willing to pay. On April 27, 1887, an attachment based upon said rule absolute was issued against him, directing the sheriff to proceed unless within 60 days petitioner paid over one-fourth of said \$1,031.50, or \$257.87. He did pay on said attachment \$150 on July 12, 1887, and the attachment and all proceedings thereunder have since remained in statu quo. He desires to obtain his discharge under said rule, and from his indebtedness to the state; and to that end he desires to pay off and satisfy in full any judgment that may lawfully be entered against him. He prays that said attachment be set aside and annulled, except in so far as to allow him credit for the \$150 paid thereon; that the rule absolute be reopened and reviewed, and be regranted for only such sum as shall now appear to be due the state by him; that the solicitor general, representing the state, be required so to amend the rule nisi and rule absolute as that the same shall proceed in the name of the governor for the use and in behalf of the state, etc. Respondent demurred to the petition, on the ground that it was barred by the statute of limitations, and that the matters set up therein were *res adjudicata*. The demurrer was overruled, the rule absolute reopened, and set aside for future review and reconsideration, and the attachment founded thereon was annulled. Respondent excepted.

Howard Thompson, for plaintiff in error.
W. A. Charters, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 774)

WAXELBAUM et al. v. MATHEWS et al.
(Supreme Court of Georgia. April 29, 1895.)
CONTINUANCE—ILLNESS OF COUNSEL—INSOLVENCY
—DISCHARGING RECEIVER.

Under the facts disclosed by the record, there was no abuse of discretion in denying the motion to postpone the hearing, nor in passing the order complained of.

(Syllabus by the Court.)

Error from superior court, Randolph county;
J. M. Griggs, Judge.

Separate actions by Rouse, Hempstone & Co. and others and Mrs. J. R. Thornton and others. The two actions were consolidated, and tried together, against James G. Mathews. From a judgment rendered, S. Waxelbaum & Son and others bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Rouse, Hempstone & Co. and others, by their attorneys, Hardeman, Davis & Turner and Hood & Moye, on October 25, 1894, filed their petition in the nature of a creditors'

bill against James G. Mathews, and on the same day a temporary receiver was appointed, and temporary restraining order granted, restraining Mathews from disposing of his property, and requiring him to turn over to the receiver all his goods, money, notes, accounts, and other property. On October 26, 1894, the temporary receiver took possession of the property of Mathews, as directed in the order. On October 29, 1894, Mrs. J. R. Thornton, Mrs. S. F. Williams, Mrs. E. A. Mathews, Mrs. Jennie W. Mathews, N. R. Brown, Wm. C. Worrill, Wm. D. Kiddoo, and George P. Mathews filed their petition, alleging that they held mortgages against the property of James G. Mathews, then in the hands of the receiver, and praying that they be allowed to levy and sell the same. Upon this petition, the judge below directed the receiver to show cause on a certain day why the petition should not be granted, the order also requiring the parties in the original petition to be served with copies thereof, and the hearing was set at the same time as the application for injunction and receiver. Said application and the petition of the mortgagees coming on to be heard, it was agreed that both should be heard and determined in the same proceeding. The first-named petitioners moved a continuance or postponement of the hearing, because Mr. Turner was the leading counsel representing the petition, was at that time confined to his bed from illness, and from providential cause was prevented being present to represent them. In support of this ground, Mr. Hood, who was associate counsel, stated in his place that Mr. Turner was the leading counsel in the case, was sick in bed and unable to attend the trial; that Mr. Turner was the only member of the firm of Hardeman, Davis & Turner who had had anything to do with the cause, or knew anything thereof. In support of this he read a letter from Mr. Davis, of said firm, dated November 7, 1894 (the hearing was November 14, 1894) stating: "Mr. Turner still quite sick, not likely to be up in a week. Saw Judge Hutchins. He agrees to postpone. Take order so Turner can file affidavits when he gets up. The others of us had never heard of the case until yesterday." Signed: "Hardeman, Davis & Turner." The motion to postpone was overruled, to which ruling petitioners excepted. Among other things, the original petitioners offered in proof the original tax-returns slip of Mrs. Jennie W. Mathews, and the affidavit attached thereto for the year 1894, under the tax acts of 1886, 1888, 1890, 1892, showing return by her of only 20 acres of land in Randolph county, valued at \$200, and no other property, the oath being signed "Jennie W. Mathews," and attested: "Sworn to and subscribed before me this 6th day of May, 1894. Z. H. Shelby, Receiver of Tax Returns, County of Randolph, Ga." The court refused to admit this evidence upon the ground that the execution thereof had not been proved. To this ruling, also, petitioners excepted, and alleged that

said return slip was admissible, and the affidavit attached thereto showed that Mrs. Mathews "did not owe to her husband" James G. Mathews the amount of money for which he gave her the mortgage claimed by her; and that it was admissible without proof, because it purported to be an affidavit signed by her before the tax receiver; and under the order of the court said proof was to have been submitted by affidavit, and the returns slip was duly submitted under order of the court. (The order setting for hearing the petition of the alleged mortgagees provided that all affidavits to be used by either party at the hearing be submitted to opposing counsel at least two days before the hearing.) Petitioners put in evidence the Tax Digest of Randolph county for 1894, by which it appeared that all the property returned by Mrs. Jennie W. Mathews for taxation was 20 acres of land, valued at \$200. Also, the Tax Digest for 1894, showing that all the property returned by James G. Mathews was: Real estate, \$1,250; money, notes, and accounts, \$225; merchandise, \$3,850; furniture, \$120. Also, a statement, signed by James G. Mathews, dated August, 1892, as follows: "Assets: Real estate, house and lot, \$1,500; stock of merchandise on hand, \$4,500; good accounts outstanding, \$3,000; cash on hand, \$40. Liabilities: For merchandise, \$1,800; for cash to other parties, \$2,400; stock insured at present only for \$1,500." Also, affidavit of George and J. J. McDonald that about October 19, 1894, J. C. Mathews, for the purpose of procuring a loan from the Bank of Cuthbert, made a statement to deponent and J. J. McDonald, as a director of said bank, that at that time Mathews had stock of goods worth at least \$10,000 or \$12,000, and good accounts worth \$2,500; that he owed \$4,000, and besides owed Mrs. J. R. Thornton about \$1,500; but that debt would not trouble him; and that upon statement of his financial condition the bank made him an additional loan of \$296. Also, affidavit of Drewry, bookkeeper of said bank, that as such he presented to J. G. Mathews, since the same became due and payable, note dated May 8, 1894, due October 1, 1894, for \$140.38, payable to Armstrong, Cater & Co., and notes dated April 2, 1894, due October 1, 1894, for \$129.58, and one due October 15, 1894, for the same amount,—both payable to Rouse, Hempstone & Co.; and the payment of these notes was refused by Mathews and returned to the bank. Also, affidavit of George McDonald, that said Mathews came to the bank to see him, as president thereof, about some notes at the bank for collection against him; that deponent got the notes, mentioned in the affidavit of Drewry and others, against Mathews, and Mathews stated to him, about October 19, 1894, that he could not pay them, and wanted to get the bank to pay them, which it declined to do, and, payment of same having been refused, deponent, as president, ordered the notes returned; and that at the same time the bank

did pay a note for Mathews that was in protest shape, and Mathews said he could not now pay others. Also, affidavit of Ed. McDonald, cashier of the same bank, that said notes were presented to Mathews for payment after they were due, and payment thereof was refused, and the notes by the bank returned prior to October 25, 1894. Also, affidavit of Arthur Hood that on October 25, 1894, prior to the filing of the original petition, he, as attorney of creditors, called on J. G. Mathews, to know if he could not pay creditors represented by Hood & Moye, or secure some of them in some way, and Mathews stated to him that he was wholly insolvent, regretted he could not pay or secure his creditors in any way, and could not pay anything on any of them. Also, the affidavit of the clerk of the superior court of Randolph county that W. C. Worrill delivered to him, as clerk, for filing, deed from James G. Mathews to Mrs. J. R. Thornton, and mortgages by James G. Mathews to the Bank of Cuthbert, W. D. Kiddoo, and W. C. Worrill,—all dated October 24, 1894, and filed for record by Worrill on October 24, 1894, at 6:50 p. m.; and that W. D. Kiddoo filed for record on October 25, 1894, at 10:20 a. m., mortgages executed by James G. Mathews to Jennie W. Mathews, to George P. Mathews, to George W. Mathews, to Mrs. E. A. Mathews, to Mrs. J. R. Thornton, to N. R. Brown, to Mrs. S. F. Williams. Also, affidavit of various persons that they were acquainted with the character of the stock of goods in the storehouse of J. G. Mathews, and that said stock was not worth more than 75 cents on the dollar. Also, a letter of J. G. Mathews to Strauss Bros., dated October 19, 1894, stating, among other things, that his collections and sales had been extremely poor; that he had the largest stock he had ever carried, and it was unincumbered; that he had more due him on accounts than ever before at that date, but as he could neither collect nor make sales for the cash, it placed him where he was unable to meet promptly claims against him, and he would have to insist that his creditors "one and all" grant him such extension as will enable him to pass over the present depressed and panicky season, and that their note 15-18 had been paid, but he could not pay the one due November 1st to 4th under 30 days. Also, the mortgages in question, which mortgages were on the entire stock of goods and merchandise, store furniture, and fixtures of Mathews, and the mortgage to his wife included a small amount of furniture at his residence. Also, the account of Mrs. Jennie W. Mathews on the ledger of J. G. Mathews. On the credit side of this account, among other entries, was the following, under date of December 29, 1884, 1885: "To house and lot on College street, Cuthbert, Ga., \$1,250; to bills receivable, \$909.65." Across this entry was written "Void." It was admitted that the unsecured indebtedness of James G. Mathews was \$7,477.93, and the amount covered by the

mortgages \$7,379.50. It was also admitted that the inventory taken by the receiver of the stock was \$12,928.23; cash turned over to the receiver by J. G. Mathews, \$268.45; amount of notes and accounts turned over to receiver, which had not been transferred, \$1,406.54; amount of notes and accounts transferred to Jennie W. Mathews, E. A. Mathews, George T. Mathews, George W. Mathews, Mr. J. R. Thornton, and S. F. Williams, \$2,423.71; household furniture, \$70.

Defendants put in evidence affidavits of J. G. Mathews to the following effect: On his ledger account with his wife appear some items in reference to a sale to her of the house and lot in Cuthbert, in which he now resides, and the giving, payable to her, a note for remainder, appearing on the books. These entries were made by him, and deed and note executed by him, with the intention at the time of investing a part of her funds in said house and lot, but she declined to accept the same, and the deed and note were never delivered to her. He never gave in for her in Randolph county any taxes until 1894, and then gave in a small tract of land in which part of her money was invested, in June, 1893. He always thought, as her money was used in his business by him, that when he gave in his taxes this included hers; that he did this without any intention to evade the payment of taxes thereon, or deceive any one as to her worth or his. On January 12, 1894, he took the last inventory of his stock, etc., and his mercantile assets then were \$10,113.04, and his house and lot were worth \$1,250. His total liabilities, not including that to his wife, were \$5,570.94, and his liabilities to her, then about the same as now due her, \$4,288.40, leaving the total worth over all \$1,503.70. After that date, and to July 14, 1894, goods worth \$7,268.24 went into his stock, and he paid out to his debts and expenses about \$5,250.80; and, while he cannot ascertain how much goods were sold during that period, he believes that on July 14, 1894, and at all times prior thereto while he was in business, he was solvent. The orders for the goods from plaintiffs in the creditors' petition were all given by July 14, 1894, except four bills, amounting to about \$200, and he is unable to state when the orders for these goods were given. When he commenced his mercantile business in Cuthbert, in August, 1884, he had \$1,750 which belonged to his wife, all of which went into his business. Some time in the fall of 1883, at the house of Dr. W. R. Thornton, in Cuthbert, T. L. Williams, his wife's father, advanced her out of his estate \$500, and on Christmas, 1883, advanced her \$700, and gave to deponent an order on R. T. Humber for \$300 more, which he collected before January 1, 1884. About the first of 1884, Williams advanced to her a horse and two cows and calves, and deponent sold the horse and one of the cows for about \$165. Before August, 1884, she handed deponent \$50 at one time,

and \$20 at another, and at other times enough, with the above, to make the \$1,750. About the first of 1884, Williams gave her some land in Stewart county, and while in life collected the rents and paid them to deponent for her; and after his death J. T. Williams, as agent, rented said land, and paid the rent to deponent for her until October 1, 1889, when J. T. Williams bought a part of the land for \$400, which he paid, together with \$60, the rent of the land for 1889, to Orr & Co. on a debt due by deponent to them; and after the purchase J. T. Williams continued to collect the rent for the balance of the land up to 1894. Deponent's wife also deposited with him, after he commenced business, in small sums, and he annexes to this affidavit a detailed statement showing all amounts received by him for and from her, the dates when the several amounts were credited by him to her, and the interest calculated thereon at 7 per cent. per annum. None of said moneys were paid back to her, except amounts invested in fruit farm, fruit trees, work on farm, a mule, and a cow, the whole amounting to \$391.25, a detail of which is contained in said statement, with interest calculated on each at 7 per cent. per annum. On October 24, 1894, he executed and delivered to her a note and mortgage for the balance he was due her, as will appear from said statement, \$4,288.40. He owed her at that time said amount, every cent of which was just, and considered by him as a trust in his hands for her,—all of which money had gone into his mercantile business, and the benefits of which his various creditors during his business had received. He made the mortgage in the most perfect good faith, without any intention to delay, hinder, or defraud his creditors. On January 31, 1889, he received from Mrs. S. F. Williams \$62, for George W. Mathews, his son, which he delivered to him as a donation to said son from his grandfather, and gave Mrs. Williams a receipt therefor. On the same day he executed a note payable to George W. Mathews for the \$62, got W. A. Dickson to witness it, and explained to him how the money came; and deponent has ever since kept the note for his son. On October 24, 1894, he executed a new note, secured by mortgage to his son, for the \$62 and interest, and delivered the note and mortgage to G. T. Mathews, his brother, for his said son. On January 31, 1889, Mrs. S. T. Williams deposited with him, subject to call, \$100, stating that she wanted him to pay interest on it until she called for it. He has paid the interest annually, and this deposit is the consideration for the note and mortgage given her, which was delivered to her son J. F. Williams, her agent, on the day it bears date. The consideration of the note and mortgage made and delivered to Mrs. E. A. Mathews, deponent's mother, was another note dated —, which note was given for a balance due her at the time it bears date, for money

she loaned and deposited with him, as will appear from the books kept by him. The consideration for the note and mortgage given Mrs. Thornton was a balance due by deponent to W. R. Thornton in his lifetime, Mrs. Thornton being his only heir, and money collected by him for her, and money loaned to deponent by her out of money she obtained for insurance upon her husband's life,—all of which will more fully appear by the books kept by him. The consideration of the note and mortgage he gave to George P. Mathews was \$135, loaned by George P. Mathews to him December 15, 1893, and for which he gave George P. Mathews his note at that time, with interest that had accumulated thereon. The mortgage made to N. R. Brown by deponent October 28, 1894, was given to secure a note for money deposited and loaned by him to deponent, which appears on his books. The mortgages made to Kiddoo and Worrill, dated October 24, 1894, were made to secure a contract made with them at the date said mortgages were executed. All the mortgages were given in good faith to secure valid subsisting debts, and it was not his purpose in so doing to hinder, delay, or defraud his creditors. In reply to an affidavit of J. J. and George McDonald: He, about October 19, 1894, did ask the Bank of Cuthbert to advance him some money, and they did about that time pay for him a debt then in the hands of the bank for collection, of about \$296. He did not understand either of them to ask of him a full statement of his indebtedness, and did not either attempt or intend to give them such, but he understood them to ask for the amount of his indebtedness due to mercantile creditors, and would become due in a short time thereafter, as it was to meet these that he was asking for the loan, and he only gave them a statement of such of his debts to merchants and the bank as were due and would become due by November 1, 1894. During the conversation George McDonald asked him if he was still using his aunt's (Mrs. Thornton's) money, and he told him he was, and that the amount was about \$1,500, and he cannot understand how it was possible for them to misunderstand him in the matter. In reply to the affidavit of Drewry: Drewry never, after the notes mentioned in his affidavit became due, formally presented to him the said notes, nor did he to him refuse payment. The following occurred: One day after the notes were due Drewry came to his store having in his hands his usual collection book, and deponent, seeing him on a collecting tour around the square, and knowing that there were in possession of the bank at that time numbers of claims then due by him, said to Drewry that he knew what Drewry was after, and asked him where was George McDonald; and being told he was at the bank, deponent stated he would go over and see McDonald, and make some arrangement about paying the claims in the bank's hands for collection.

Drewry did not show him what claims he had with him, but he supposed Drewry had all that were in the bank's hands for collection. In reply to the affidavit of Hood: Prior to the filing of the creditors' petition against him, Hood never mentioned to him any claims he held as attorney except one, and that not one of the plaintiffs in petition. He stated to deponent, on October 25, 1894, that Inman, Smith & Co. had dispatched him to get something on their claim against deponent, or get some security therefor, and asked deponent what he could do, and deponent replied he could not do anything,—could neither pay them at that time nor secure the parties; did not say to Hood that he, deponent, was wholly insolvent. Deponent says that, from information received from the receiver, his stock of goods, furniture, and fixtures invoice \$12,928.23. He turned over to the receiver in cash and stamps \$268.45. He turned over to the receiver notes and accounts, to the amount of \$1,405.54, and receiver says are worth \$150. Collaterals are in some of the secured creditors' hands, as appears by his answer, amounting to \$2,423.71; and he believes if he could continue business, and help to collect these, they would be worth three-fourths of their face, \$1,817.79; furniture at his residence, \$70; that his debts unsecured are about \$7,477.93; secured, \$7,379.50,—total assets at cash prices, \$15,234.47; total liabilities, \$14,857.43: \$377.04. And all this without allowing anything to deponent for the profits he might reasonably hope to make on his goods, if he were allowed to sell them himself; while, from all his experience as to sales by receivers or sheriffs, he is of opinion that from 50 to 65 per cent. is all that could be realized for his stock, and his notes, accounts, and the collaterals never would become greatly less in value than now. While at the time he had his conversation with Hood he did not have sufficient data to state accurately about his solvency, he at that time believed he was solvent. On October 4, 1894, he sent for Ed. McDonald and told him there were some notes of his falling due that day that were in the bank, and asked him to protect all that were in protest shape, and McDonald consented. McDonald never at that time showed him either of the notes described in his affidavit, or any others; nor did he state he had them with him, nor did he mention the name of any particular note, nor did he at any other time before the filing of the creditors' petition show him such notes or ask him to pay them. Annexed is the original statement shown by him to George and J. J. McDonald at the time they mention in their joint affidavit, and from it it can be seen that no business man, with a knowledge of the character of the trade deponent was engaged in, would have reasonably supposed this was a full statement of his indebtedness. The statement annexed shows, as due from October 1st to 4th to certain firms, certain sums; as due to the bank and certain

named firms from October 15th to 18th certain sums; as due from November 1st to 4th to certain named firms, certain amounts,—the whole amounting to \$4,007.82; cash receipts for September, \$2,360.75; from 1st to 17th October, \$985.20, merchandise stock, at least \$10,000; and notes and accounts, \$2,500. Defendants introduced, also, affidavits of J. T. Williams, Mrs. Jennie W. Mathews, Mrs. E. A. Mathews, W. A. Dickson, Mrs. S. F. Williams, Mrs. J. R. Thornton, and George P. Mathews, tending to corroborate the affidavit of James G. Mathews as to the amount of his indebtedness to the various mortgagees (except Worrill and Kiddoo), as to how such indebtedness arose, as to the giving of the various notes and mortgages, etc. Mrs. Jennie W. Mathews deposed, among other things, that some time in 1885 or the first of 1886 her husband proposed to invest some of her money in his hands, and used by him, in the house and lot in which they now reside in Cuthbert, but she declined to allow the investment, and no deed to the house and lot, or note for any balance of amount due by him to her over the house and lot, was ever at any time accepted by or delivered to her. Mrs. E. A. Mathews deposed, among other things, that the indebtedness of James G. Mathews to her is valid and honest, and that in accepting his note and mortgage to her she acted in good faith, and without any intention to hinder, delay, or defraud any creditor of his; and that, if he had any such intention, she had no knowledge of it, and no reason to suspect it. Mrs. S. F. Williams deposed similarly as to the note and mortgage to her. Mrs. Thornton deposed similarly as to the note and mortgage to her. George P. Mathews deposed similarly as to the note and mortgage to him. Defendants put in evidence a note of James G. Mathews, to which Dickson was a witness, dated January 31, 1889, due one day after date, payable to George W. Mathews, or order, for \$62, with interest at 7 per cent. per annum. Also, two receipts by James G. Mathews to Mrs. S. F. Williams, each dated January 31, 1889, one for \$100, acknowledging receipt from her of that amount on deposit, subject to call, and the other acknowledging receipt from her of \$62 in settlement of donation by T. L. Williams, deceased, to George W. Mathews. Also, affidavit of W. D. Kiddoo and W. C. Worrill: They have had considerable experience for 10 or 12 years as to the matters herein spoken of, and in all that time have never known any stock of goods to be sold by a sheriff or receiver anywhere in this (the Pataula) circuit for more than 67 per cent. of its cost price, and never knew of but one that sold that high. They are both of the opinion that the stock of goods, etc., of James G. Mathews now in the hands of the receiver would not sell that high, either at sheriff's or receiver's sale. Also, affidavit of W. D. Kiddoo: He delivered to the clerk of the superior court for record, at 10:20 a.

m., on October 25, 1894, all the mortgages on James G. Mathews filed that day. Each of them had been delivered to the parties to whom they were made payable, and persons authorized to receive them, and he was then requested to have said mortgages recorded for the mortgagees, by such persons or mortgagees. He did not deliver to the clerk the mortgages he received on October 24, 1894. Also, affidavit of W. C. Worrill: In his presence James G. Mathews delivered to W. D. Kiddoo a note and mortgage for \$400, dated October 24, 1894, and also delivered to the president of the Bank of Outhbert, George McDonald, a mortgage of the same date. After delivering, Kiddoo handed deponent his mortgage, with a request that he deliver it to the clerk of the superior court for filing and record. McDonald handed deponent the mortgage for the bank, and requested him to deliver it to the clerk for filing and record. Deponent had a mortgage made by James G. Mathews to himself, and when he delivered his own, delivered the mortgages of Kiddoo and the bank to the clerk. Deponent was present when J. G. Mathews delivered to Mrs. Thornton the deed to his house and lot in Outhbert, and after accepting it she handed it to deponent, and requested him to deliver it to the clerk of the superior court, which deponent did, all of said deliveries to the clerk being made on the evening of October 24, 1894. Also, affidavits of various persons: They are merchants in Outhbert, and know something of the character of the goods of Mathews now in possession of the receiver. In their opinion, if the goods were now forced to sale by a receiver or sheriff, they would not bring more than 50 per cent. of the cost price. In the last several years they have known of numbers of such sales of similar stocks, which have ranged from about 50 to 65 per cent. Also, note of J. G. Mathews to N. R. Brown for \$342.35, dated February 8, 1893, due November 1, 1893; note of same to Mrs. E. A. Mathews for \$328, dated November 12, 1891, due one day after date; and note of same to George P. Mathews for \$135, dated December 15, 1893, due one day after date. Also, the cashbook and ledger of J. G. Mathews, showing that the cash and charges in said books correspond with the amounts and dates of such three notes and the notes to G. W. Mathews and Mrs. S. F. Williams, and in support of the evidence of Mrs. E. A. Mathews, Mrs. Jennie W. Mathews, and Mrs. Thornton.

The court ordered that the receiver allow the sheriff to levy upon and take possession of the goods, books, and merchandise, the property of J. G. Mathews in his hands; that the receiver be paid, for his compensation as such, a stated amount for his expenses and all costs of this proceeding to date, out of the assets by this order put in the hands of the sheriff; that he pay over to the attorneys for the mortgage creditors all the money he has collected on notes and account that were

transferred to such creditors; that the application for a permanent receiver be denied as to all the assets of J. G. Mathews, except the accounts and notes contained in the lists of such claims turned over to him by J. G. Mathews (amount \$1,405.54), less Mitchell Taylor's note and mortgage (for \$100, the account for which said note and mortgage were given being among those transferred on October 24, 1894, to Mrs. Jennie W. Mathews), which he will turn over to the creditors to whom the debt of Taylor is transferred, and also the money now in his hands; that McDonald be made permanent receiver of the money now in his hands as temporary receiver, and said accounts and notes, until the further order of the court; and that when the sheriff sells the goods he pay over to the several mortgage creditors, according to their priority, the net proceeds of his sale; and, if all of the mortgages are thus paid the mortgagees holding collaterals be required to turn over to the receiver the balance of the collateral remaining in their hands, and he proceed to collect the same and hold the proceeds until the further order of the court. To the granting of this order the original petitioner excepted: Because it was contrary to law; because contrary to the evidence; because the evidence uncontradicted was that J. G. Mathews was insolvent, and that the assets in the hands of the receiver were more than sufficient to pay off the preferred creditors; because the evidence showed strongly that the intention of J. G. Mathews in giving the mortgages was to hinder, delay, and defeat his nonpreferred creditors, and a receiver should have been appointed to hold said assets until this matter could be determined by a jury; because the court, having already seized said assets by its temporary receiver, while Mathews was still a merchant, it was contrary to law and equity for the court to take the assets out of the hands of the receiver, and direct the sheriff to levy upon and sell the same upon the application of the mortgage creditors; and because, the evidence showing that Mathews was a trader when the temporary receiver was appointed, and that he was insolvent, but that his assets were more than enough to pay off the preferred debt, to refuse to appoint a receiver to protect the assets was contrary to law and to the evidence.

Hardeman, Davis & Turner and Hood & Moye, for plaintiff in error. W. C. Worrill and W. D. Kiddoo, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 217)

JOHNSON v. STATE.

(Supreme Court of Georgia. April 8, 1895.)

CARRYING CONCEALED WEAPONS—NEW TRIAL.

There being evidence to sustain the verdict, and no error of law being complained of,

this court will not control the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Macon; John P. Ross, Judge.

Willie Johnson was convicted of carrying concealed weapons, and brings error. Affirmed.

The following is the official report:

Willie Johnson was accused of carrying concealed weapons, and was found guilty. The sole question is whether the finding is sufficiently supported by the evidence. Ison Lamar testified: "Willie Johnson came to a house where there was a dance, with Bob Watkins. About half an hour after they came, Watkins and I got into a fuss, during which I looked towards Johnson. He was aiming a pistol at me. A moment after, he fired it at me. I saw him several times during the preceding half hour. Saw no pistol in his possession or about his person. He was dancing during the time he was there." Bob Watkins testified: "I went to the house with Johnson. Saw no pistol in his hands, nor in any of his pockets. Saw no pistol till the fuss. First I saw of the pistol was in his hand when he was shooting it. Did not see him make any motion to draw anything. Don't know whether he was dancing or not." Jerre Jackson testified: "I was at the hall when Bob and Willie came in. They had been there some time when Bob and Ison got in a fuss. Willie said something about the quarrel, taking Bob's part. Ison got mad with Willie, and cursed him. Willie cursed back. Ison started towards Willie with a knife. Willie shot sorter in the direction of Ison. The first I saw of the pistol was when it was in Willie's hand. I did not see him make any motion to draw a weapon. I do not know what became of the pistol after the shooting,—there was such a crowd around, and I was scared. I got out of the window, and left. Willie did not dance any."

Harris & Harris, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 217)

BELL v. STATE.

(Supreme Court of Georgia. April 8, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL—NEW TRIAL—SUFFICIENCY OF MOTION.

The grounds of the motion for a new trial alleging errors on the part of the judge who presided at the trial are not approved. Those which relate to alleged misconduct on the part of the jury, the substitution of one juror for another, and to newly-discovered evidence, are not properly verified or supported. The only grounds which can be considered by this court are that the verdict is contrary to law and contrary to the evidence; and, as the evidence for the state was sufficient to support the verdict, no cause for a new trial appears.

(Syllabus by the Court.)

Error from superior court, Calhoun county; B. B. Bower, Judge.

West Bell was convicted of a crime, and brings error. Affirmed.

Geo. H. Dozier and Thos. W. Latham, for plaintiff in error. W. N. Spence, Sol. Gen., and J. M. Terrell, Atty. Gen., for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 213)

MITCHELL v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

1. The indictment being founded upon the act of August 9, 1881 (Acts 1880-81, p. 591), prohibiting the sale of certain specified liquors within the limits of the 714th district, G. M., of Carroll county, and the indictment charging that the accused sold such liquors within that district, it was essential to prove that the sale actually occurred within the limits thereof; and, the state having failed to make such proof, the verdict was necessarily contrary to law.

2. As ruled by this court in *Hines v. State*, 18 S. E. 558, 93 Ga. 187, it was not necessary, in such case, for the state to prove affirmatively that the accused was not a "licensed physician, in the regular practice of his profession," etc., although the indictment so alleged.

(Syllabus by the Court.)

Error from city court of Carroll; W. F. Brown, Judge.

Isham Mitchell was convicted of an illegal sale of liquors, and brings error. Reversed.

J. L. Cobb, for plaintiff in error. T. A. Atkinson, Sol. Gen., and Adamson & Jackson, for the State.

PER CURIAM. Judgment reversed.

(96 Ga. 732)

CLARK v. FLANNERY et al.

(Supreme Court of Georgia. May 13, 1895.)

RESTRAINING EXECUTION—SUFFICIENCY OF EVIDENCE.

On the facts disclosed by the record, there was no error in denying the injunction.

(Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Action by William G. Clark, as next friend of certain minors, against John Flannery & Co. and others. Defendants had judgment, and plaintiff brings error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

A petition was brought, December 27, 1894, by Clark, as next friend of the seven minor children of J. A. D. Coley, for injunction against the enforcement of executions in favor of John Flannery & Co. against J. A. D. Coley, trustee. The injunction was denied, and plaintiff excepted. It appears that Allatia Coley, brother of J. A. D. Coley, died, leaving a will dated December 2, 1885, which was proved and admitted to record on January

4, 1886. By this will he constituted J. A. D. Coley executor, and devised to him all his estate, consisting of 400 acres of land, upon which testator lived, known as a part of the old J. A. D. Coley plantation; also three mules, one horse, and his household and kitchen furniture, in trust to and for the children of J. A. D. Coley then in life and such as should thereafter be born, for and during the life of J. A. D. Coley; then to vest absolutely in, and become the property of, said children, or such of them as should be living at such time. The petition alleges that J. A. D. Coley undertook to discharge the duties delegated to him by the will, as trustee, and took possession of the property, neither having nor claiming any title or interest therein except a life estate in the office of trustee; that on May 22, 1893, he gave to Flannery & Co. five promissory notes for \$90 each, and one for \$73.79, all due October 15, 1893, with interest from maturity at 8 per cent., and 10 per cent. attorney's fees, the first five being in renewal of notes between the same parties, dated March 10, 1891; that the consideration of said notes was money borrowed by Coley for his own personal use and that of his wife and children, and only a small portion of it, if any, was used for the benefit of the trust estates, and but little for the benefit of the cestuis que trustent, but the bulk of it being applied to purposes in no way connected with the trust estate, and for which the trust estate was in no way liable; that on January 11, 1891, Flannery & Co. brought suit on the notes in the county court, and Coley, though knowing the material allegations in the declaration to be untrue, neglected and failed to make any defense, and allowed judgment to be taken against him by default, and against the trust estate, without any proof except the production of the notes; that in the fall of 1893 he had delivered to Flannery & Co. four bales of cotton as a credit on said indebtedness, but no credit was given therefor, and the judgment was rendered for a much larger amount than was due on the notes; that execution has been issued upon the judgment, against Coley and against the trust property, and the land has been levied on and advertised for sale thereunder; and that Coley is insolvent, and, if the land be sold, it will strip the minors of the provision made for their support, without any fault on their part, and without an equivalent for the debt for which the property is sold. Attached to the petition is a copy of the declaration on one of the notes on which suit was brought in the county court, which note is signed by "J. A. D. Coley, Trustee." The declaration alleges that J. A. D. Coley, as trustee for his children (naming three of them) and all his other children, all of whom are minors, is indebted to plaintiff \$90 principal, besides interest and attorney's fees, upon a note given for money furnished by plaintiffs for the trust estate of which Coley

is trustee, which money was necessary for said trust estate, and was used for and by it for the benefit of the cestui que trust in making crops on the trust-estate lands, and feeding the trust-estate stock, and otherwise in running said trust estate for the benefit of the trust estate and the cestui que trust. It then describes the 400 acres of land, the crops, stock, etc., of which the trust estate is alleged to consist, refers to the will of Allatin Coley, and states that said property is trust property, and is subject to plaintiff's debt; and judgment against the same is prayed. Upon this declaration judgment by default was rendered, February 6, 1894, in accordance with the allegations and prayer thereof, except that the judgment does not include attorney's fees.

The petition for injunction was sworn to by the plaintiff therein. In support of the same he read the affidavit of J. A. D. Coley, as follows: He is not indebted to Flannery & Co. the amount of the judgments taken against him, as trustee, in the county court, on February 6, 1894. The notes on which the judgments are founded did not represent the true indebtedness. He was entitled to certain credits which did not appear on the notes, among which credits were the proceeds of four bales of cotton sent to Flannery & Co. in 1894, and duly received by them. On the day the judgments were taken, J. L. Johnson, of the firm of Flannery & Co., agreed with defendant that if he would make no defense to the suits, Johnson would allow the credits to be taken off before judgment was entered; there being at the time no dispute as to the fact of the credits. Acting on this agreement, deponent made no defense; but, instead of taking it off the credits as agreed, counsel for Flannery & Co. took judgment for the full amount of the notes, allowing no credits, and deponent did not discover this fact until some time afterwards, when too late to appeal or otherwise redress the wrong. The net proceeds of three of the bales of cotton were \$104.56, as per statement of Flannery & Co. No account was rendered for the other bale, though its receipt was duly acknowledged by letter and orally. Deponent believes the books of Flannery & Co. will show the indebtedness to be considerably less than the amount of the judgments after taking off the four bales of cotton; but he is unable to state the exact amount, as he depended on plaintiffs to keep the account and give all proper credits. He intended to make defense, and have the claims reduced to their true amount, and would have done so but for Johnson's promise. The indebtedness represented by these notes had been running for several years, payments having been made on the account from time to time, and notes renewed at different periods; but the true indebtedness was to be shown by the account kept by Flannery & Co., notes and mortgages sometimes being given in advance. All the indebtedness was for money borrowed, or advanced by them to

deponent; and, so far as he believes, or can remember, none of it went to the benefit of the trust estate represented by him, but it was used by him to pay his personal debts and family expenses. He commenced dealing with Flannery & Co., as trustee, about 1887, and at their request continued the account in this way, and gave notes accordingly; but whatever money from them was used for the benefit of the trust estate, has long since been paid in full, and the trust estate got no benefit of the present indebtedness. Flannery & Co. demurred to the petition, and made answer, alleging as follows: The money was advanced by them to Coley as trustee, and for the benefit of the trust estate, and was so used by him, and not a cent was advanced to him individually, for they knew his condition, and would not have credited him personally. The money was advanced for the trust estate, and to enable him to run the same; and, except for the trust estate, they would not have advanced him anything whatever. At the time the judgments were rendered he was present, and represented by counsel, Judge A. C. Pate. It was agreed between the counsel for both parties and the parties in person that the judgments should not be pushed until fall, Coley, as trustee, promising to pay out of his crops; and, as a matter of courtesy and indulgence, Flannery & Co. agreed to hold up the judgments until the crops were gathered, and faithfully complied with their agreement, to give the trustee an opportunity to pay out of the crops. He paid nothing and not until December 4, 1894, did they attempt to push the *fi. fas.* Until the filing of this petition, nothing was heard of the debts not being for the trust estate. They deny the allegations touching the delivery of four bales of cotton and failure to give credit for the same. In support of the answer there were affidavits by Johnson and by counsel for Flannery & Co., amplifying the allegations thereof. Also several mortgages, given in 1890, 1891, and 1893, by "J. A. D. Coley, trustee for the children of J. A. D. Coley and Charlotte T. Coley," and signed "J. A. D. Coley, Trustee," covering crops of corn, cotton, etc., on the Allatia Coley place, and given to secure indebtedness by promissory notes, and general and special balances. One of these mortgages is dated May 22, 1893, and purports to be given to secure five promissory notes for \$90 each and one for \$73.79, bearing the same date, and due October 15, 1893, covering "all my crops of cotton and corn now up and growing on the farm in Pulaski county, Ga., known as the Allatia Coley Place," now held by me in trust for said children of J. A. D. Coley and Allatia Coley, for whose benefit the debt hereby secured was contracted," etc.

W. L. & Warren Grice, for plaintiff in error.
J. H. Martin, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 783)

MATTHEWS v. WILLOUGHBY.

(Supreme Court of Georgia. May 15, 1895.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

The determination of this case depended entirely upon whether the jury believed the witnesses for the plaintiff or the witnesses for the defendant. They having believed the former, and there being no error of law alleged, the case falls within the general rule that a verdict supported by evidence, and approved by the trial judge, will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Madison county; H. McWhorter, Judge.

Action by Adeline Willoughby against J. H. Matthews and her husband, Willoughby. Judgment for plaintiff, and defendant Matthews brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

The case was brought to this court, and a new trial granted, because of the refusal of a continuance moved for by defendant. 85 Ga. 289, 11 S. E. 620. On the last trial there was a verdict finding the premises for plaintiff and \$25 per year for rent. Defendant moved for a new trial, on the general grounds, and, his motion being overruled, excepted. The evidence for plaintiff was to the following effect: She and her husband are now divorced. The land in dispute is hers. Her money paid for it. She owned some railroad stock, which she sold and gave him \$387.50, and told him to buy the land. He bought the land from Mrs. Talmage, and paid for it with plaintiff's money. When he went to get the deed, Mrs. Talmage had it already made in his name. He told her he wanted it in his wife's name, and she said he could have it changed any time he wanted to. When he came home, and plaintiff found the deed was made to him, he told her she could have it changed whenever she wanted. They then moved on the land, made one crop, and stayed there until April of the year following. She never told defendant directly that her money paid for the land, but he came over to see about putting a sawmill on the place, and she told her husband, in defendant's presence, that her money paid for the land, and she did not want the sawmill put there. Supposes defendant heard this. He was right there, and could have heard it. She and her husband had a falling out about the land, and he moved over to Bailey Matthews, and she tended some patches that year, and he worked a portion of the land. After she moved off, she does not know who cultivated the land, whether her husband or Matthews. She never made any effort to have the deed changed so as to show that the land belonged to her. As soon as her husband came home with the deed, he told her Mrs. Talmage said it could be changed any time so as to put the deed in her. She and her husband fell out about Matthews wanting to put the sawmill on the land and saw up the timber. There was a house and part of another house on the land, and there might

have been a little patch cleared. She and her husband cleared a little more. It is nearly all cleared now. The place is worth for rent \$100 a year. Her husband owed Matthews, who wanted the money, and her husband did not have it. Matthews asked him to deed him the land to secure the debt and what her husband was to get from Matthews that year. He told Matthews the land was not his; that plaintiff's money paid for it. And Matthews said that did not make any difference; insisted on the deed being made, and her husband made it; gave Matthews his note for \$200, and Matthews gave him bond for title to reconvey the land. Some time after this, one Phillips had a judgment against Willoughby, which was levied on some cotton. Willoughby wanted to borrow the money from Matthews to pay Phillips, and Matthews told Willoughby to just give him up the bond for titles, and they would knock Phillips out of his money, and then he (Matthews) would give Willoughby back the bond. Under these statements, Willoughby gave him the bond, and, after that, went to Matthews for a settlement, and to get the bonds. But Matthews told him he had no settlement for him; that Willoughby did not have a scratch of a pen against the land; and that, if Willoughby did not leave and stay away from there, he would hurt him. Willoughby paid Matthews all he owed Matthews. Matthews got all his crop. Plaintiff introduced the deed from Mrs. Talmage to Willoughby, the deed from Willoughby to Matthews, and the bond for titles from Matthews to Willoughby. Matthews testified: Willoughby owed him about \$160, and wanted supplies amounting to about \$40 more. Matthews wanted security. Willoughby told him it was all right; that he (Willoughby) had the deed to the land; that he bought it from Mrs. Talmage, and had paid her for it; and showed Matthews the deed, saying the land was straight, and all right, and was his. Matthews agreed that, if Willoughby would deed him the land, he would take Willoughby's note for \$200, furnish him the other \$40, give him bond for titles, and reconvey Willoughby the land whenever Willoughby paid the debt. Willoughby made him the deed, and he gave the bond for titles. He continued to let Willoughby have goods, and Willoughby continued to get in his debt, promising all the time to pay. Matthews got tired of carrying him, insisted on his money, and they settled; and Willoughby was owing him a considerable amount, the \$200, and had no other way to pay the land, and Matthews agreed to take the land for what Willoughby then owed him, and the latter agreed to it. It was a fair trade, in good faith, and Matthews paid him the full value of the land, without notice from any one that plaintiff had or claimed any interest in the land. Plaintiff never told Matthews, nor said in his hearing, nor ever gave him any notice, that she had or claimed any interest in the land. There is no truth in the testimony about the sawmill bus-

iness. He never told Willoughby he wanted his bond to defeat Phillips, or anything of the kind, but the bond was delivered up as above stated. He has traded with Willoughby since, who still owes him other amounts, and never heard until this suit was brought of plaintiff's claims. The things he let Willoughby have for which Willoughby owed him were supplies, etc., for Willoughby and his wife, and for things generally Willoughby wanted to buy. About the time Phillips had some of Willoughby's cotton levied on, Willoughby tried to borrow some money about getting the debt settled, and Matthews thinks Willoughby got a bag of cotton on that debt. He (Matthews) never got anything that Phillips was to have, and never got anything from Willoughby but what Willoughby got full value for. Willoughby never did ask for the bond after he gave it up to Matthews. Matthews was notified to produce his books and evidences of debt against Willoughby. Has not produced them, but has a copy in court. Bailey Matthews testified for defendant: "Willoughby had been working with me and in that neighborhood for several years. I let him have land to cultivate, the year he bought the land in dispute. He made a very fine cotton crop that year, and had been making good crops for several years. He was also receiving a good deal of money from preaching to a good large church, and that paid him well; sometimes \$15 or \$20 a month. I have known it to pay him that much, and they paid that pretty regularly. I was a deacon in the church, and helped take up the collection, and know of my own knowledge of his getting this money that way. I had bargained for the land in dispute and other land, and found I was not going to be able to pay for all of it; and Willoughby was talking about wanting to buy some land, and I asked him to let me sell him this piece, and we about agreed on it. The next day we went to see Mrs. Talmage. I had already paid her about \$50 on the land. Asked her how much more was due, and told her we had come for the deed, that I didn't have the money myself, but that Willoughby was going to take it up. She agreed to make the deed to Willoughby. There was nothing then said by Willoughby nor any one about the land being bought for plaintiff or any one but Willoughby, nor about the money which paid for the land belonging to plaintiff or any one else. I don't know how many members were in the church Willoughby had charge of. I testified in this case before, but don't remember testifying that Willoughby ever told Matthews his wife claimed the land. Don't remember ever having heard Willoughby told Matthews any such thing, and don't remember ever having heard Matthews tell Willoughby he wanted the bond to defeat Phillips in anything. The title, I reckon, is in Phillips, to the land I am living on. What I testified on the former trial was what I thought was the truth. The matter was then fresher in my memory than now. I was then

a witness for plaintiff. In rebuttal, a witness testified for plaintiff. I heard Bailey Matthews testify on the former trial. He testified, in substance, that he was present when Matthews asked Willoughby to make him a deed to the land; that Willoughby then told Matthews the land belonged to plaintiff, that she paid for it, and the deed was made to him by mistake; and that Matthews replied that was all right, that he wanted the deed any way."

D. W. Meadow and B. T. Moseley, for plaintiff in error. John J. Strickland, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 733)

MADDOX et al. v. TIDWELL et al.
(Supreme Court of Georgia. May 15, 1895.)

CREDITORS' BILL—PROPRIETY OF DECREE.

Under the facts appearing in the record in this cause, the order of the chancellor properly guards all the rights of the respective parties, and no error was committed in the appointment of a receiver or in requiring bond of the defendants.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Petition by Tidwell & Pope against J. J. & J. E. Maddox and R. M. Wiley and others. Decree for petitioners, and J. J. & J. E. Maddox bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Tidwell & Pope filed their petition, in the nature of a general creditors' bill, alleging: Wiley & Wilkins, a firm composed of W. D. Wiley and J. H. Wilkins, are indebted to them \$689.08, on a promissory note dated November 14, 1894, and due one day after date, which Wiley & Wilkins refuse to pay. (3) On November 14, 1894, Wiley & Wilkins, by Wilkins, executed and delivered to petitioners a mortgage on their stock of merchandise at 140 Whitehall street, Atlanta; also on a horse and delivery wagon, the books of account of defendants, and the fixtures in said store. (4) On November 16, 1894, petitioners foreclosed this mortgage, and the sheriff levied the mortgage *fi. fa.* on the goods in the store, but could not levy on the books of account, nor the horse and delivery wagon, nor a large part of the goods in the store at the time the mortgage was given, for reasons hereinafter stated. (5) There has been much dispute and trouble between Wiley and Wilkins, Wilkins claiming that Wiley was selling large quantities of merchandise belonging to the firm, to his individual creditors, in payment of the individual indebtedness of Wiley. (6) There is much bad feeling growing out of said difficulty between the partners, and they cannot agree upon the conduct of the business. (7) Wilkins claims that Wiley has disposed of the horse and wagon, and that the same were

removed from the stable on the night of November 14, 1894, by Wiley, and has not been seen since, and that Wiley refuses to tell where it is, and the sheriff has not been able to levy the *fi. fa.* upon the same, all of which petitioners charge and believe to be true. (8) Wiley has removed the books of accounts from the store where they have always been kept, and the sheriff has been unable to levy the *fi. fa.* upon them. Petitioners charge, on information and belief, that Wiley has delivered them to his brother R. M. Wiley, and refuses to tell the sheriff where they are when requested to do so. (9) On November 14, 1894, about dark, Wiley colluded with J. J. & J. E. Maddox, and had five dray loads of goods, belonging to Wiley & Wilkins, carried to the store of J. J. & J. E. Maddox, the latter and Wiley pretending that the goods taken were consigned to Wiley & Wilkins by J. J. & J. E. Maddox. This was not true, but all of said goods that had come from J. J. & J. E. Maddox were purchased and not consigned, and a large part of them had never belonged to J. J. & J. E. Maddox, but had been purchased by Wiley & Wilkins from petitioners and other merchants. (10) The goods in the store of Wiley & Wilkins are being levied upon by persons who claim liens upon them, and are now in the hands of the sheriff. (11) The assets of Wiley & Wilkins are in great danger of being dissipated and lost to their creditors. They are insolvent, and the goods levied upon by the sheriff are not of sufficient value to pay petitioners' mortgage *fi. fa.* (12) Prayer for process to Wiley & Wilkins, J. J. & J. E. Maddox, R. M. Wiley, and the sheriff. (13) Prayer for injunction restraining defendants from interfering with said goods. (14) For a receiver to take charge of all the assets belonging to Wiley & Wilkins; for temporary receiver and temporary restraining order. (15) That J. J. & J. E. Maddox deliver up said goods in their possession to the receiver. (16) For judgment or decree against Wiley & Wilkins for the amount of said indebtedness, and for general relief. J. J. & J. E. Maddox and R. M. Wiley demurred generally. Also, because plaintiffs' petition is multifarious, in that there is a misjoinder of defendants. Further, because there is no allegation of insolvency of the defendants, and no other sufficient reason alleged against them to authorize a restraining order, injunction, receiver, or other remedy against them. Further, because, under the allegations in paragraph 3 of the petition, petitioners had no right to take and accept a mortgage of Wilkins, it not being alleged that the other partner had notice of the same or consented thereto, or ever ratified the making of the mortgage. Further, because, under the allegations of paragraph 5, plaintiffs are not entitled to any remedy against these defendants. Further, because the allegations of paragraph 7 are insufficient against these defendants, and do not authorize or justify petitioners, or furnish them any remedy against defendants.

Further, because paragraph 8 is an insufficient allegation as against these defendants, and furnishes no right or remedy against defendants. Further, because, under the allegations of paragraph 9, petitioners are not entitled to any restraining order, injunction, or receiver, or other judgment or decree against these defendants, and are not authorized and ought not to be permitted to proceed further against defendants. Further, because the allegations in paragraph 10 set forth no right or cause of action against these defendants, but, on the contrary, under the allegation that other creditors of Wiley & Wilkins have valid liens, petitioners should not be allowed to hinder and delay them in their collection. Further, because, under the allegations in paragraph 11, plaintiffs are not entitled to any remedy against these defendants, said property being in the hands of the sheriff as such, and defendants being wholly solvent, and able to respond to any judgment plaintiffs may recover against them. Further, because, under the allegations in the petition, no right or remedy is shown against these defendants, and the prayer for process should be denied. Further, because the prayer for injunction in paragraph 13, so far as applicable to those defendants, should be denied, it being nowhere alleged that they are undertaking to interfere with said goods or with the sheriff in any manner. Further, that the prayer in paragraph 14 should be denied as far as applicable to these defendants. Further, that the prayer in paragraph 15 should be denied, J. J. & J. E. Maddox being wholly solvent, and able to respond to any judgment or recovery of any property on suit brought therefor. No title is shown in petitioners to said property, and no right of recovery of the same; and, under the allegations in the petition, they are not entitled to any such judgment, or decree against defendants. Further, because no copy or exhibit of the note nor of the mortgage claimed by the petition is attached to the petition. Various other mortgage creditors of Wiley & Wilkins were made parties plaintiff. Answers were filed, the nature of which will sufficiently appear from the report of the testimony hereinafter.

The judge below ordered that a receiver be appointed to take charge of all the assets of Wiley & Wilkins now in their store, sell the same for cash, and hold the money subject to order of the court; that J. J. & J. E. Maddox turn over the goods and merchandise taken from the store on November 14, 1894, unless they give bond and security in the sum of \$500, to pay petitioners such sum as they might recover on the final hearing, or the delivery of such goods or merchandise as they might obtain a verdict or decree for; that R. M. Wiley deliver to the receiver the horse and wagon and the books of account, unless he give bond to pay petitioners the amount of any judgment or decree obtained in the case therefor, or any amount recovered on the same, or the value of the same;

and that the receiver give bond. Defendants J. J. & J. E. Maddox and R. M. Wiley jointly excepted to the portions of the order as to them, and also excepted severally as to said portions of the order.

Upon the hearing, petitioners read the affidavit of Wilkins: "I was at the store of Wiley & Wilkins the afternoon that J. J. & J. E. Maddox removed the goods therefrom. I was absent from the store not longer than twenty minutes, and on my return found several drays in front of the store, loaded with goods therefrom, which could not have been done in that time in any orderly way." Also, affidavit of Burton Smith: "On December 15, 1894, I went to the store of J. J. & J. E. Maddox, late in the afternoon, on behalf of Tidwell & Pope, and said to J. J. Maddox that no more goods must be taken from the store of Wiley & Wilkins, and protested against the former removals, and demanded the authority therefor. Said Maddox stated that the goods were removed because consigned, and Wiley & Wilkins denied this, and Maddox stated that the original invoice showed them to be consigned. I then demanded an itemized statement of goods removed, and he promised one the next day. Some days afterwards, I asked for it, and he referred me to Glenn & Maddox; and I called on them, and they would not furnish a statement." Also, affidavit of F. W. Tidwell: "I was at the store of Wiley & Wilkins the day before it was closed by the sheriff, and saw the goods that were removed by certain drays. The draymen and other negroes were very hurriedly taking the goods from the shelves, and throwing them into barrels and boxes, and loading them upon the drays. This was done in great confusion and disorder; so much so that people passing along the street stopped to look on. Four drays were loaded and carried away in fifteen or twenty minutes. W. D. Wiley was assisting in taking the goods from the store, and putting them in shape for the dray. It would have been impossible for any one to have made a list of the goods so taken, on account of the hurry and confusion with which they were taken from the shelves and put on the drays. I am not related to Tidwell of Tidwell & Pope." Also, similar affidavits of W. H. West and W. D. Tidwell. Also, affidavit of J. H. Wilkins: "I never heard until this day of any contract or writing by Wiley to hold goods purchased from J. J. & J. E. Maddox on consignment. It is absolutely untrue that I ever agreed to the signing of the same by Wiley. Wiley & Wilkins were engaged in the retail grocery business until the petition was filed. On the day of the removal of the goods by J. J. & J. E. Maddox, I heard J. J. Maddox make to Mr. Burton Smith the statement deposed to by the latter. Wiley & Wilkins did not have any goods on consignment from J. J. & J. E. Maddox. All the goods received from said Maddox were purchased

by Wiley & Wilkins. About one-third of the goods so removed were received from Maddox by purchase, were purchased from other merchants. One-third of them were purchased from Tidwell & Pope. I am acquainted with the stock of goods belonging to Wiley & Wilkins, and from having seen some of the goods on the drays; and, from a careful examination of the stock the day after said goods were removed, I am satisfied, to the best of my knowledge and belief, that at least \$350 worth of goods were taken from the store by Maddox. More may have been taken, but goods to that amount at least were removed. I made an itemized list of said goods the day after they were removed, and attached it to this affidavit, showing items and values of said goods, and the persons from whom they were purchased. Wiley had open accounts of the firm's books with various persons named. At the end of the month after they had been opened, I made out these accounts, along with others, when Wiley asked me not to present them until the first of the next month. On the first of the next, they were made out again, and Wiley told me that these parties owed him something on his old books, and he would prefer that he would present both accounts, and close them up. This he did not do. The accounts amounted to \$300, and I presented them, and was told that the goods had been purchased under an agreement with Wiley that they were to be credited on the indebtedness of Wiley to said parties, which Wiley afterwards admitted to be true. The understanding between me and Wiley was that neither should draw out of the business on personal account more than \$50 a month. Wiley had drawn out more than said \$50 in cash, and the \$300 above mentioned would have overdrawn his account that much in those months, which would soon have drawn out all the capital in the business. The amount of capital was \$1,200. Wiley admitted to me that he had the horse and wagon and mule and wagon taken from the livery stable at night, and carried away. They were in possession of R. M. Wiley. They would not tell me where they were. That he also took the books of account from the store, and delivered them to R. M. Wiley, who refused to deliver them to the deputy sheriff, who demanded them from him. The goods now in the store are worth about \$1,000, and most of them were purchased from persons to whom mortgages were given by me, parties to this bill, all of whom sold to the firm of Wiley & Wilkins on account of my connection with said firm. The only goods on consignments in the store were three boxes of tobacco, and one of these was taken by J. J. & J. E. Maddox with the other goods taken. Attached to this affidavit was a list of goods, footing up \$351." Also, affidavit of D. W. Pope: "Tidwell & Pope took their mortgage in good faith to secure the payment of a debt due

them. I had no notice of any kind that Wiley objected to said mortgage. Before we sold any goods to them, I saw Wiley, and asked him for statement of the condition of the firm. He told me the firm was thoroughly solvent; that their goods were paid for; and that there were no liens or claims of any sort against them, except the current bills that were not due." Also, the affidavit of the deputy sheriff: "I sought to levy the mortgage *fi. fa.* of Tidwell & Pope on the books of account and horse and wagon. R. M. Wiley refused to deliver them to me, and I could not find them to levy the *fi. fa.* upon." Also, the mortgage of Tidwell & Pope, signed by Wiley & Wilkins, by J. H. Wilkins, dated November 14, 1894; and the affidavit of foreclosure and filing of the same, December 16, 1894. Also, mortgage by Wiley & Wilkins by J. H. Wilkins, to Camp Bros. & Co., dated November 14, 1894, to secure indebtedness for \$53.03 and interest; and affidavit foreclosing the same and filing thereof, December 17, 1894. Also, mortgage by Wiley & Wilkins to Lowe & Son, dated September 6, 1894, for \$37.35; and affidavit foreclosing same and filing thereof, December 17, 1894. Also, mortgage signed Wiley & Wilkins, by J. H. Wilkins, to A. P. Morgan Grain Company, dated November 14, 1894; and filing of the same, November 15, 1894. This mortgage was to secure an indebtedness of \$175.52. Also, affidavit of A. P. Morgan: "While J. J. Maddox's representative was moving goods from the store, I notified him that my firm held a mortgage on the stock of goods and the notes and accounts connected with the business, and also notified Maddox that the mortgage was recorded, and that J. J. & J. E. Maddox would be held responsible for the removal. The mortgage given to my firm was to secure a debt due it, and was taken in the utmost good faith." Also, writing dated August 15, 1894, signed by Wiley: "I have this day sold my individual half interest in my stock of goods and mule and wagon at 140 Whitehall street, to J. H. Wilkins for \$624.74, to form a partnership for two years." Also, the following, dated August 15, 1894, signed by Wiley & Wilkins: "This agreement to do a general retail grocery business at 140 Whitehall street. Style of firm to be known as Wiley & Wilkins for two years, and each of us agree not to sell anything except for cash, and each of us agree not to draw out more than \$50 per month." Also, invoices from J. J. & J. E. Maddox, which did not have the word "consigned," but were in the usual form of goods in cases of purchase and sale. Also, mortgage from Wiley & Wilkins, signed by J. H. Wilkins, to J. D. Frazier, dated November 14, 1894, to secure indebtedness for \$137.96, with record thereof November 14, 1894.

Defendants introduced affidavit of W. D. Wiley: "I have equal control and authority in the firm of Wilkins. If Wilkins, on No-

venber 14, 1894, executed and delivered plaintiffs Tidwell & Pope a note for \$689.08, I was not consulted before or at the time of making the same, and had no notice or knowledge that the same was about to be made until after it was so delivered, and all notice and knowledge thereof was purposely kept from me by Wilkins and plaintiffs. If on November 14, 1894, Wilkins executed a mortgage on the firm's property, it was done so without my knowledge or consent, and Tidwell & Pope and Wilkins fraudulently and secretly conspired and colluded together to deprive me of all notice and knowledge of the same being executed, knowing full well that I would object thereto. I had no notice of the same until it had been executed and delivered, and said Wilkins, for the purpose of deceiving and assisting Tidwell & Pope to perpetrate this outrage upon me and my business, that is, the business of Wiley & Wilkins, Wilkins represented to me and pretended that he was out in town, attending to the firm's business; and, as soon as any knowledge reached me of the making of said mortgage, I expressly repudiated the same, refused to ratify it, and affirmed that I would never ratify it. At the time it was made and delivered, I was present and convenient at the store of Wiley & Wilkins, and could have been consulted, and my objections could have been easily ascertained, all of which was well known to Tidwell & Pope. The effect of said mortgage would be to entirely stop the business of said Wiley & Wilkins, and the closing up of the business. All the goods which Wiley & Wilkins obtained from J. J. & J. E. Maddox were so obtained on consignment, and not otherwise. The allegation that I colluded with J. J. & J. E. Maddox for any purpose whatever, and particularly as set out in paragraph 9 of plaintiffs' petition, is absolutely false. Before and up to the time and moment I received notice of the making of said mortgage, the copartnership business of Wiley & Wilkins was conducted without any ill feelings or difference of opinion, and whatever difference has arisen between myself and J. H. Wilkins was brought about primarily by unfair conduct of Tidwell & Pope and said Wilkins, in making said mortgage, and in purposely suppressing the fact that it was to be made from me; and said Tidwell & Pope is directly responsible for all these differences, and no one else. We were having a good trade, and the business was fairly successful, and the closing of said business by Tidwell & Pope could result in nothing but injury to me and other creditors of my firm. On November 13, 1894, Mr. Rube Tidwell, of the firm of Tidwell & Pope, was at the store of Wiley & Wilkins. I was also present in the store, and said Tidwell and Wilkins had some conversation at the desk of Wiley & Wilkins, and at the same time had the invoice book of Wiley & Wilkins before them, and made examination of it. There was no reason, and could have been none, if

it was the intention at that time—the intention of said Tidwell & Pope and said Wilkins—to execute said mortgage as set up by plaintiffs in this case, why it could not have been brought to my knowledge, nor any reason why I could not have been consulted as to the same. On said date, to wit, November 13, 1894, Wiley & Wilkins, by check, paid Tidwell & Pope about \$103. As I understood, this payment covered all bills due by Wiley & Wilkins to Tidwell & Pope up to that time. The note given November 14, 1894, due one day after date, was given to cover bills for the goods purchased from Tidwell & Pope, and said bills have not yet fallen due. Wilkins had no right or authority, as a member of the firm of Wiley & Wilkins, to change the date of maturity of said bills, or make them due within a shorter time than they really were. I have read the affidavit of J. J. Maddox, dated November 26, 1894, and the facts therein stated are true. At the time of the conversation between J. J. Maddox and J. H. Wilkins, I was present, and heard the same. Wilkins agreed to furnish the names to whom Wiley & Wilkins proposed to sell goods on consignment, and the annexed bill of goods is the original statement of goods received from J. J. & J. E. Maddox by my firm, and is unchanged. A. P. Morgan tried to buy goods of Wiley & Wilkins in payment of the claim of Morgan Grain Company after the grain company heard of the mortgage to Tidwell & Pope, and tried to get me to transfer the accounts in payment, or to secure the debt of the grain company, and asked for a mortgage, and I refused." Also, the bill referred to in said affidavit, the bill being dated August 15, 1894, and containing a long list of goods, amounting to \$259.05, showing said goods were consigned. Also, affidavit of R. M. and W. D. Wiley: "Wilkins has never paid but \$200 on his purchase of an interest in this stock of goods, and under these circumstances, when his first note fell due, R. M. Wiley raised the money for him on the Wilkins and R. M. and W. D. Wiley note from the Exchange Bank; and this note is now in that bank for collection out of R. M. Wiley, as indorser. Not another dollar has been paid on the note of Wilkins, indorsed by W. D. and R. M. Wiley, to the Neal Loan and Banking Co. and J. B. Redwine. None of them have been paid, and are outstanding against R. M. Wiley as indorser." Also, affidavit of J. J. Maddox: "On August 15, 1894, the annexed written agreement, signed by Wiley & Wilkins, was executed and delivered to J. J. & J. E. Maddox. It was signed by W. D. Wiley, and directly afterwards Wilkins endeavored to make arrangements with me to sell goods from my firm to customers of Wiley & Wilkins on time. I told him this would not be allowed, unless before said sales the names of the proposed customers were furnished my firm for their approval. Wiley & Wilkins furnished to my firm no such names." Also, said

written agreement, dated August 15, 1894, and signed, "Wiley & Wilkins, by W. D. Wiley": "Received of J. J. & J. E. Maddox goods and merchandise as invoiced. The same are accepted on consignment. It is understood and agreed that all future orders are to be placed with same understanding, and are to be sent on consignment, and I agree to sell them for cash only." Also affidavit of R. F. Winn: "Said contract of August 15, 1894, last above mentioned, was carried by me to the place of business of Wiley & Wilkins, together with a large quantity of merchandise, and tendered to Wilkins, who directed to have the same signed by Wiley; Wilkins remarking at the same time that Wiley fully understood the arrangement between J. J. & J. E. Maddox and Wiley & Wilkins. In pursuance of these instructions, I handed the contract to Wiley, and it was signed. The goods on that day delivered by J. J. & J. E. Maddox to Wiley & Wilkins were so delivered on consignment, and were to be sold for cash only, and accounted for by them to J. J. & J. E. Maddox. I was in the employ of J. J. & J. E. Maddox on that date, and was directed by them to have said contract signed as aforesaid." Also, affidavit of J. J. Maddox: "All the goods that went from J. J. & J. E. Maddox to Wiley & Wilkins were so placed on consignment. The allegations in the 9th paragraph of the petition that Wiley colluded with J. J. & J. E. Maddox, for the purposes therein stated, are untrue. J. J. & J. E. Maddox are solvent, and fully able to respond to any judgment which may be hereafter obtained against them by plaintiffs." Also, invoice book of Wiley & Wilkins, showing that the bills purchased from Tidwell & Pope were not due when the mortgages were made, nor when the petition was filed.

Also, affidavit of J. J. Maddox: "Within is a full and correct statement of all goods received from Wiley & Wilkins. The same are not worth over \$300, and, after allowing the said amount, there is still due my firm \$213.88, or more." Also, statement containing a list of the goods which J. J. & J. E. Maddox received from the store of Wiley & Wilkins, complained of in the petition. Also, another affidavit of J. J. Maddox: "The above and foregoing is a full and correct statement of the account of Wiley & Wilkins, with all credits they are entitled to, less the amount of goods received back. Two white men were sent to the place to receive the goods." Also, itemized statement, marked "Consigned," showing list of the goods delivered to Wiley & Wilkins from August 15, 1894, to November 13, 1894, with all credits, and further showing amount of goods returned to J. J. & J. E. Maddox by Wiley & Wilkins, as claimed in the preceding affidavits.

The affidavits and statements in the last paragraph mentioned were not introduced along with the other evidence. After the evidence closed and argument was proceeding,

the court announced that he would hear from the defendants. Attention was called to the fact that, though peculiarly in their possession, defendants relied on general statements, and furnished no figures or details. The court said he would hear from them. Then, during the concluding argument for defendants, these lists and affidavits were produced. Defendants' counsel said he did not think it necessary to produce them before, as he thought the defense good without them.

Glenn & Maddox, for plaintiffs in error. Payne & Tye, Mayson & Hill, and Smith & Pendleton, for defendants in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 340)

ROSS v. CORNELL.

(Supreme Court of Georgia. May 15, 1895.)

DISPUTE BETWEEN PARTNERS—INJUNCTION—RECEIVER.

In view of the pleadings and evidence, there was certainly no abuse of discretion in denying the injunction, nor in refusing to appoint a receiver.

(Syllabus by the Court.)

Error from superior court, Bibb county; John L. Hardeman, Judge.

Petition by James T. Ross against William H. Cornell. Decree for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

James T. Ross brought a petition to declare a dissolution of a copartnership existing between himself and W. H. Cornell, praying also for a receiver to take charge of the partnership assets, and for injunction to prevent Cornell from interfering with the assets or the receiver. After a hearing, the court discharged the temporary receiver theretofore appointed, and dissolved the temporary injunction theretofore granted; and plaintiff excepted. It appears that on May 20, 1890, W. H. Cornell and E. T. Napier entered into a contract of partnership in the retail drug business in Macon, to continue for two years from October 1, 1890, which contract contained the following stipulations: "Napier agrees to contribute \$3,000 to be used in the partnership business; and, in the place of money, Cornell agrees to give his entire time, skill, and experience to said business. Out of the profits of the business, each of said partners shall draw not exceeding \$75 per month. At the termination of the partnership, a complete inventory is to be taken of the stock on hand and of the debts due the firm; and, after paying back to Napier the \$3,000 contributed by him, all the profits, stock, and debts due the firm are to be equally divided between said parties; all outstanding indebtedness to be paid before any division takes place. Each of the parties shall use their best endeavors for the joint interest, etc. True and perfect books of account shall be kept, to be open at all times to the inspection of each partner, in

which each shall enter all money by him received on account of the partnership, and all money laid out and expended, and all other matters and things appertaining to the partnership." On November 30, 1891, the following contract was entered into between Ross, Cornell, and Napier: "With the consent of Cornell, Napier hereby sells and transfers to Ross all the rights of Napier in the merchandise, accounts, and business of the firm of Cornell & Napier, in consideration of \$3,250 paid by Ross to Napier; whereupon, by agreement of the parties, Ross is hereby subrogated to all the rights and interests of Napier as fixed and shown in the contract between Cornell and Napier of May 20, 1890, except in so far as such rights may be varied or enlarged by the following specifications and agreements entered into, for considerations of mutual interest, between Cornell and Ross: (1) It is agreed between Cornell and Ross that Ross shall contribute, out of his individual share of the profits of the business, a sum not to exceed \$40 per month, to be expended solely for the hire and wages of a clerk or clerks so long as it is necessary for the conduct of the business to hire a clerk. (2) Cornell shall give his entire and undivided care and personal attention to the conduct of the business, and shall keep proper books of account, which will contain all proper entries, and at all times show the true condition of the business. Ross is not to give any of his time nor personal attention to the conduct of the business; but shall at all times have free access to the books kept, that he may examine them by himself or any authorized agent or accountant. (3) All the assets of the firm, merchandise, fixtures, choses in action, etc., to the extent of \$3,000, shall be and remain the individual property of Ross, subject only to the liabilities properly contracted for and in the conduct of the business. The assets in excess of that sum shall be owned equally by Cornell and Ross. (4) Unless sooner dissolved by mutual consent or the death of one of the parties, the partnership shall be and remain for the term of five years from this date; provided, however, that if, at any time the business shall prove unprofitable, Ross may, at his option, alone dissolve the copartnership, and terminate the same, by giving Cornell thirty days' written notice of his intention to do so; and, in the event of such termination, Cornell shall not interpose any objection to the dissolution of the firm and the sale or closing out of the business. Subject to the foregoing modifications, changes, and conditions, Cornell and Ross hereby adopt for themselves the contract and agreements heretofore referred to, and agree to conduct the business under the name of W. H. Cornell & Co."

The court construed the fourth section of this contract to mean that Ross should not have the right to dissolve the partnership without the consent of Cornell, prior to November 30, 1896, even though he gave the 30 days' notice specified, unless the partnership

business should in fact be unprofitable at that time; and that, if it was earning as much as one quarter of one per cent. net upon the capital invested, it was not unprofitable in the sense of the contract. These rulings are assigned as error. It appears that on December 1, 1894, Ross gave Cornell written notice that he would dissolve the partnership at the expiration of 30 days; but Cornell refused to consent to the dissolution, on the ground that there was no sufficient ground for the same, and that the business was profitable.

Under his petition and the evidence introduced in support of the same, Ross contends that Cornell has violated the contract as follows: Instead of giving his entire and undivided care and personal attention to the business, he employed a high-priced clerk, to whom for months he has largely entrusted the conduct of the business, absenting himself from the store for a considerable portion of each day, and devoting his time to private affairs of his own, and to the affairs of secret organizations in which he holds salaried positions; at one time absenting himself from the city for about four weeks, on business incident to one of such organizations, thereby occasioning serious injury to the partnership business. In making the contract, plaintiff relied particularly upon Cornell's skill and experience in the conduct of the business, and upon his considerable acquaintance in the city, to attract custom. The services of the clerk, no matter how skillful he may be, cannot and do not compensate for Cornell's failure to give the business his undivided care and personal attention. For a great part of the time the business has had no attention except from the clerk. It has been unnecessary to hire such an expensive clerk, except that Cornell might give a portion of his time to his private affairs and to those of the secret organizations referred to. Had he given his entire and undivided care and attention thereto, it would have been unnecessary for him to employ any assistance except an errand boy or unskilled clerk, at a cost of, say, \$15 per month. Plaintiff has made a careful and thorough investigation of the value of the partnership assets, and, to the best of his knowledge and belief, their aggregate value is not more than \$2,500, if so much. During the three years the partnership has been in existence, he has received, exclusive of the salary of the clerk employed at his expense, \$789.21 in cash or goods, or about 8 per cent. upon his investment; while the assets, allowing for depreciation and bad accounts due the firm, have shrunk to \$2,500 or less in value. The business is rapidly depreciating in value, and by the expiration of five years from the date of the contract, if it continues, it may be insolvent, and plaintiff will probably lose largely, and may be involved in debt in addition to the loss of the amount invested by him. Cornell, having no money invested in the business, has nothing to lose by a continuance of the partnership, but it is to his ben-

effort to oppose the dissolution and sale. Furthermore, the books of the firm, which Cornell undertook to keep, have been kept inaccurately, loosely, and in a very irregular and unbusinesslike manner; so much so that it is practically impossible, from an inspection of them, to get an accurate and definite idea of the condition of the business or the personal account of Cornell, or, in many instances, to determine the amounts due the firm, or the items purchased, or the dates of the purchases. Plaintiff further charges fraud and bad faith upon Cornell, in that, notwithstanding the provisions of the contract, and the fact that the profits of the business are very small, and do not justify such conduct, Cornell has drawn from the business in cash and goods, during the 37 months of its existence, at least \$2,500, and probably much more, \$375 of which was drawn within the last five or six weeks, and about \$250 since January 1, 1895.

Cornell's answer, and the evidence offered in support of the same, contain the following: He has not violated the terms of the contract in any manner. He has given his entire and undivided attention to the conduct of the business, as contemplated by the contract. He is a member of secret organizations, but this did not and does not interfere with his attention to the drug-store business. On the contrary, he has in this manner been enabled to come in friendly contact with a great many people, who have thus become his customers and increased his trade. Before signing the contract, he made known to Judge John P. Ross, who was acting for plaintiff, the fact that he was a member of these organizations, and held office in them, and asked if, under the contract, he would be prohibited from holding said offices, stating that, if the contract did so prohibit, he did not desire to sign it; and Judge Ross distinctly stated that the contract did not contemplate such prohibition, but that it simply meant that defendant was not to engage in any other mercantile business. (This was denied by affidavit of Judge Ross.) He has not taken advantage of any provision in the contract that he was not entitled to, and the business demanded, but has acted in the utmost good faith towards plaintiff. The clerk he employed has been in his employment for years, and was so employed at the time plaintiff purchased Napier's interest. Plaintiff made no objection to the continuance of this clerk, but agreed to pay out of his profits of the business \$40 towards the clerk's salary, and all over that sum was to be equally divided between plaintiff and defendant; that is, the excess of \$40 per month for clerk's hire was to be charged to the expense account. The clerk's salary is \$50 per month, which is a very moderate price for a competent man. A skillful clerk demands \$75 to \$100 per month for his services in Macon. Plaintiff well knew the price paid for this clerk, and made no objection to the

same. Defendant has charged \$40 of the salary to plaintiff, and the other \$10 to the expense account, as the books will show. He denies that he has intrusted the conduct of the business to the clerk for months past or any other time, or that he absents himself from the store, devoting himself to private affairs and to those of the secret organizations. When he is absent, it is upon business of the store, collecting bills, buying goods, etc.; and while, upon such trips, he may collect a few dues owing to his secret societies, it does not take from his business any of his valuable time. He admits that he left the city on a short pleasure trip, but denies that such act caused any injury to the partnership business. He has brought all his skill and experience to bear favorably upon the drug business, to the profit of plaintiff and himself. The clerk has no more control of the business than is usually given to a clerk in a similar business. It was and is absolutely necessary to hire such clerk, his main duty being to fill prescriptions. An errand boy or unskilled clerk could not do this without great risk and detriment to the business. In October, 1894, by an inventory taken by an expert accountant, at the instance of plaintiff, the assets amounted to \$4,906.95, including cash on hand, stock, fixtures, and only such accounts as were considered good. If plaintiff has not drawn more than \$789.21, it is his own fault, as by said inventory there was on October 1, 1894, \$1,150.18 in the American National Bank, \$499.30 of which plaintiff was entitled to as part of the net profits of the business. The amount due plaintiff, and more, was still in the bank at the time the temporary receiver took possession, awaiting the call of plaintiff. The assets are reasonably worth the amount of the valuation placed upon them by the inventory referred to. The business has not depreciated in value, but it is rapidly enhancing. From present prospects, there is no cause to fear that it will not be sufficient to pay the debts and yield a good profit to the partners on November 30, 1896. When plaintiff became a partner, the assets were not cash, but were composed of the stock of goods, including accounts which have never been collected. Defendant went to work in good faith, and has succeeded, through his own exertions and his individual friendship, in building up a business which is worth much more than the actual value of the goods, and the profits arising therefrom are more than 42 per cent. upon the capital invested. Defendant is unwilling, after having struggled through three years of unparalleled business depression, with the result stated, to dissolve the partnership and lose the opportunity to reap the benefits which will accrue to him by November 30, 1896, when in all probability business will revive. He denies that plaintiff has lost any money, but says he has made a good interest upon his investment, and that there is no probability of his losing any money in the

future conduct of the business. The good will and trade are worth much more than the whole capital invested; and, if the partnership is dissolved, defendant will be a greater loser than plaintiff, as the assets would necessarily be sold at a great loss, and his efforts in building up a trade and line of customers would be lost to him. He denies that he has violated the contract by drawing more than \$75 per month in cash or goods. While he may some months have drawn a few dollars over \$75, in other months he drew much less. The average amount he has drawn is several dollars less than \$75 per month. This was according to the custom with himself and Napier, which was satisfactory to them, and defendant continued the same custom with plaintiff. The inventory already referred to shows that in one month plaintiff drew \$150 in cash. While defendant was not compelled, under the contract, to invest any money in the business, he did place therein \$350 cash belonging to him, which he had a right to withdraw when he saw fit. He did withdraw \$250 after January 1, 1895, which he had a right to do, as there was a net profit to his credit of more than that amount; and, even after drawing that sum, he had not drawn on an average \$75 per month. He denies the allegations as to the keeping of books, and says that any one with a knowledge of bookkeeping could readily gather from the books the condition of the business, his personal account, or any other account thereon, and it could readily be seen what amounts were due the firm, all items purchased, and the dates of the purchases.

Anderson & Anderson, for plaintiff in error.
Wimberly & Felder, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 330)

**EAST TENNESSEE, V. & G. RY. CO. v.
HUGHES.**

(Supreme Court of Georgia. June 10, 1895.)

**ACTION AGAINST RAILROAD COMPANY—INJURIES
TO PLAINTIFF'S DAUGHTER—EVIDENCE.**

There was sufficient evidence to support the verdict, and in none of the rulings of the court complained of in the motion for a new trial was any error committed authorizing a reversal of the judgment below.

(Syllabus by the Court.)

Error from superior court, Dodge county;
J. J. Hunt, Judge.

Action by Rosa Hughes against the East Tennessee, Virginia & Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Rosa Hughes sued the railway company for damages resulting to her from personal injuries to her daughter, Annie Bozeman. She obtained a verdict, and a new trial was ordered by the supreme court. 92 Ga. 388, 17

S. E. 949. Upon the last trial in March, 1894, a verdict for \$350 in favor of the plaintiff was rendered. Defendant's motion for a new trial was overruled, and exception was taken. The grounds of the motion are as follows: (1-3) Verdict contrary to law and evidence. (4-6) Verdict so strongly against the weight of evidence as to indicate bias or prejudice on the part of the jury against defendant. (7) Verdict contrary to the charge; that, if the conductor did not order plaintiff's daughter to jump from the train while in motion, or if he did so order, and the order should have been disobeyed on account of the obvious danger of complying with it, there could be no recovery. (8) Error in admitting the interrogatories and answers of Dr. T. D. Walker, and especially those in reference to the character and permanency of the injuries alleged to have been received by Annie Bozeman, and the effect of such injuries upon her ability to render services, over defendant's objection that the witness had failed to answer the tenth and eleventh cross interrogatories propounded by defendant, to wit: Tenth: "Do you know what kind and quantity of services Annie Bozeman was accustomed to render before her alleged injury?" Eleventh: "Are you prepared to testify that her alleged injury permanently disabled her from rendering such services as she was accustomed to render before the alleged injury; and can you state that she has not since rendered the same kind of services, and in as efficient a manner, or even more efficiently, and as good or better wages, since the alleged injury than before?" The ninth cross interrogatory was at the bottom of a page, and was in these words: "State all you know which will be of benefit to the defendant, as if specially thereto interrogated." The tenth and eleventh cross interrogatories were on the next following page, and at their conclusion were the date and signature of defendant's counsel. The objections were not made in writing, but orally, when the interrogatories, which were received during the trial, were offered. (9) Error in admitting, over defendant's objection, the third direct interrogatory, and the answer of the same witness, viz.: "State what nursing, care, and attention was necessary for Annie Bozeman, and for what length of time; and state what the same was reasonably worth, giving fully and particularly the items and value, and the circumstances going to show the value of the same, with board, etc." Answer: "Her condition was such as required constant attention day and night for three months, after which time she would still require nursing, but not such constant care as she would require the first three months. A nurse for a negro could be procured for ten or twelve dollars per month. I do not know what her board would be worth." The objection was made in writing at the time of crossing the interrogatories, and was upon the ground that the testimony was irrele-

vant and illegal. (10, 11) Error in admitting the testimony of Annie Bozeman that the board she was getting at Mrs. Hendricks' was worth \$10 or \$12 per month, over objection that it was incompetent to prove what the board was worth, and that the question should be, how much did she have to pay, or how much was charged for her board, if anything? And in admitting, over like objection, her testimony that her board was worth about \$10 in 1891 and 1892, and \$6 or \$7 a month in 1893. (12) Plaintiff, as a witness, was asked by her counsel the following questions, and made the following answers: "Q. Did you ever agree to pay any board for her (Annie)? A. No, sir. I asked Mrs. Hendricks what she would charge me to board Annie. Q. Was she boarding with Mrs. Hendricks? A. Yes, sir. Q. What did she charge you? A. She told me that anybody else would charge me \$12 a month. Q. What did she charge you? A. That is what she said to me. Q. Have you ever paid Mrs. Hendricks that board? A. No, sir; I never paid her. I ain't been able to pay her." Defendant objected to the testimony about a charge of \$12 a month for board, and the court said: "I overrule the objection. She said that is what Mrs. Hendricks charged her." Defendant alleges that this remark was error, and was an expression of opinion upon the evidence, and an intimation to the jury as to what had been proved; and that it was especially hurtful to defendant, as defendant contended that plaintiff did not have to pay any board, and was not charged therefor by Mrs. Hendricks; that there was no contract for her to pay such board; and that Mrs. Hendricks had refused to answer plaintiff's interrogatories on the subject, and her husband testified that there never had been any demand upon plaintiff for board. (13) Defendant's counsel asked the conductor who is alleged to have ordered Annie Bozeman off the train the question, "If you told the girl you would put her off, what did you mean?" He answered, "I meant that I would stop the train, and let her get off." This testimony was rejected, which ruling is assigned as error, defendant contending that, if the conductor used any such language, it was not used as an order to get off, or as a threat, but simply to inform plaintiff's daughter that she would be given an opportunity to get off the train. (14) Error in admitting in evidence the testimony taken down by F. H. Burch, stenographer on the trial of this case at the September adjourned term, 1893, as set out in the brief of evidence filed with the motion for a new trial in this case, defendant objecting that said testimony was illegal and irrelevant; that there was no motion for a new trial in the case on the trial of which the testimony was taken down; that said testimony had never been agreed upon by counsel, nor approved by the court; that it was not sufficiently identi-

fied by the testimony of Burch, the stenographer, nor sufficiently proved to be correct; and that it was not admissible for the purpose of impeachment, nor for any other purpose, and no sufficient foundation was laid for its introduction.

De Lacy & Bishop, for plaintiff in error.
J. H. Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 185)

MASON v. STATE.

(Supreme Court of Georgia. March 11, 1895.)

CRIMINAL LAW—NEW TRIAL—REMARKS OF JUDGE.

Where a witness for the state, who was being examined by the solicitor general, had testified more than once that she recognized the accused by his voice alone, and counsel for the accused objected to any further examination of the witness as to her identification of the accused, while the court might properly have required the solicitor general to desist from asking any more questions on this line, it was, under section 3248 of the Code, error requiring a new trial for the judge to remark to the solicitor general, in the hearing of the jury: "Well, if she knew him by recognizing his voice, that is sufficient. What more do you want?" This expression by the judge was at least an intimation of his opinion as to what the witness had testified, and as to its sufficiency to establish the identity of the accused as the perpetrator of the alleged offense.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

From the conviction, Willis Mason brings error. Reversed.

O. H. Brand, for plaintiff in error. R. B. Russell, Sol. Gen., for defendant in error.

PER CURIAM. Judgment reversed.

(97 Ga. 189)

WESTBROOK v. STATE.

(Supreme Court of Georgia. March 11, 1895.)

HOMICIDE—INSTRUCTIONS—REVIEW ON APPEAL.

1. A ground of a motion for a new trial, assigning error upon a few words which constitute only a portion of a sentence of the court's charge, is without merit; especially when it appears from an examination of the entire sentence in which these words occur that no error was committed.

2. Where the court had given full and fair instructions as to the statement of the accused, and had distinctly informed the jury that they could believe a part of the statement and reject a part, if they thought a part of it was true and a part of it false, a charge in the following language: "Find out what the truth of the case is; what the real facts are; and look to the evidence for that purpose, and to the prisoner's statement, if you think it worthy of credit,"—could not have had the effect of impressing the jury "that they were not to look to, nor believe nor consider, any part of the prisoner's statement, unless they considered the whole of it worthy of credit."

3. The sole issue in a trial for murder being whether the killing was deliberate and intentional or the result of a mere accident, and the court, in its charge to the jury, having plainly and dis-

tinctly instructed them that, if the killing was accidental, the accused should be acquitted, and the jury having returned a verdict for murder, without any recommendation, thus manifesting beyond doubt that they believed the killing was willful, the fact that the judge read to the jury section 4333 of the Code, relating to the law of self-defense, is not cause for a new trial. While this section was not at all pertinent, the reading of it, under the circumstances, could not have resulted in any injury to the accused.

4. The evidence was sufficient to warrant the verdict, and, the same having been approved by the trial judge, this court will not set it aside. (Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Ed Westbrook was convicted of manslaughter, and brings error. Affirmed.

W. T. Lane and W. K. Wheatley, for plaintiff in error. J. M. Du Pree, Sol. Gen., F. A. Hooper and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 194)

USOM v. STATE.

(Supreme Court of Georgia. March 18, 1895.)

ROBBERY—APPEAL—REVIEW OF EVIDENCE.

The corpus delicti was clearly proved, and, although the evidence to identify the accused as the perpetrator of the crime was not strong, nor entirely satisfactory to this court, it was sufficient to warrant a finding that he was the guilty party. This court, therefore, cannot control the discretion of the judge below, who was satisfied with the verdict, in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Sellus Usom was convicted of robbery, and brings error. Affirmed.

The following is the official report:

According to the testimony of Mrs. Bellah and her daughter, they were driving home from Marietta on the public road outside of the town, when they were overtaken by a negro man, walking. He walked by the side of the wagon for a few moments, then suddenly ran to the wagon, and seized the satchel which was hanging on the "front gate" of the wagon. Mrs. Bellah also took hold of it, and tried to keep him from getting it, but he pulled it from her, breaking the handle, and ran away with it. These two witnesses identified Usom as the man who did the robbery. They had not known him previously. The robbery occurred between 4 and 5 o'clock on Friday, the 29th of June. On the next Monday, Mrs. Bellah was called to the jail, and defendant was brought before her as the person in custody who was supposed to have committed the crime. On account of the light shining in her face, she could not well see him, and did not then recognize him so well as afterwards, when he had his hat on, etc. Defendant introduced a number of witnesses, whose testimony tended strongly to

prove an alibi, and to show that a different negro (a stranger) was seen on the afternoon of the robbery very near where it probably occurred, and running away from the place. The jury found defendant guilty. He moved for a new trial on the grounds that the verdict was contrary to law and evidence, and without evidence to support it. The motion was overruled, and he excepted.

J. Z. Foster and Frey & Frey, for plaintiff in error. W. R. Power, Harrison & Peeples, and Geo. R. Brown, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(96 Ga. 789)

CLIFFORD v. GRESSINGER et al.

(Supreme Court of Georgia. April 15, 1895.)

LANDLORD AND TENANT—EXISTENCE OF RELATION—EJECTION OF TENANT—INJUNCTION.

1. Under a written contract, whereby the owner of land rented the same to another for a term of years at a stipulated rent, to be paid annually in cotton, or its equivalent in money, the tenant also to pay all taxes, and to make certain improvements upon the land during the rent term, although the contract also contained a provision that the tenants should, at the expiration of the rent term, have an option to purchase the land at a named price, and upon specified terms as to time of payment, the relation of landlord and tenant existed between the parties during the continuation of the rent term; and upon the tenant's failure to pay the stipulated rent for any year when it became due it was the right of the landlord to sue out a warrant, under section 4077 et seq. of the Code, for his summary ejection.

2. Under the facts disclosed by the record in this case, there was no error in refusing to grant an injunction restraining the landlord from proceeding with the warrant for the ejection of the tenant.

(Syllabus by the Court.)

Error from superior court, Butts county; M. W. Beck, Judge.

Petition by M. J. Clifford against W. M. Gressinger and others for an injunction. Judgment for defendants, and petitioner brings error. Affirmed.

The following is the official report:

After hearing had on the petition and certain evidence offered, without answer from defendants, injunction was denied, to which ruling Clifford excepted. The petition alleged: Petitioner is in possession of a farm in Butts county known as the "John Harkness Place," described, held under a lease for five years, coupled with the right to purchase at the expiration of said term, between W. M. Gressinger, then of Butts county, and petitioner, dated December 30, 1893, the term to begin January 1, 1894, and end January 1, 1899. In pursuance of this contract, petitioner took possession of the property, and commenced preparations for cultivating and improving it, but, finding he could not cultivate the cultivable part to its full extent with the means he then had, and without income from other sources, he, with the knowledge, consent, and ratification thus implied, and without objection of

said Gressinger, turned over the management of the farm to his wife, except a one-horse farm thereon, which he, as landlord and cropper, cultivated with one Hardy to whom Mrs. Clifford furnished a mule, wagon and harness. Petitioner continued running the farm as aforesaid under the management of his wife, hoping to obtain outside work and income towards the successful operation of the farm. He and his wife planted five acres in grapes and fruit trees on the land, and made other improvements, at considerable expense, of the value of \$——, with the bona fide purpose of purchasing the place under said contract. For want of sufficient means, unfavorable seasons, and other causes, the result of said farming operations for 1894 were poor, not yielding enough cotton to pay the rent in cotton as stipulated therein, and the expense of running the farm was greater than the profit thereof. But knowing that under the lease contract there was no stipulation for a forfeiture of the contract, and hoping to regain in the remaining four years of the term what was lost, petitioner proceeded to provide for cultivating the land for 1895. He had actually contracted with competent and responsible persons for 11 500-pound bales of cotton, exceeding the rental stipulated in said contract by 3 bales, and this to be net and free from any expense to petitioner; but Gressinger, by his attorney, Curry, without pursuing the remedy he had against petitioner under the terms of the contract, interfered with and prevented said parties from controlling and using the property thus profitably and to his advantage; this, too, with the knowledge that, while petitioner could not sublet the property without the consent of his lessor, in a mere tenancy that petitioner held in the land all the privileges of the five-year term under the law of the state. Petitioner again leased the property, or agreed to do so, to other parties, for more than enough to pay the rent, but was again prevented from doing so, to his great and irreparable injury \$500, or other large sum. In pursuance of his unjust purpose to cripple and interfere with petitioner in his efforts to perform his part of the contract before the termination of the lease, Gressinger, through his agent, Anderson, sued out a distress warrant and warrant to evict petitioner, alleging his failure to deliver the cotton as rent under the contract, or pay the equivalent in money. The sheriff has served these warrants upon petitioner, and is threatening to eject him from the land. For this wrong and damage Gressinger is wholly irresponsible in damages, as petitioner is informed and believes that Gressinger is insolvent; and that, while the property is in the name of W. M. Gressinger, he did not pay for the land, but the money of his father, W. M. Gressinger did; and that he owns no other property. Waiving answer, petitioner charged that Gressinger has no legal remedy against him to evict him from the land, but, under the contract, can only proceed against him for

the value of the cotton therein stipulated to be delivered; and prayed for injunction against the sheriff and against Gressinger, restraining them from further proceeding to oust him from the premises.

Petitioner put in evidence the contract mentioned between him and Gressinger. It recited that Gressinger leased and rented to Clifford, for a term of five years, beginning January 1, 1894, and expiring January 1, 1899, the John Harkness place, describing it; that Gressinger agreed that the land might be cultivated for agricultural purposes only, and that no timber was to be taken from it save for firewood, and to improve the place; that Clifford might have the option of purchasing the land after the expiration of the lease and rent term by paying to Gressinger \$1,050 on January 1, 1899, and on the same day executing three notes for \$900 each, due January 1, 1900, January 1, 1901, and January 1, 1902, the notes to bear interest at 8 per cent. per annum from date; that, after these notes had been paid to Gressinger, he agreed to make to Clifford a warranty deed in fee simple; that Clifford "hereby" leases and rents of Gressinger the lands subject to the restrictions mentioned in this contract, and for such lease and rent term agrees to pay to Gressinger, on October 14, 1894, and every year thereafter on the same date the same amount, till the lease term has expired, 8 bales of middling cotton of 500 pounds each, packed and delivered in a certain warehouse; that for the entire lease and rent term Clifford agreed to pay 40 bales of 500 pounds each, lint middling cotton, 8 bales to be paid annually on October 15th during the continuance of the lease and rent term; and that, if the cotton was not delivered as above stated, and of middling grade, its equivalent in money was to be paid and received; that Clifford was to pay all the taxes on the land during the term of the lease and rent contract; that he agreed to plant out 20 acres in a vineyard during the lease and rent term, and pay all the expenses thereof, and to plant out not less than 5 acres in a vineyard every year till he had planted out the 20 acres; and that Clifford agreed to pay all the expenses incurred in improvements on the land during the lease and rent term, all improvements to become a part of the realty, and remain on the land. Also affidavit of Bixby that he had heard one Byars say that he had rented a two-horse farm from Clifford for 1895 for 4 bales of cotton, weighing 500 pounds, and that he failed to comply with the contract because Curry, attorney for Gressinger, had told him that if he rented the land he would have to pay rent twice, and had better not comply with said contract. Also affidavit of Lee Stark and Charles Harkness that Anderson Stewart had rented the Harkness place from Clifford for 1895 for 12 bales of cotton of 500 pounds each, and failed to comply with his contract by reason of statements coming from Curry that he would have to pay rent twice if he rented from Clifford. Also, affidavit of

O. S. Clifford to a similar effect. Defendant introduced the affidavit and warrant to dispossess. It is stated in the bill of exceptions that defendant introduced also an affidavit of Curry, but such affidavit does not appear either in the bill of exceptions or record.

J. W. Preston and Ray & Ray, for plaintiff in error. Anderson & Curry and Y. A. Wright, for defendant in error.

PER CURIAM. Judgment affirmed

(97 Ga. 197)

WALKER v. STATE.

(Supreme Court of Georgia. June 10, 1895.)

PROSECUTION FOR MURDER—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—REVIEW ON APPEAL.

The exception to the ruling of the presiding judge in admitting testimony, not stating what, if any, ground of objection was made thereto at the time the testimony was offered; the charge of the court complained of, that "written testimony is always the highest and best evidence,—is better evidence than the oral testimony," though irrelevant, being harmless; the alleged newly-discovered evidence being only cumulative in its character, and impeaching in its effect,—it does not appear that upon the trial any error of law prejudicial to the accused was committed, and the evidence bearing directly upon the main issue having established to the satisfaction of the jury the guilt of the accused, and being sufficient to support the verdict, whatever may be the impression of this court as to the probative value of the evidence, it will not reverse the judgment of the trial judge in refusing a new trial; it not appearing that in so doing he has abused the discretion which the law confers on him, but denies to the supreme court.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Ed Walker was convicted of murder, and brings error. Affirmed.

The following is the official report:

Ed Walker was indicted for the offense of the murder of one Carrie Armstrong. The defense was based upon the theory that the killing was accidental, and upon this question the evidence was conflicting. It appeared in evidence that the defendant and the deceased were not married, but had been living together for some years. The defendant claimed that while he was in bed with the deceased they became engaged in a playful scuffle, during which one of the pillows and his pistol, which had been placed under the pillow, slipped to the floor; that she reached over him, got the pillow, and raised back with it; that he got the pistol, to put it back under the pillow, and before he could get it put back under the pillow she began playing with him again, and before he could get the pistol out of his hand, she grabbed his hand some way or other (there being no light in the room), and the pistol (which was a self-cocking pistol) fired. The main witness for the state was Eliza Armstrong, the mother of the deceased, who occupied a room adjoining that of the deceased. She testified, among other things, that she was awake when de-

fendant came to the room of deceased, heard the conversation between them previous to the shooting, and heard the shot. Her testimony in the case indicated that there was a quarrel between defendant and deceased; that defendant was jealous as to the deceased, and that the shooting was the result of the quarrel. She denied that she ever told any one that the shooting was not intentional. There was evidence for the defendant that Eliza Armstrong did say that the shooting was unintentional. Eliza Armstrong further testified that she did not testify before the coroner's jury that she was asleep when the shooting occurred. There was evidence for the defendant to the contrary, and also evidence that she testified both ways. One Lelle Matthews testified for the state that in February before the killing, in September, she was walking along with the deceased, when they were overtaken by defendant, it being at night; that defendant walked up, and deceased said, "John Smith"; and defendant cursed her, and said it was not John Smith, and shot towards her, but did not shoot her; and that defendant afterwards said he would not hurt deceased for anything. It appeared for the state that John Smith knew the deceased, and had visited her, or had visited the house in which she lived, during some two years, sometimes staying all night at the house. John Smith testified for the defense that he knew the deceased and had been to the house, but never went to see deceased at all, and that he never went to see her two years before she was killed. The defendant was found guilty, with a recommendation to imprisonment for life. His motion for a new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in admitting, over the objection of the defendant, the testimony of Lelle Matthews mentioned above, said difficulty being in no way connected with the killing. It was not stated in this ground what objection was made to the testimony when offered. Error in charging: "Wherever there is written and parol (oral) testimony, the written testimony is always the highest and best evidence. It is better evidence than the oral testimony,"—there being no evidence to justify said charge. It does not appear that there was any written evidence introduced. Also, because of newly-discovered testimony. In support of this ground movant produced the affidavit of two persons who were members of the coroner's jury that Eliza Armstrong testified before that jury that at the time of the killing she was asleep and the pistol shot waked her up. Also, the affidavits of two others that Eliza Armstrong, after the killing, stated that the killing was an accident; that she was in the room next to defendant and deceased at the time, heard them laughing and playing, and heard the pistol when it

fell on the floor. One of affiants deposed that Eliza Armstrong further stated that defendant and deceased were as friendly as two babies, and she never knew them to have any difficulty; that deceased never suffered for anything, and that defendant bought deceased anything she wanted. Also, an affidavit as to the good character and credibility of these two last-mentioned affiants. Also, the affidavits of defendant and his counsel as to their ignorance of the alleged newly-discovered evidence until after the trial; and of the counsel, as to their diligence in preparing for trial, and that the two first-mentioned affiants are known to said counsel, and are worthy of belief.

Carson & Williams, for plaintiff in error.
S. P. Gilbert, Sol. Gen., and J. M. Terrell,
Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 217)

McELVEEN v. STATE.

(Supreme Court of Georgia. March 25, 1895.)

RECEPTION OF EVIDENCE — HARMLESS ERROR — SUFFICIENCY OF EVIDENCE.

1. Even if it was erroneous to admit parol evidence of the contents of certain promissory notes alleged to have been given for money lost at a game of cards, without accounting for the absence of the notes themselves, yet, where the accused in his statement admitted the existence and contents of such notes, there was no cause for a new trial.

2. Independently of the notes in question, the evidence was amply sufficient to authorize a verdict of guilty, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county.

J. B. McElveen was convicted of gaming, and brings error. Affirmed.

The following is the official report:

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in admitting, over objection of defendant's counsel, the testimony of Cunningham that "McElveen and Thompson won nearly \$400 in cash, and two notes, one for \$500, and another for \$1,000." The objection was that such evidence was secondary, the originals of the two notes not having been produced, their loss not having been accounted for, and no evidence having been given as to their existence or nonexistence, and that the evidence given as to their contents was not the best evidence, no foundation having been laid for its introduction. Also, because the court erred in admitting the testimony of Looney, over objection of defendant's counsel, that "one of the notes I recovered was for \$1,000, and one of them was for \$500." The objection was that this evidence was not the best evidence, was secondary, and that the state had failed to show that the originals could not be produced, or that they were lost, and had failed to lay the foundation for the in-

troduction by any evidence as to their existence or nonexistence. Also, because of newly-discovered evidence. In support of this ground, movant produced the affidavit of F. W. Dewey: On April 25, 1893, he was bar-keeper at the Aragon Hotel buffet. During the afternoon of that day, a bell boy of the hotel came to the buffet, and asked that deponent send the dice box to Mr. Thompson which he had left with him. It was during the afternoon that the boy came, and he sent the box to Thompson. Thompson had left the box with deponent a month or so previous. Also, the affidavit of David Allston: "I am a waiter at the Aragon Hotel, and was in April, 1893. I served the lunch, drinks, and cigars to Cunningham, McElveen, Thompson, and Harp in the private dining room of the hotel, during the afternoon in which the game was played for which McElveen was tried. I think this was the afternoon of April 25, 1893. I was going in and out of the room all during the afternoon, and would stay in the room between orders for drinks; sometimes as long as a half hour at the time. While in the room, I watched the game that was being played, and did not during the whole time see McElveen play. He watched the game, but took no part in it. I never saw him engaged in the game. He was simply looking on like I was. If he had played, I must have known it and seen it, and I did not so see him. Thompson won the most of the money lost by Cunningham." Also, the affidavit of defendant: That the facts in the affidavit of Dewey were unknown to him at the time of the trial; that he used due diligence to discover evidence and prepare for trial; that before the trial he made every effort to find Allston, made diligent search for him, and was informed that he had gone to Chicago; and that Allston was not to be found until after the trial. Also, the affidavit of defendant's attorneys: That they were totally ignorant of the facts contained in the affidavit of Dewey until after the trial; that they used due diligence in preparing for trial; and especially did they use due diligence in regard to securing the affidavit of Allston. The evidence for the state, briefly stated, was that in April, 1893, Cunningham came to Atlanta, where Harp introduced McElveen to him at the Aragon Hotel; that Cunningham was drinking, and Thompson, Harp, McElveen, and Cunningham got into a private room at the Aragon, and began to shake dice for drinks; that later they played for money, and McElveen and Thompson that afternoon won nearly \$400 in cash, and two notes, one for \$500, and the other for \$1,000; that the notes were both given payable to McElveen, and one of them was by him indorsed to Tice, who discounted it at the bank; that the first note was not given payable to Thompson at first, and later made payable to McElveen; that Cunningham did not state to McElveen that he desired McElveen to have the notes made payable to him because of

complications about his (Cunningham's) father's estate, and to protect Cunningham with his bank in Marietta, who had suspected him of gambling; that, the morning after the game, McElveen got the dice box out of his room; that Looney, a detective, got one of the notes from one Lewis and one from Tice, McElveen consenting for the notes to be given up, and not in any way resisting Looney's effort to get them; that Looney ordered the warrant sworn out in the magistrate's court against McElveen for gaming dismissed when he (Looney) got the notes; that McElveen told Looney at first he knew nothing about it, but later said he knew about the notes, and denied having anything to do with the game; that McElveen took part of the proceeds of the money, and paid a board bill due the Aragon Hotel, etc. For the defendant, the evidence, in brief, was: Harp, Thompson, and Cunningham were in the game at the Aragon for which McElveen was tried. Harp and Thompson won the money. McElveen was present some of the time, but did not play in the game at all while Harp was there; Harp left them there. Cunningham stated that McElveen was not in the game; but that the notes were made payable to him as an accommodation to Cunningham. Cunningham afterwards told several different stories about the transaction, in none of which did he say McElveen played in the game, and he admitted he had lied if he ever said McElveen was in the game, but did not know why he had lied. Cunningham stated, also, that he was not in the game at all, but the man who was in it was a man from Augusta by the name of Cunningham. A witness for defendant testified that Cunningham's general character was bad, and the witness would not believe him on oath where he had any interest in the matter. Cunningham was the only witness for the state testifying directly to McElveen's participation in the game. McElveen made a statement in which he claimed that he had nothing to do with the game; that he watched the other parties during the game, having been invited into the private dining room to join in a lunch with Cunningham, Harp, and Thompson; that a note was given to Thompson for \$500, and afterwards destroyed, at Cunningham's request, and a new one given, which was made payable to McElveen, Cunningham stating he would like to make it payable to McElveen to protect him with his bank at Marietta, who had suspected him of gambling, and that, if McElveen would use the note, he could say to them he had bought grain from McElveen; that Cunningham stated also that it would protect him against his brother-in-law, who would use it against him in connection with a lawsuit or administration in regard to his father's estate; that it was at the request of Thompson, McElveen's friend, who was a nonresident, and Cunningham, and purely as an accommodation to them, that McElveen permitted the note to be made that way; that

the next day Cunningham insisted on gambling some more with Thompson, "to get even"; that Cunningham then asked McElveen if McElveen would go down to the bar and get the dice box for them, and McElveen refused, telling him, if he (Cunningham) wanted the dice box, to ring the bell, and send the bell boy for it; that McElveen then left the room, and when he returned, which was half an hour later, Thompson and Cunningham were throwing dice there (in Thompson's room); that a few minutes later Harp came in, and joined in the game; that, when it was over, Cunningham had lost \$1,000, for which he gave a second note, similar to the first; that McElveen took the first note to a bank, got it discounted, and turned the money over to Thompson, and gave the second note to Lewis to discount, and had no more to do with it; that McElveen did not play in the game at all; and that he never plays dice or cards.

W. H. & E. R. Black, for plaintiff in error.
C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 215)

BROWN v. STATE.

(Supreme Court of Georgia. March 25, 1895.)

JURY—CHALLENGE TO THE ARRAY—CRIMINAL LAW
—NEW TRIAL.

1. An objection to an entire panel of jurors from which a jury was about to be stricken to try a misdemeanor case, the ground of the objection being that all the jurors had heard the evidence introduced upon the trial of other persons jointly indicted with the accused then on trial, and "had likely formed and expressed an opinion," was in the nature of a challenge to the array, and was properly overruled. If the objection was in fact good as to any or as to all of the jurors, it should have been made by challenge to the polls. *Jones v. State*, 16 S. E. 380, 90 Ga. 616.

2. The newly-discovered evidence was merely of an impeaching character, and the evidence introduced upon the trial was sufficient to warrant the conviction.

(Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

The following is the official report:

Lensey Brown was tried in the city court of Atlanta upon affidavit and accusation charging him, Charles Davis, and Jordan Taylor with stealing a suit of clothes, the property of Tom Adair, from the house of Hattie Shunn. The defendants severed. Davis and Taylor were tried separately, and found guilty. Afterwards Brown was tried, and was also found guilty. His motion for new trial was overruled, and he excepted, and brings error. Affirmed.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because defendant was jointly indicted with Davis and Taylor, and, defendant having elected to sever, Davis was put on trial, and found guilty, and

Taylor was put on trial, and found guilty, and sentenced. Afterwards the case of this defendant was called. Counsel objected to being tried by the present jury, who had passed on the cases of Davis and Taylor, and heard all the evidence, and had likely formed and expressed an opinion. The court overruled the objection and forced the defendant to trial before said jury. As to this ground the court certified: "After the court had overruled the objection to the jury, and ordered the counsel to proceed with the selection of the jury to try the case, counsel for defendant stated that he would waive the right to strike the jury, and try the case before the first five on the list, and they were called by the clerk at his instance, and the case tried before them." Also because the solicitor general did not introduce Taylor, to show that there was an agreement for Taylor and Davis to steal the clothes, and that defendant Brown was to pawn them, and divide the money; Taylor being in the court, and sworn as a witness for the state. Also because of newly-discovered evidence. In support of this ground, movant produced the affidavit of Louis Hurd. He was in the station house in Atlanta when Davis and Taylor were arrested and brought there, and heard each of them state positively that Brown did not have any thing to do with stealing the clothes, and did not know they were stolen; and that there was an agreement that they were to steal the clothes, and Brown was to pawn them. Also the affidavit of Brown and his counsel as to their ignorance of the facts stated in the affidavit of Hurd at the time of the trial, and that they used due diligence to discover evidence and prepare for trial. Upon the trial, Hattie Shunn testified: Tom Adair boarded with her, and she put his suit of clothes in her drawer, and it was stolen out of her house, in Fulton county, on a certain day. Her brother, Jordan Taylor, and Charles Davis came to where she was at work, and wanted to get the key to the house. She gave him the key, and they went off, and came back in about an hour, and gave her the key. When she went back home she found the front door unlocked, but the back door was [locked], and the clothes gone. Brown was not with them, and she did not see Brown that day. When she left the house, she locked the front door, and left the key on the inside, went out of the back door, and locked it, and took the key. Charles Davis testified: He and Taylor got the key from Hattie. Went to her house, and stole the clothes, and delivered them to Brown. It was an agreement between the three that Taylor and witness were to steal the clothes, and that Brown was to pawn them, and they would then divide the money. Witness testified, when Taylor was on trial, that there was no agreement with him that Brown was to pawn the clothes, and then divide

the money with witness and Taylor; and that, if Taylor had such an agreement with Brown, witness did not know it. The reason he testified that Brown knew nothing about the clothing being stolen was that they had agreed to testify for each other, but since witness has been convicted of the crime he thought Brown ought to bear his part of the burden as well as witness and Taylor. Witness and Taylor have not talked about the case since convicted, and have made no arrangement to change what he testified theretofore. Lula Hook testified that two men came to her room (the night of the day the clothes were stolen), asked if Brown was there, and called him out; that she did not see who the parties were; that when Brown went out she closed the door, and did not hear what was said outside; that Brown came back directly, and had a bundle of goods; that Brown did not examine the bundle while in the house; that it was not wrapped up good, and Brown wrapped a paper around it, and went off, saying he would return directly. The ownership and value of the clothes were proved. A witness testified for defendant that since Davis and Taylor had been convicted he had seen them talking together, and Taylor said he did not intend to go to the chain gang for 12 months without Brown; that he intended to take Brown with him. Defendant made a statement, in which he claimed that Taylor and Davis came to Lula Hook's house, called him out, and said they had a suit of clothes they wanted [him] to take and pawn for them, and they would pay him for it; that he was better acquainted with the city than they were. He told them it was most too late. He took the clothing, and went down on Decatur street, and pawned it. He knew nothing about the clothes being stolen.

A. C. Perry, for plaintiff in error. Lewis W. Thomas, for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 135)

SENIOR v. STATE.

(Supreme Court of Georgia. June 10, 1895.)
PROSECUTION FOR ASSAULT—IDENTITY OF ACCUSED
—CROSS-EXAMINATION OF PROSECUTRIX
—ACCURACY OF VISION.

1. It was error for the judge, upon the trial of an indictment for assault with intent to rape, while counsel for the accused was cross-examining as a witness the woman alleged to have been assaulted, and testing the accuracy of her vision by asking her the color of the clothing of different men in the bar of the court, to interrupt counsel, and state, in the presence of the jury: "That is no test. She was right up to this man [meaning the accused, and referring to the time of the alleged assault]. You can't take an old person like that, who has to wear specks, and test her sight from where you are from here."

2. Where in such a trial the identity of the accused with the person who committed the alleged assault was a vital and controlling issue,

and the accused and his brother were sitting together in the bar of the court, it was the right of counsel for the accused, while the woman alleged to have been assaulted was on the stand as a witness, to ask her to point out which of the two was the man who committed the offense, and upon her refusal so to do, it was the duty of the judge either to require the witness to comply with this request of counsel, if in her power, or else to rule out all of her evidence implicating the accused as the guilty person. If the witness had stated her inability to say which of the two men in question assaulted her, this would have been a sufficient compliance with the counsel's request.

3. Other than as above indicated, there was nothing in any of the grounds of the motion for a new trial which would require or justify a reversal of the judgment below.

(Syllabus by the Court.)

Error from superior court, De Kalb county; Richd. H. Clark, Judge.

Zack Senior was convicted of assault, and brings error. Reversed.

F. R. Walker, for plaintiff in error. John S. Candler, Sol. Gen., for the State.

PER OURIAM. Judgment reversed.

(96 Ga. 795)

MANN et al. v. GLAUBER et al.

(Supreme Court of Georgia. June 10, 1895.)

SALE—DELIVERY TO CARRIER—EFFECT.

1. The charge complained of, to the effect that, in the absence of an agreement to the contrary, delivery to a common carrier is delivery to the consignee, was correct. *Falvey v. Richmond*, 13 S. E. 261, 87 Ga. 99.

2. The request to charge, while in some respects legal and pertinent, contained at its conclusion expressions calculated to confuse and mislead the jury, and was therefore properly refused. The evidence fully warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Appling county; J. L. Sweat, Judge.

Action by Glauber & Isaacs against Mann & Melton. Judgment for plaintiffs, and defendants bring error. Affirmed.

The following is the official report:

Glauber & Isaacs sued Mann & Melton upon an account for certain goods, and obtained a verdict for the amount sued for. Defendants' motion for a new trial was overruled, and they excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in charging the jury that if they believed from the evidence introduced that the plaintiffs, Glauber & Isaacs, had sold a bill of goods to the defendants, Mann & Melton, and had delivered said goods so ordered or purchased by the defendants on a boat therein named to be delivered to Mann & Melton at their landing, at Piney Bluff, on the Altamaha river, the delivery on the boat was a delivery to the defendants, Mann & Melton, in the absence of a direct contract that the defendants would not be liable unless the goods were received by them.

Error in refusing to charge as requested: "Generally, the delivery of goods is essential to the perfection of a sale. The intention of the parties to a contract may dispense therewith. Delivery need not be actual. Constructive delivery may be inferred from a variety of facts. Until delivery is made or dispensed with, the goods are at the risk of the seller, unless it was understood and agreed at the time of the delivery of the goods, or at the time of the contract for the sale of the goods, that they were to be shipped by the boat at the risk of the defendants."

G. J. Holton & Son, for plaintiffs in error. Graham & Parker, for defendants in error.

PER CURIAM. Judgment affirmed.

ATKINSON, J., disqualified, and not presiding.

(91 Ga. 224)

H. B. CLAFLIN & CO. et al. v. VONDERAU et al.

(Supreme Court of Georgia. June 10, 1895.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SCHEDULE—APPOINTMENT OF RECEIVER.

1. The inventory and schedule of property attached to the assignment, covering in terms all the property owned by the assignors, containing a specification of all classes of the goods assigned, and designating the locality at which they were to be found, was, in legal contemplation, sufficiently full and complete. At least this inventory and schedule was made substantially in compliance with the terms of the statute. Lumpkin, J., dissenting.

2. On the merits, there was, in view of the evidence contained in the record, no abuse of discretion in denying the injunction, or in refusing to appoint a permanent receiver.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by H. B. Claflin & Co. and others against Vonderau & Co. and others for an injunction and receiver. Judgment for defendants, and plaintiffs bring error. Affirmed.

The following is the official report:

On December 7, 1894, Vonderau & Co., a firm composed of W. P. Vonderau and A. S. Parker, executed and filed for record an assignment for creditors to A. W. Vess. On the same day they filed a mortgage on their stock of goods in favor of some of the preferred creditors mentioned in the assignment deed, this mortgage being dated November 28, 1894. Vess accepted the trust delegated in the assignment on the day it was executed. One month afterwards H. B. Claflin & Co. and several other creditors brought their petition to set aside the assignment as illegal and void, and as made to hinder, delay, and defraud creditors of the assignors; and for injunction and receiver. F. W. Lucas was appointed temporary receiver, and the hearing for permanent injunction and receiver took place on January 30th. The court rendered the following judgment: "Upon consid-

ering the allegations made in the petition, the answers of the defendants, the evidence as contained in the documents and affidavits submitted, and the argument of counsel, and being of the opinion that the inventory and schedules attached to the assignment are sufficiently full and complete to put parties interested on notice, and not to be misleading, that the allegations of fraud in making the assignment and the preferences thereby given are not sustained by proof, and that it is to the interest of creditors that the assignee, who is under good bond for the faithful performance of his duties, shall proceed with the execution of his trust, the application for the appointment of a permanent receiver and for injunction (except as hereinafter provided), is refused. The order appointing a temporary receiver is revoked, and it is ordered that F. W. Lucas, the temporary receiver, restore to the possession of said assignee, A. W. Vess, all assets of every description now in his possession or control, and account for and pay to him all moneys that have come into his hands as such temporary receiver, less what he has expended in his management of the business. But, in view of the evidence touching the purchases by the defendants of merchandise from H. B. Clafin & Co., and from C. E. Graham & Co., respectively, it is ordered that said assignee keep separate accounts of his sales of the bill of goods identified by the affidavit of H. L. Cook as purchased of H. B. Clafin & Co. in the months of August and September, 1894, and that identified by the affidavit of W. J. Graham as purchased of C. E. Graham & Co. during said months, and that he retain and have the proceeds thereof subject to the order of the court upon the final order and decree in this case." To this judgment the plaintiffs excepted.

The assignment recites that the assignors, doing business in dry goods and notions, are in a failing condition, and cannot continue business and meet their obligations, owing to their inability to collect what is due them; that they desire to pay all their indebtedness in the shortest time possible, and with the least risk of loss to their creditors, and think it proper that preference should be made; that they are confident, if their assets are properly disposed of, and not sacrificed, all their creditors will be paid in full; and that it will be to the interest of all the creditors for the firm to assign their assets to some discreet and proper person, who will manage them for the benefit of all interested, rather than have the sheriff take charge and sell. Therefore, in consideration of the premises and of the things to be done, hereinafter mentioned, and of five dollars cash in hand paid, they grant, convey, and assign to Vess and his assigns all their merchandise, stock in trade, fixtures, amounts due them on notes, accounts, etc., and all property of every kind belonging to them as a firm. Reference is made to attached schedules of assets and

creditors as full and complete. The assignee is to take the property conveyed in trust to sell and dispose of at public or private sale, at his discretion, and to collect all sums due the firm, and to reduce said property to cash as early as practicable consistently with the interest of the creditors, to be judged of by the trustee, and to dispose of the same as follows: (1) Pay the expenses of procuring such help as he may need, to be determined by him, in selling and disposing of the property and collecting the notes and accounts; also the fees of an attorney, if he should need one; also store rent, insurance, and such incidental expenses as are necessary while disposing of the property; also pay himself \$100 monthly, until the property is sold out, for his services, and the sum of five per cent. of the collections that pass through his hands after the sales are over; also pay to John J. Strickland \$250 for professional services in drawing this deed and other service, and pay the clerk his fee for recording this deed. These debts are first preferred, being in the nature of expenses. (2) Pay to Lee, Tweedy & Co. the amount of their judgment against Vonderau & Co., the same being about \$240. (3) Pay to the following named persons and firms the amounts stated (naming 24, including W. J. Parker, note, \$901.30; M. L. Bickers, two notes, \$566.41; W. H. Robertson, \$369.12; St. Elmo Lodge No. 40, K. of P., account, \$153.85; the others ranging in amount from \$10 to \$250, except two notes and accounts, and accounts in favor of James White, cashier, for \$1,178), all of whom are hereby made preferred creditors after the sums mentioned in the preceding paragraphs have been paid in full; the creditors mentioned in this paragraph not to be preferred one over another, but to be paid equally. (4) Pay to all other creditors, without preference among themselves, the full amount due each, or such per cent. thereof as he may have funds to pay, after paying all the preferred claims as above stated. In the inventory of assets the stock of goods is set forth in 44 items, each with an amount opposite, thus: "190 pcs. dress goods, \$2,550.24; 15 pcs. velvets, \$300; 125 pcs. silk, \$1,125.10; 80 pcs. velvet ribbon, \$125.50; 240 pcs. wash goods, \$650; linen damask and towels, \$285.10; linen damask and napkins, \$375.50; 1 lot white goods, \$45; 1 lot swiss and mull, \$38.75; 1 lot embroidery, \$75.30; 60 pieces jeans, \$410.10; 1 lot notions and fancy goods, \$210; 1 lot underwear, \$250.15; 1 lot notions and fancy goods, \$1,546.15; 1 lot dress trimmings, \$585.40; 1 lot notions, \$1,010; 1 lot hosiery, \$450.25; 1 lot notions, curtains, poles and fixtures, \$750.20; 1 lot trunks, \$175," etc. The aggregate of the 44 items is \$16,542.79. The list of accounts due to the assignors contains a great many names, with amounts opposite each. It also contains 26 names, each with a pen mark drawn through it, and of these 22 seem to have had no amount placed opposite them. It is explained in defendant's answer

that the accounts thus indicated were collected before the assignment was filed. The inventory and schedule of indebtedness of the assignors sets forth the names of the creditors, their places of residence, and the amounts due each, thus: "The H. B. Claflin Co., New York, 12 notes, \$4,180; Lee, Tweedy & Co., N. Y., judgment, \$204.22; The Meridian Curtain Co., N. Y., acct., \$42.75; Nonatic Silk Co., Cincinnati, acct., \$5.60; C. E. Graham & Co., Greenville, S. C., acct., \$402.63; O'Farrell & Ash, Athens, acct., \$12.23; J. A. Scriven Co., New York, \$60; Coolis Bros. & Co., N. Y., \$34.75; Standard Watch Co., Syracuse, N. Y., \$24," etc. In some cases the kind of claim (i. e. whether account or note) is indicated; in others it is not. The schedules were each sworn to separately. The grounds of the petition are, in brief, that Vonderau & Co. bought goods from plaintiffs in August, September, and October, 1894, upon false representations, made for the purpose of getting credits, that they were in good and solvent financial condition, owing only \$4,500 and being worth \$14,000 above all liabilities, which statements were made to deceive petitioners, and did deceive them, and upon which they relied in shipping the goods; that said statements and representations were part of a scheme and conspiracy, which culminated in the making of the assignment, to get a large stock of goods on hand on credit, and to fail, and make preferences to favored parties; that Vess was a former partner of the firm, and was a party to said scheme; that of the preferred creditors Mrs. L. J. Vonderau is the mother of W. P. Vonderau, Mrs. Bickers is the wife of a former partner in the firm, and W. J. Parker is a brother of A. S. Parker, and it is charged that the ostensible indebtedness to them is fictitious, and is really a reservation for the benefit of the assignors; that the preference given to the St. Elmo Lodge of Knights of Pythias is for money due that lodge by Vess as its treasurer; that Vess is still a silent partner, or has some concealed interest in the firm; that in the last summer he went North to purchase goods for them, and made false and fraudulent representations as to their solvency and financial standing, for the purpose of getting credit, whereby they obtained goods from petitioners and other creditors; that under the assignment he runs and controls the business just as directed by Vonderau and Parker; that \$100 a month for his services is exorbitant, as such services are not reasonably worth over \$60 or \$75 per month; that he is mismanaging and wasting the assets, and is insolvent; that he construes the assignment to allow him to run the business, and is proceeding to do so, paying for three clerks at \$40, \$25, and \$12 per month, and retaining Vonderau as clerk and Parker as bookkeeper at amounts not agreed on, but doubtless to be ample; that the assignment is void because the schedules are not full and complete as required by law, and because of omissions of assets

therefrom, including certain accounts which petitioners are informed are due the firm, considerable sums of money collected by them, goods of the value of \$500, consisting of a large lot of ladies' jackets and cloaks and a lot of gossamers and mackintoshes; that it is void also because the schedule of assets is insufficient, as it groups together merchandise in large lots and lumps, without making an inventory and schedule of the same, and specifically showing the kind, quantity, and quality of the goods; that the lists of merchandise and of accounts due the firm purport to show assets of the value of \$20,000, and the list of creditors indicates an indebtedness of \$14,000, whereby it is sought to mislead creditors into the belief that there is enough to pay them all, and thus prevent them from making any attack upon the assignment, while the assignors are colluding and confederating with the assignee to sell and dispose of the property, and put the proceeds beyond the reach of creditors other than those preferred; that the real value of the assets, allowing for bad and insolvent accounts and set-offs against others of them, will not be more than \$6,000 or \$7,000; that Vess is threatening to sell out the goods at a sacrifice, and at less than half the cost or value, and petitioners are informed that he is so doing; and by such mismanagement the trust fund, which is all petitioners have to look to for the payment of their debts, is being dissipated.

Defendants answered, denying the material allegations of the petition, except they admit their indebtedness to plaintiffs. They further admit that whenever called upon to make a statement of their financial condition they invariably and truly stated that they were solvent. They deny making any statement that was not substantially correct, or any statement as a basis of credit upon which plaintiffs acted. They allege that Claflin & Co. declined to sell them goods on their own responsibility or statements, but did sell them on a written guaranty of Vess, which they took from him when he bought the goods. They deny being insolvent when the goods were bought of plaintiffs, or at any time since, and set forth a statement of their assets and liabilities in August, 1894, showing that they were worth \$7,711 net over all indebtedness at the time they made their purchases in the summer and fall of that year. It is untrue that there was any scheme to get a large stock on hand, and then fail. On the contrary, they limited their purchases to as small an amount as possible, countermanded several orders, and returned a lot of goods after they had been shipped, for the reason that they were increasing their indebtedness beyond what they desired to make it in view of the financial condition of the country; such orders countermanded and goods returned to plaintiffs and others amounting to something like \$1,000. Vess retired from the firm in September, 1893, when there was a dissolu-

tion, notice of which was given as required by law. The purpose of the mortgage which was executed on November 28, 1894, and filed before the assignment was filed, was to secure the creditors therein named, whom defendants felt bound to protect in case an effort should be made by any creditor to have a receiver appointed. At the time of its execution, defendants hoped to make sufficient collections to pay the pressing demands against them, and continue their business; but subsequently it was apparent they would be unable to do so, and they decided it was for the best interest of the creditors that they should assign, so that the assignee could get the benefit of the holiday trade then, rather than later. The indebtedness to Mrs. Vonderau, Mrs. Bickers, and W. J. Parker is not fictitious, but is bona fide. That due Mrs. Vonderau is for cash loaned by her, less merchandise furnished to her from time to time. In July, 1891, when the firm was composed of Vess, Vonderau, and Mrs. Bickers, Vess bought her interest, and gave three notes therefor, due October 1, 1893, 1894, and 1895. When Vonderau and Parker bought the interest of Vess, as a part of the purchase they assumed the payment of these notes. A number of payments in cash and merchandise were made on the notes, leaving the balance stated in the assignment. The debt to W. J. Parker was for money loaned. Vess was treasurer for the St. Elmo Lodge, K. of P., and, instead of placing the money he held in trust in bank, he placed it with the firm, and it went into their business. They thought it fair and proper that they should protect the lodge to the amount of which they had received the benefit. They protected this debt just as they did money placed with them by F. W. Lucas, as administrator, the present receiver. They deny that Vess is a silent partner, or has any concealed interest in the firm, or that he made any false and fraudulent statements as to their solvency and financial standing, or for the purpose of deceiving plaintiffs, or that did deceive them. He is a first-class salesman, purchased the entire stock of goods, is perfectly familiar with them and with the trade, has the absolute confidence of customers who purchase dry goods in Athens, and was selected as assignee for the reason that he was honest and honorable, and the best man that could be got to wind up the business. The temporary receiver stated that Vess was indispensable in closing up the business, and that he would not undertake the duties of receiver unless allowed to retain Vess in his employment. One hundred dollars a month is not more than the services of Vess are worth. Defendants have paid him that amount ever since they have been in business. He was paid that by other dry-goods houses in the city before defendants employed him, and he will command that amount any day he will accept a standing offer. He was not mismanaging and wasting the as-

sets, and no fraud on petitioners or any other creditors was being practiced or contemplated. He employed for one month the force the firm had at the time the assignment was executed. The policy of the plaintiffs is not to lessen expenses, but to increase them. Those of the temporary receiver have been much heavier than those of the assignee. He retained Vess at a salary of \$80 a month, raised the salary of a clerk in the store, and hired a bookkeeper at \$3 per day, all after the holiday trade was over, and without making any effort to collect the outstanding accounts. Whether or not Vess is solvent is immaterial, as he was operating under a solvent bond for \$20,000, which was an absolute protection to all the creditors. It is not true that he construed the assignment to mean that he was to continue to run the business, but his policy was to carry the business on until after the holidays, up to the middle or latter part of January, and then wind up the business, and stop expenses. There was no waste while he was in possession, but all goods were sold at and above cost. It is denied that anything was omitted from the inventory and schedule of assets, which defendants owned as a firm. When defendants were unable to meet their indebtedness, and stated to the representative of the Claflin Company that they would be compelled to close, and felt bound to protect the creditors mentioned in the mortgage, and any other home creditors, the Claflin Company proposed to them that if they would execute and deliver to said company a first mortgage on their stock of goods the company would furnish them money to pay off the home creditors, and carry them on, and allow them to continue business. Defendants refused to accept this proposition, for the reason that it was an injustice to the other creditors should they fail to pay all the creditors in full. The Claflin Company then admitted both the genuineness of the debts they now attack and the sufficiency of the assets on hand to pay them. The temporary receiver is unfitted for the position by reason of age, etc., and his management has been unfortunate. All charges of fraud, collusion, or conspiracy are denied.

The evidence at the hearing was very voluminous and conflicting, and the nature of it is indicated by the foregoing statement. It is contended by plaintiffs that the evidence shows the omission from the schedule of accounts due the assignors of 37 accounts ranging from 10 cents to \$90, besides a number of interest-bearing notes and mortgages, as well as large amounts due the firm by Vonderau and Parker, and a small amount due by Vess; that the schedule of creditors omits the names of J. H. Stone, \$83, and A. W. Vess, \$23.03; that the amount due Claflin & Co. is stated at \$73 less than it really is; that 22 of the accounts included in the schedule of assets had been transferred by the assignors to W. H. Robertson, no men-

tion of which transfer appears in the assignment, these accounts aggregating \$737.16; that three others appearing in the schedule of assets, and amounting to \$415.30, were transferred by the assignors to Stromberg, Kraus & Co., no mention of such transfer appearing in the assignment; that the evidence was overwhelming that plaintiffs' goods were obtained from them by fraudulent misrepresentations of the assignors and the assignee as to the financial situation of defendants; and that the evidence further proves all the allegations of the petition.

Lumpkin & Burnett and Harrison & Peebles, for plaintiffs in error. Robt. S. Howard, H. C. Tuck, John J. Strickland, and Erwin & Cobb, for defendants in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., dissenting as to sufficiency of the inventory and schedule.

(4 S. C. 376)

YOUNG v. COHEN.

(Supreme Court of South Carolina. July 10, 1895.)

COSTS ON APPEAL.

When an appeal is taken, and a new trial demanded, by the party against whom the judgment is rendered, and the appellate court adjudges that a new trial shall be awarded unless the respondent remits a part of his judgment, but further adjudges that, in case respondent does remit, the judgment so reduced shall be affirmed, the respondent, having so remitted the excess, is entitled to costs.

Appeal from common pleas circuit court, Union county; Aldrich, Judge.

Action by John L. Young against Phillip M. Cohen. Defendant appeals from a judgment taxing him with costs. Affirmed.

Munro & Munro and R. W. Shand, for appellant. Hydrick & Sawyer, for respondent.

POPE, J. This cause was before us on appeal at the April term, 1894. Our judgment was rendered on September 12, 1894. 20 S. E. 62. The contention by the defendant there was that he should be awarded a new trial because, by the ruling of the circuit court adverse to his contention, he had been charged \$139.75 too much, which was included in plaintiff's judgment against him. This court agreed with the defendant, and adjudged that the defendant should have a new trial unless the plaintiff entered a remittitur of \$139.75 upon his judgment against the defendant, but adjudged further that, if such remittitur were so entered by plaintiff, plaintiff's judgment should be affirmed. The present contest arises as to the costs of such appeal. The circuit judge decided that the plaintiff was entitled to be regarded as the prevailing party, and accordingly adjudged the costs which had been taxed to such plaintiff. From this judgment, which was rendered by Judge Aldrich at the spring term,

1895, of the court of common pleas for Union county, the defendant now appeals. The grounds of appeal are three in number, but only present the alleged error in different phases. So now the question presented to this court is this: When an appeal is taken from a judgment by the party against whom the judgment is rendered, and a new trial is demanded by such appellant, and this court adjudges that a new trial shall be awarded unless the plaintiff remits a part of his judgment, but further adjudges that, in case the holder does remit, his judgment so reduced shall be affirmed, who is the prevailing party in such a judgment so as to be entitled to costs? This question has been before this court before, to wit, in the cases of Stepp v. Association and Loch v. Mawn (heard together) 41 S. O. 206, 19 S. E. 490. There Chief Justice McIver, as the organ of the court, among other things said: "Now, in the cases at present under consideration, it is very clear that the appellants did not succeed in reversing the judgments appealed from. On the contrary, these judgments now stand affirmed, though reduced in amount by the voluntary act of the plaintiffs themselves; for it is very obvious that this court had no power to require the plaintiffs to abate the amount of their recovery. All that this court could do, and all that it undertook to do, was to declare that the judgments should be reversed upon a certain contingency, which never happened, and cannot now ever happen. It is very clear, therefore, that the judgments never were reversed, but, on the contrary, were distinctly affirmed so soon as the plaintiffs complied with the conditions offered them by this court." The court adjudged the costs to the plaintiffs in those cases. These cases, so decided, rule the present appeal, and this appeal must be dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 362)

STATE v. LARKINS.

(Supreme Court of South Carolina. July 8, 1895.)

TRIAL BY JURY—VIOLATION OF ORDINANCE.

Under 16 St. at Large, p. 467, § 2, conferring on the recorder of the city of Charleston all the authority of a trial justice in criminal matters, and Code Cr. Proc. § 20, providing that every person charged with an offense before a trial justice shall be entitled, on demand, to a trial by jury, a person charged before the recorder of Charleston with violation of an ordinance is entitled, on demand, to a jury trial.

Appeal from general sessions circuit court of Charleston county; Ernest Gary, Judge.

Rufus Larkins was arraigned before the recorder of the city of Charleston for violating a city ordinance, and, a trial by jury being refused him, appealed to the court of general sessions. From a judgment reversing the judgment of the recorder, the state appeals. Affirmed.

Charles Inglesby, Corp. Counsel, for the State. S. J. Lee, for respondent.

GARY, J. Rufus Larkins, the defendant, was arrested by the police of the city of Charleston, charged with a violation of section 548 of the city ordinances, with reference to lotteries and games of chance. Upon being arraigned before the recorder, the defendant demanded a trial by jury, which was refused. The defendant then appealed to the court of general sessions, on the ground that there was error on the part of the recorder in refusing to allow him a trial by jury. The appeal was heard by his honor, Ernest Gary, presiding judge, who reversed the judgment of the recorder, and remanded the case to that court, for the purpose of affording the defendant a trial by jury. From this order of his honor, Judge Gary, the state has appealed to this court, on the ground that he erred in holding that defendants in the police court of the city of Charleston are entitled, when charged with violations of city police ordinances and regulations, to demand trials by jury, that the right to trial by jury in such cases in said police court of the city of Charleston is secured to defendants by the laws and constitution of this state.

For a history of the police court of the city of Charleston, see the opinion of this court in the case of *City Council v. Brown*, 20 S. E. 56. In 1878 (16 St. at Large, p. 467) an act was passed entitled "An act to define and regulate the jurisdiction of the police court of Charleston." Section 1 of said act is as follows: "That from and after the ratification of this act, it shall be the duty of the recorder of the city of Charleston to hold the police court of the city of Charleston, heretofore held by the mayor of Charleston, and that in addition to the power and authority already by law vested in the recorder, he shall be invested with all the power and authority heretofore vested in the mayor as the presiding officer of the police court, and with all the powers, authority and jurisdiction of a trial justice of this state in criminal matters and cases, except that the recorder shall not be allowed to charge or receive any of the fees allowed by law to a trial justice." Section 2 is as follows: "In case of the sickness or other unavoidable absence of the recorder, the police court shall be held by one of the aldermen of the city of Charleston, or by one of the trial justices of Charleston county, as may be designated by the mayor." In the case of *City Council v. Brown*, supra, the court says: "The recorder tried the case by reason of the fact that he was invested with all the powers, authority and jurisdiction of a trial justice of this state in criminal matters and cases." As the recorder tried the case under the powers of a trial justice conferred upon him, it follows necessarily that the defendant had the right of appeal, which is incidental to such trial." Another incident of such a trial is the right to a jury. The

powers, authority, and jurisdiction of a trial justice, conferred upon the recorder, carried with them their corresponding rights of the prisoner in such cases. One of the rights of a prisoner charged with the violation of an ordinance, when tried before a person clothed with the powers, authority, and jurisdiction of a trial justice, is to have a jury to pass upon his innocence or his guilt. *Town of Lexington v. Wise*, 24 S. C. 163; *Town Council v. Ohlandt*, Id. 158; *State v. Williams*, 40 S. C. 373, 19 S. E. 5. Section 20, Code Cr. Proc., provides that every person arrested and brought before a trial justice charged with an offense within his jurisdiction shall be entitled, on demand, to a trial by jury. Although the question presented in this case was not involved in the case of *City Council v. Brown*, supra, the principles therein announced are conclusive of this case. After a careful consideration of that case, this court sees no reason to change its views therein announced. It is the judgment of this court that the order of the circuit court be affirmed.

(44 S. C. 374)

WOODLEY v. TOWN COUNCIL OF OLIO.
(Supreme Court of South Carolina. July 10, 1895.)

QUALIFICATIONS OF VOTERS—FEMALE SUFFRAGE.

The general assembly has power to permit adult females who own \$100 worth of taxable property within the corporate limits of a town to vote at an election to decide whether bonds of the town be issued to procure railroad extension.

Petition by J. M. Woodley to enjoin the town council of Olio from issuing bonds. Denied.

T. W. Bouchler, for petitioner. C. F. Townsend, for respondent.

POPE, J. This is an application in the original jurisdiction of this court for an injunction to restrain the town council of Olio, in Marlborough county, in this state, from issuing \$4,500 of the bonds of said corporation, to procure an extension of the Latta Branch Railroad to the said town of Olio, under the authority of an act of the general assembly entitled "An act to authorize the town of Olio, in Marlborough county, to issue bonds in aid of the Latta Branch Railroad," approved December 18, 1894, and by its terms to take effect immediately upon its approval. 21 St. at Large, 1068, 1069. An order was issued from this court, on the 15th day of April, 1895, requiring the said town council of Olio to show cause before this court, at 11 o'clock a. m., on the 17th day of April, 1895, why such injunction should not issue. The grounds in the petition why the injunction should issue were because the said town council of Olio had already had an election held in pursuance of the terms of said act, wherein a majority

of the voters had authorized the issue of the bonds in question, and said town council were about to issue said bonds, but the petitioner urged that said election was invalid, because females who were adults, and who owned \$100 worth of taxable property in said town, were allowed to vote at said election; and because, by the terms of said act, in the event the Latta Branch Railroad Company declines to extend its road to the town of Clio, said town council is authorized to use said bonds to procure some other railroad to extend its road to said town of Clio, the said town council of Clio is authorized to use said \$4,500 in bonds to procure some other railroad than the Latta Branch Railroad Company to extend its road to said town of Clio. In the return of respondents, they set up the facts that the election was duly conducted as required in every particular, and that the fact that adult females who owned \$100 worth of taxable property within the corporate limits of said town of Clio were allowed to vote at such election did not render said election void; and, further, that there was no purpose on the part of the respondents to use the bonds for any other purpose than that indicated in the title to said act; and therefore prayed that the rule be discharged. We will briefly notice the grounds of objection.

1. Should such female and adult who owns \$100 worth of taxable property within the corporate limits of the town of Clio be entitled to vote when she was so authorized under the act of the general assembly of this state? This is no longer an open question in this state. This court held in *Wilson v. City Council*, 39 S. C. 397, 17 S. E. 835, that an act similar in its provisions on this point was in pursuance of the power vested in the general assembly, and this decision was approved in a subsequent suit between the same parties. *Id.*, 40 S. C. 290, 18 S. E. 792.

2. Should the town council of Clio be allowed, if they should ever wish to do so, to apply the \$4,500 to obtain a railroad connection of any railroad company by an extension of its road to Clio, other than the Latta Branch Railroad? This question is purely speculative. It will be time enough to consider it when such an event occurs. However, we may say, in passing, that we see no ground to assail the act in question on this score. The injunction must be denied.

A previous order was issued denying the injunction, and this opinion is rendered in support of such order already passed.

(44 S. C. 357)

STATE v. WALLACE.

(Supreme Court of South Carolina. July 8, 1895.)

LARCENY — EVIDENCE — APPEAL — REVIEW — IMPEACHMENT OF WITNESS.

1. On a trial for larceny, when the property stolen was found in the possession of a wit-

ness for the state, it was error not to allow defendant in cross-examination to show that the witness was also in possession of similar stolen property.

2. An exception which only raises an abstract legal proposition will not be considered on appeal.

3. On a criminal trial it is error to rule that the only way to discredit a witness for the state is to put witnesses on the stand to prove that he is not worthy of belief.

4. Exceptions to disconnected portions of a charge will, on appeal, be considered in connection with the whole charge.

5. Exceptions to a charge regarding good character will not be considered on appeal, when there was no evidence as to good character.

Appeal from general sessions circuit court of Spartanburg county; Adrich, Judge.

John Wallace was convicted of grand larceny, and appeals. Reversed.

Nicholls & Jones, for appellant. O. L. Schumpert, for the State.

GARY, J. The defendant was indicted of grand larceny at the January, 1895, term of the court of general sessions for Spartanburg county. The stolen property consisted of a buggy, harness, and lap robe, the property of R. D. Blowers, which was alleged to have been stolen in September, 1893. In November, 1894, the stolen property was found in the possession of one Hasting Gist, the brother-in-law of Wallace. Gist said, at first, that it belonged to his mother, Lizzie Gist; afterwards he said it belonged to John Wallace. Lizzie Gist at first claimed the property, but afterwards said it belonged to Wallace. In his examination, Hasting Gist said that his mother had another buggy. On cross-examination, defendant's counsel asked: "Q. Where did your mother get that second buggy you say she had? A. She got it from Chris Gossett. Q. Isn't that the buggy that Mr. Blowers arrested Chris Gossett about, or compromised with him? A. Do which? Q. Isn't that the buggy that Mr. Blowers arrested Chris Gossett for? The Solicitor: That is incompetent. Mr Nicholls: We wish to show that this man Chris Gossett was in Mr. Blowers' employment, and in the business of stealing buggies. The Solicitor: With John Wallace? We will admit that. By the Court: You may examine him about this particular buggy Wallace is charged with stealing now, not some other buggy. If you can make him particeps criminis— Mr. Nicholls: This man is the man that was found with the stolen goods, and he is trying to shift it off on somebody else. That is our view of it, and we think we can make him admit, himself, probably, that they got another buggy from Mr. Blowers through this same person. The Solicitor: Grant that he did,—grant that he got another buggy, and another, and another; that has nothing to do with the case. We are trying him for stealing a particular buggy. Mr. Nicholls: I think it would tend to discredit this witness to show that he had been buying buggies at another time. By the Court: If that is your purpose, the proper

way is to put witnesses on the stand to prove that he is not worthy of belief. Mr. Nicholls: Does your honor rule that we cannot ask him any question, while he would not be bound to answer, the answer to which would tend to discredit him? By the Court: If a question is asked which is irrelevant and objected to, of course I will have to hold that it is irrelevant, because, even if he were to refuse to answer an irrelevant question, or answer an irrelevant question falsely, you could not predicate a charge of perjury upon it. A conviction of perjury would have to be upon some question material to the case. If it is immaterial, you could not convict him. Mr. Nicholls: I would like to ask him if he did not get this second buggy. By the Court: You may ask him. I suppose the solicitor will object. Q. Didn't you get this last buggy from Chris Gossett? The Solicitor: I object. By the Court: I cannot see, so far, the relevancy of that second buggy transaction, as the defendant, Wallace, is not charged with stealing it. Subject to letting it come in if I can be shown the relevancy hereafter, I must sustain the solicitor's objection."

Appellant's first exception is as follows: "That his honor erred in refusing to allow defendant to show that Hasting Gist and his mother, in whose possession the stolen buggy was found, had bought another stolen buggy from Chris Gossett, who had the custody of Mr. Blowers' buggy." The stolen property was found in the possession of Hasting Gist. The theory of the defense was that Hasting Gist and his mother were participes criminis with Chris Gossett, and that he had stolen the property from Mr. Blowers. The object of the defense in cross-examining Hasting Gist was to show, by circumstantial evidence, that the possession of the stolen property by Hasting Gist was directly connected with the larceny. If the testimony had shown that Hasting Gist and his mother had been in unlawful possession of the other buggies delivered to them by Chris Gossett, which he had stolen from Mr. Blowers, it would have tended to throw light upon and explain the possession of the property alleged to have been stolen by the defendant. Testimony as to their guilt would have tended to exculpate him. The circuit judge was therefore in error, and this exception is sustained.

The second exception is as follows: "That his honor erred in ruling and holding that the defendant's counsel could not ask the state's witness Hasting Gist questions the answer of which might tend to discredit him." The following appears in the case: "Mr. Nicholls: Does your honor rule that we cannot ask him any question, while he would not be bound to answer, the answer to which would tend to discredit him? By the Court: If a question is asked which is irrelevant and objected to, of course I will have to hold that it is irrelevant, because even if he were to refuse to answer an irrelevant question, or answer an irrelevant question falsely, you

could not predicate a charge of perjury upon it. A conviction of perjury would have to be upon some question material to the case. If it is immaterial, you could not convict him." The exception does not complain of error on the part of the presiding judge in refusing to permit the witness to answer a specific question. The question asked to discredit the witness might have been wholly inadmissible, and there would have been no error on the part of the circuit judge in refusing to allow the witness to answer them. The exception only raises an abstract legal question. Furthermore, the presiding judge did not make a direct ruling upon the question. This exception is overruled.

The third exception is as follows: "That his honor erred in ruling and holding that the only way to discredit a witness for the state was to put witnesses on the stand to prove that he is not worthy of belief." In this there was error. One of the most effective modes of discrediting a witness is by cross-examination. The distinction between the character and the credit of a witness is pointed out in the case of *Chapman v. Cooley*, 12 Rich. 654. This exception is sustained.

The fourth and fifth exceptions are as follows: "That his honor erred in virtually charging the jury that they might disregard the rules of law and evidence, and 'if the witness impress you with the idea that that man stole that property, say so by a verdict of guilty.'" "That his honor erred in assuming and indicating to the jury that defendant was not only charged with a crime against the state, but was one of those persons who have violated its laws." These portions of his honor's charge, when considered in connection with the whole charge, show that the exceptions cannot be sustained.

The sixth exception is as follows: "In charging the jury in substance that good character could only have weight in doubtful cases, and then only such weight as a jury saw fit to give it." It nowhere appears in the case that any testimony was introduced as to good character. There is therefore nothing upon which to predicate this exception, and it is overruled. It is the judgment of this court that the judgment of the circuit court be reversed, and a new trial granted.

(44 S. C. 378)

BROWN v. BROWN et al.

(Supreme Court of South Carolina. July 10, 1895.)

RESCISSION OF DEED—FRAUD AND UNDUE INFLUENCE—SUIT BY GRANTOR'S HEIRS—BURDEN OF PROOF—LIMITATIONS.

1. A deed by a husband to a wife conveying to her in fee a one-third interest in land for her support and maintenance is based on a sufficient consideration as against an attack by his heirs.

2. A grantor cannot impeach his deed on the sole ground that it was without consideration.

3. The burden of proof is on the heirs of a husband who attacked a deed by him to his wife

as having been obtained by undue influence and duress.

4. An action by heirs to set aside a deed of their ancestor as obtained by fraud will not lie unless commenced within six years after the ancestor had sufficient information to put him on inquiry as to the way in which the deed was obtained.

5. The costs are in the discretion of the court in an equity case.

Appeal from common pleas circuit court of Newberry county; Fraser, Judge.

Action by Frances C. Brown against George D. Brown and another to have set apart an interest in certain lands owned by her deceased husband. From a judgment for plaintiff, defendants appeal. Affirmed.

M. A. Carlisle, for appellants. Johnstone & Cromer, for respondent.

GARY, A. A. J. The plaintiff in the case, Frances C. Brown, commenced an action on the 7th day of October, 1892, against the defendants, George D. Brown and Lucinda C. Moseley, for the purpose of having certain real estate, in which her deceased husband, J. W. R. Brown, owned an interest at the time of his death, set apart to her. The husband, Brown, died intestate on the 25th day of August, 1891, leaving him surviving as his only heirs at law, and entitled to distribution of his estate, his wife, the plaintiff, Frances C. Brown, and his brother, the defendant George D. Brown, and his sister, the defendant Lucinda C. Moseley. The plaintiff, in her complaint, alleges that on the 25th day of May, 1883, her husband, J. W. R. Brown, granted and conveyed to her absolutely in fee simple a one-third interest in the tract of land herein sought to be partitioned, and prays that the same may be set apart to her. The answer of the defendants denies the execution of this deed of conveyance, alleges that the same was without consideration, and assails it affirmatively upon the ground that it was procured by the plaintiff first abandoning the home of her husband, and then, while living separately from him, by means of duress, threats, and promises to return home, extorted from him the execution of the alleged conveyance, and that, by reason of said abandoning of her husband's home and the said duress, threats, and promises to return, the said J. W. R. Brown was, for the sake of peace in his family, forced to make the said conveyance, the same being without even love or affection or any other consideration, and therefore invalid, void, and of no effect in law. The plaintiff, in her reply, denies each and every allegation of new matter, and pleads the statute of limitations, in the words "that, if there ever existed any right to avoid the plaintiff's deed on the grounds of duress or undue influence, it occurred more than six years before this action was begun." At the November term, 1894, of the court of common pleas for Newberry county, the following issue was submitted to the jury: "Is the deed set out in the complaint a valid and effectual

conveyance of the estate which it purports to convey?" After hearing the testimony in the cause, and under the charge of the presiding judge (the Honorable T. B. Fraser), the jury answered the said issue in the affirmative; and the presiding judge rendered a decree in which he concurred in the finding of the jury, and held that the plaintiff was entitled to have set apart to her a one-third interest and estate in the lands described in the complaint, less certain parcels which had been alienated in the lifetime of the plaintiff's said husband. The decree further provided that the defendants pay the costs of the action occurring upon the said issue raised by their answer, together with the witnesses' fees and the costs of taking testimony on said issue; that the rest of the costs be paid by the plaintiff and the estate of J. W. R. Brown, one-third thereof by the former, and two-thirds by the latter.

The defendants have appealed to this court, upon the following exceptions: (1) "That the words 'support and maintenance of the wife' is a sufficient consideration expressed in the deed by which the land in question was conveyed by the husband to the wife." (2) "That the seal of the deed itself was *prima facie* evidence of consideration, and, if no consideration is expressed in the deed at all, that the seal will be sufficient consideration." (3) "That the burden of proof when the deed was made by the husband to the wife, and was attacked on the ground of undue influence and duress exercised by the wife, was upon the defendants, heirs at law of the husband, who attacked the deed." (4) "That the statute of limitations for six years ran against the defendants from the time that J. W. R. Brown, the husband, had notice of all the circumstances of the deed, or the discovery of fraud by him." (5) "The presiding judge erred in decreeing that the defendants should pay the costs of the trial of the issues raised in their answer, and as set forth in the decree."

As the first two exceptions relate to the same subject-matter (the consideration of the deed), they will be considered together. The charge of the presiding judge upon which these two exceptions are based is in the following words: "Deeds usually run in consideration of natural love and affection, or in consideration of so much money, or in consideration of so much property, of land, or consideration of something else, some valuable consideration; but I take it, and instruct you, that a deed like this, when the consideration is stated to be for the support and maintenance of the wife, is sufficient consideration. The seal itself is *prima facie* evidence of consideration, and, if no consideration is expressed in the deed at all, that seal will be sufficient." In this charge, we think, there was no error. The verdict of the jury upon the issue submitted to them, and the concurrence in their finding of the presiding judge, sitting as chancellor, has certainly established the fact that the deed in question is a genuine

instrument, which J. W. R. Brown, the husband of the plaintiff, in his lifetime, duly signed, sealed, and delivered to her. Having thus executed the deed with all these formalities, it would not lie in his mouth, nor would he be permitted, if alive, to impeach his deed under seal, on the sole ground that it was without consideration. It was binding on him, in the absence of fraud or collusion; and these defendants, who claim through him as his heirs at law, could acquire no higher equity nor any greater rights in the premises than their intestate. As the circuit judge now very properly charged the jury, "these defendants stand in the shoes of J. W. R. Brown." The law of nudum pactum is inapplicable to instruments under seal. The very fact of having a seal attached imports a consideration. See *Carter v. King*, 11 Rich. Law, 133. In that case the question is pertinently asked: "How could any deed of gift or covenant to stand selsed ever prevail if the want of valuable consideration which renders a parol promise void would avail to defeat a speciality?" Besides, the husband is bound in law as well as in morals to maintain and support the wife, and after his ability to provide a support for the wife has become impaired (as is charged in this case) by being addicted to the habit of strong drink, we can see no reason why he should not be permitted to deed to the wife an interest in his real estate, and thereby enable her to earn for herself that support which the law enjoins upon the husband. For the foregoing reasons, the first and second exceptions are overruled.

The rule of law which governs in the third exception is stated by Mr. Wharton in his work on Evidence (volume 1, § 356), and is as follows: "That he who in a court of justice undertakes to establish a claim against another, or to set up a release from another's claim against himself, must produce the proof necessary to make good his contention. This proof may be either affirmative or negative. Whatever it is, it must be produced by the party who seeks forensically either to establish or to defeat a claim. It makes no difference, therefore, whether the actor is plaintiff or defendant so far as concerns the burden of proof. If he undertakes to make out a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. * * * If there is a case made out against a defendant on which, if the plaintiff should close, a judgment would be sustained against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated." In our own case of *Pool v. Dial*, 10 S. C. 445, the rule is thus stated: "The general rule upon questions of this kind is that, if a contract is regular on its face, the burden of proof is on those who assail such regularity." Testing this exception by the above rules, we see no force in this ground of appeal, and the same is therefore overruled.

With regard to the fourth exception, it may

be better to state what the circuit judge did charge the jury on the subject of the statute of limitations. He charged: "A man has six years from the discovery of fraud to attack that fraud, to attack the deed for fraud, six years from the time he discovers it; that is, six years from the time he knows or has sufficient information to put him on inquiry as to the facts which constitute the fraud. Well, if Brown, the deceased, knew what he was doing when he made that deed, or had notice of all the circumstances of that deed, then the statute of limitations ran out at the end of six years, and he could not commence an action, nor those who come after him, because the heirs at law stood in his shoes." The propositions of law embraced in this charge are fully sustained by the cases of *Beck v. Searson*, 8 Rich. Eq. 130, and *Kirksey v. Keith*, 11 Rich. Eq. 33. The fourth exception is likewise overruled.

The fifth and last exception charges error on the part of the circuit judge in decreeing that the defendants should pay the costs of the trial of the issue raised in their answers, and as set forth in the decree. This court has so often considered this question, and there being a long and unbroken current of authorities on the subject, we do not feel that it is necessary to enter into a lengthy discussion of the law on that subject. In an equity cause the costs are in the discretion of the court. *Winsmith v. Winsmith*, 15 S. C. 612; *Childs v. Frazee*, 15 S. C. 611; *Bratton v. Massey*, 18 S. C. 559; *Lake v. Shumate*, 20 S. C. 34; *Scott v. Alexander*, 23 S. C. 126. In this case we fail to see any abuse of that discretion. The fifth exception is therefore overruled.

The judgment of this court, therefore, is that the judgment of the circuit court be affirmed.

(44 S. C. 406)

McCRADY v. JONES et al.

(Supreme Court of South Carolina. July 15, 1895.)

LIMITATIONS—INTEREST.

1. The cause of action in favor of an indorser against a prior accommodation indorser, for money paid in satisfaction of a note after default, accrues when the payment is made, and not at the time his liability attaches.

2. An indorser who has paid a note on default is entitled to interest only on the amount paid from the date of payment to that of verdict.

Appeal from common pleas circuit court of Richland county; Fraser, Judge.

Action by Edward McCrady against Jones and Robertson, as accommodation indorsers on a promissory note. From a judgment for plaintiff, defendants appeal. Affirmed on remittitur.

Robt. W. Shand, for appellants. Obear & Douglass, for respondent.

McIVER, C. J. On the 20th of January, 1886, W. R. Davie made his promissory note, whereby he promised to pay, 60 days after

said date, to himself or order, at the office of Roddy & Son, bankers, the sum of \$520.41, the note containing these additional words: "If not paid at maturity, interest thereafter at the rate of ten per cent. per annum until the whole is paid." This note was thereafter indorsed on the same day by the following parties, in the following order: W. R. Davie, Jones & Robertson, and Edward McCrady; and the note was discounted by Roddy & Son for W. R. Davie. On the 10th of September, 1887, the plaintiff paid this note to Roddy & Son, and on the 1st of February, 1893, this action was commenced to recover the amount thereof. The only defense relied upon at the trial was the statute of limitations, the defendants claiming that they were accommodation indorsers, as to which there was some conflict of testimony. The circuit judge was requested to charge that if the jury find that the defendants, Jones & Robertson, were only accommodation indorsers, and that more than six years elapsed after the maturity of the note before this action was commenced, then the statute of limitations is a bar to the action. The circuit judge declined so to charge, and, on the contrary, instructed the jury that it makes no difference whether the defendants were accommodation indorsers or not, for, even if they were, the statute of limitations did not commence to run, in favor of defendants, against the claim of the plaintiff, until he paid the money due on the note to the holders thereof; and, this having been done within six years before the action was commenced, the plaintiff's claim was not barred by the statute of limitations. He also instructed the jury as follows: "The defendants are liable for the amount of the note and interest. The complaint demands interest on the whole amount paid by McCrady, \$589.76, with interest from date of payment. The paper draws interest at ten per cent. on its face. I think he is entitled to the note and interest at ten per cent. from the time of the payment, on the original amount of the note, \$589, and interest on \$520.41, from the 19th September, 1887; that is, when paid. So much as he has paid as interest does not draw interest now." (Note. It will be observed that there is a slight discrepancy between the date of the payment made by McCrady as stated in the case and as stated in the judge's charge; the date stated in the case being the 10th of September, 1887, while in the judge's charge the date is given as the 19th September, 1887; but we do not see that this discrepancy affects the question involved.) The jury rendered a verdict in favor of the plaintiff for \$938.10; and, judgment having been entered thereon, the defendants appealed upon the several grounds set out in the record, which need not be set forth here, as they raise but two questions: (1) Whether there was error in overruling the plea of the statute of limitations; (2) whether there was error in the instructions

given to the jury as to the interest which plaintiff was entitled to recover.

While it is true, as has been stated, that there was a conflict of testimony as to whether the defendants were mere accommodation indorsers or indorsers for value, yet, under the view taken by the circuit judge, upon which he based his instructions to the jury, it is but fair to the appellants to assume, for the purpose of inquiry, that they were accommodation indorsers; and we shall proceed upon that assumption. It seems to be conceded that we have no case in this state precisely in point, and it would appear from the argument of counsel that the authorities elsewhere are conflicting. We must, therefore, base our conclusions upon inferences drawn from what we regard as well settled upon legal principles. It is well settled that, when question arises as to whether an action is barred by the statute of limitations, the primal inquiry is, when did the cause of action accrue? Accordingly, the Code provides (section 94): "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued." So that the practical inquiry in this case is, when did the plaintiff's cause of action against the defendants accrue? If it accrued at the maturity of the note, then, clearly, the action was barred by the statute, for it was not commenced within six years from that date. But, if the cause of action did not accrue until the payment of the amount due on the note, then it is equally clear that the action was not barred, as it was commenced within six years from the date of such payment, whether the correct date of the payment be the 10th or the 19th of September, 1887. We confess that we are unable to perceive how it can with any propriety be said that a cause of action accrued to the plaintiff against the defendants at the maturity of the note, for he had not then paid the note; and, while the defendants may have violated their obligation to pay the note at maturity, yet such violation afforded no cause of action to the plaintiff, but only to the then holder of the note. The test of this is that if the plaintiff had, at the maturity of the note, commenced an action against the defendants, his action would have necessarily failed, because no cause of action had then accrued to him. It seems to us that the relations between these parties are well defined by Marshall, C. J., in *McDonald v. Magruder*, 3 Pet. 470 (a case of accommodation indorsers), when he says: "That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the same note, is unquestionable. When he takes up the note, he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note; or that he, if due diligence be

used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay its amount." It follows, necessarily, from this view of the relations between the parties, that a second indorser cannot maintain an action against the prior indorser until he has paid the note upon which they are both indorsers and both liable to the payor or holder, for the reason that no cause of action against the first indorser accrues to the second indorser until he has paid the note. We suppose that the contrary view rests upon the theory that the second indorser, when he pays the note, becomes the owner and holder of the note, by assignment, as it were, and has no higher rights than his assignor, whose cause of action accrued at the maturity of the note; but we cannot accept such a theory, for this would place a second indorser who has paid the note precisely in the position of any third person, wholly disconnected with such note, who has purchased it in open market. On the contrary, the true theory is that the first indorser, by the contract of indorsement, assumes the responsibility of paying the note, if the maker fails to pay, to the relief of the second indorser. When, therefore, the second indorser pays the note, he thereby acquires a cause of action against his prior indorser, because he had paid a debt, for which the prior indorser is, as between themselves, primarily liable, though both are liable to the creditor for such debt. Hence it is not the case of the voluntary payment of a debt by one person for another from which no cause of action would arise, as was held in *Lowrance v. Robertson*, 10 S. C., at page 33, and the cases there cited, but it is a case in which, both parties being legally liable to the creditor, but as between themselves, in different order, the one secondarily liable pays the debt for which the other is primarily liable, the amount of which the latter is, in equity and good conscience, bound to refund to the former. Of course, this involves the idea that, at the time of payment, both parties must be legally liable for the payment of the debt, for otherwise it could not be said that the party primarily responsible had been relieved of a legal liability to the payment made by the other. Hence, if McCrady had not paid this note until after the right of action thereon had been barred by the statute, when none of the parties would have any longer been legally liable for the payment of the same, this action could not have been maintained. But such was not the fact, for the payment was made in September, 1887,—within six years after the maturity of the note.

There is another view which tends to support the conclusion which we have adopted. The cases of *Wiffen v. Roberts*, 1 Esp. 261 *Brown v. Mott*, 7 Johns. 361, and *Braman v. Hess*, 13 Johns. 52, seem to, hold that

when a second indorser takes up a note, by paying less than the amount due thereon, he can only recover the amount which he actually paid, in an action against the prior indorser. If this be so, then it follows that his course of action is not the breach of the contract evidenced by the note, for in that case the measure of the recovery would be the whole amount due on the note, but that his real cause of action is the amount paid by him to the relief of his prior indorser. Again, our conclusion is sustained by the analogy drawn from the doctrine in regard to the action for contribution among co-securities, which really rests upon the same principle applied above,—that the cause of action rests upon the fact that one surety had paid money which ought to have been paid by other. And in such a case it is well settled that the cause of action does not accrue and the statute of limitations does not commence to run until the money is paid (*Thompson v. Stevens*, 2 Nott & McC. 483; *Peters v. Barnhill*, 1 Hill [S. C.] 234; *Knotts v. Butler*, 10 Rich. Eq. 143); for while it is quite true that indorsers are not to be regarded as standing in all respects in the relation of cosureties, and hence it was held in *Ross v. Jones*, 22 Wall. 576, that an indorser whose liability had become fixed by proof of demand and notice could not avail himself of the benefit of a special statute of Arkansas providing that any person bound "as security" for another on a note may, at any time after action has accrued thereon, require the holder of the note to commence action against the principal debtor within a specified time, and a failure to comply with such demand will exonerate "such security"; yet Mr. Justice Clifford, in delivering the opinion of the court in that case, explicitly recognizes the doctrine that indorsers are in some respects nothing more than sureties of the maker of the note, and points out the differences in the liability of indorsers and sureties, one of which is that in the case of sureties the cause of action against them accrues at the same time that it does against the principal debtor, while in the case of indorsers the cause of action does not accrue at the same time with that of the maker, as the indorser is not liable, and therefore the cause of action does not accrue against him until after proof of demand and notice, or its equivalent, while the cause of action against the maker accrues immediately upon his failure to pay the note at maturity; and his conclusion seems to be based really upon the ground that the Arkansas statute is in derogation of the common law, and must be construed strictly, and hence cannot be applied except to the class of persons specifically named therein. So, also, it was held in *McDonald v. Magruder*, supra, that there was no right of contribution among indorsers as in a case of cosureties, unless there was a special agreement to that effect, for the reason that

their promise to pay was not joint, but several, and each has made a separate promise to pay, in the order in which their names appear upon the note. But, while this is so, yet it seems to us that the real foundation of the right of action on the part of the second indorser against his prior indorser is that the one has been compelled to pay money which the other ought to have paid, just as in case of cosureties, when one has paid, not only the one-half which he ought to have paid, but also the other half which his cosurety ought to have paid, and by such payment his cause of action then accrued, and the statute of limitations could not commence to run until such payment was made. It seems to us, therefore, that there was no error on the part of the circuit judge in declining to sustain defendants' plea of the statute of limitations.

As to the instruction given to the jury in relation to the matter of interest, we think the circuit judge was in error. If, as we have seen, the plaintiff's cause of action was the breach of the implied undertaking to pay the amount due on the note, then the measure of plaintiff's recovery clearly was the amount which the defendant sought to have paid, but which was in fact paid for them by the plaintiff, with interest on such amount, at the rate of 7 per cent. per annum from the date of such payment to the time when the verdict was rendered (*Alkin v. Peay*, 5 Strob. 17); and any amount in excess of the sum so ascertained was erroneously recovered. But this error does not require that a new trial absolute should be ordered, as the error may be rectified by plaintiff remitting on the record the amount in excess of that which he was entitled to recover.

The judgment of this court is that the judgment of the circuit be reversed, for the error just mentioned, and a new trial be had, unless the plaintiff shall, within 20 days after the written notice of this decision, enter upon the record a remittitur for so much of the recovery as may be in excess of the amount paid by him, with interest thereon from the date of such payment, at the rate of 7 per cent. per annum, to the day when the verdict was rendered, and, upon the entry of such remittitur, that the judgment of the circuit court be affirmed for the amount so reduced.

(44 S. C. 424)

STOKES v. NORWOOD.

(Supreme Court of South Carolina. July 20, 1895.)

ELECTION BY WIDOW—RIGHT TO DOWER.

A testator who owned a tract of land and personal property provided in his will that his wife should take a life estate in all his personal property and in one of the tracts of land, and absolutely \$1,000 in cash, "in lieu of the property that I received with her and in lieu of any dower on my estate." The other

tract of land he had conveyed by warranty deed, before he made the will, to one of his daughters. *Held* a case for election, and that if the widow took under the will she was precluded from claiming dower in the land conveyed to the daughter before the will was made.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.

Action by Annie Stokes against George A. Norwood for dower in land. From a judgment for defendant, plaintiff appeals. Affirmed.

Earle & Mooney, for appellant. Haynsworth & Parker, for respondent.

POPE, J. The plaintiff seeks dower in a tract of land, containing 279 acres, situated in Greenville county. Her action therefor came on for trial before his honor, Judge Ernest Gary, at the summer term, 1894, of the court of common pleas for Greenville county, in this state. The hearing was had upon the pleadings and an agreed statement of facts. The decree of the circuit judge, which was filed on the 20th day of August, 1894, required the plaintiff to elect within 30 days from the written notice of the decree whether she would take under the provisions of the will of her husband, William A. Stokes, deceased, or would claim her dower; but it was provided by the terms of the decree that, in the event that she failed or refused to so elect, her failure should be deemed an election to claim under the provisions of said will, and a forfeiture of her right to dower in the land described in the complaint. From this decree the plaintiff has appealed, and exhibits five exceptions thereto, as follows: (1) Because his honor erred in holding that this is a proper case for the application of the doctrine of election. (2) Because he erred in not holding that only the pecuniary legacy was given by the testator to the plaintiff in lieu of dower. (3) Because he erred in not holding that as the plaintiff had not received the \$1,000 which had been bequeathed to her in lieu of dower, and as there was no estate out of which this could be paid to her, she could not be required to elect to take what does not exist. (4) Because, if the plaintiff should be required to elect at all between her dower and property given to her by her husband's will, then such election should be required only as to the pecuniary legacy. (5) Because the land in which dower is claimed in this case was aliened by the testator during his life, and the plaintiff's dower therein is not barred by her accepting under the will.

The exceptions necessitate a reference to the facts which make up the controversy. It seems that in 1873 William A. Stokes, the testator, executed a paper writing claimed to be his last will. By its terms he gave to his wife, the plaintiff here, for and during her natural life, 347 acres of land, and certain of his personal property, and also, absolutely, the sum of \$400; expressing that this latter

sum was in lieu of property of said wife he had received at their marriage, and in lieu of dower. By the same instrument he gave to his daughter, then Martha L. Stokes, but now Cureton, 279 acres of land, known as his father's homestead, and unto his daughter Virginia W. C. Stokes, now Hahn, the 347 acres of land after his wife's death. These two tracts of land comprised the whole of testator's real estate. In 1875 the said testator made a codicil to his will, by which he expressed his determination that his daughter Martha L. Stokes should receive her tract of 279 acres of land at once, but increased the value placed upon it by him by \$100. In 1876 the testator made a deed in fee simple to his said daughter Martha L. Stokes for this 279 acres of land. In 1889 he made a second codicil to his will, whereby he increased the pecuniary legacy to his wife, the plaintiff, from \$400 to \$1,000, and gave her a life estate in all of his personal property. Mrs. Martha L. Stokes, now Cureton, mortgaged the 279 acres of land. Under foreclosure of this mortgage, it was purchased by the defendant, George A. Norwood. The testator died in 1892, leaving this will and two codicils in full force. His widow, the plaintiff, received, and now holds, all the property, real and personal, provided for her under the will and codicils, except the \$1,000 in cash; and, confessedly, there is no estate to yield this sum of \$1,000. Under these circumstances the widow, the plaintiff, now seeks dower in the lands, of 279 acres, owned by the defendant, George A. Norwood. In his answer no questions are raised as to coverture, seisin by W. A. Stokes, sale by him to Martha L. Stokes, death of W. A. Stokes, etc.; but insists that it was the purpose of the said William A. Stokes, by his will and the codicils thereto, that the provisions therein made should be in lieu of the dower in the lands he then owned, and of which he attempted to dispose by his said will, and that the plaintiff was thereby put to her election as to whether she would receive the provisions there made for her, or claim her dower in said land. Again, he insists that the plaintiff has elected to take the provisions made for her by the testator in his will and codicils, and that thereby she has barred herself from claiming dower in this tract of land, and she is now estopped from making this claim of dower. Again, he insists that in case it should not be held that the said plaintiff has not yet elected whether she will claim dower, or take under said will the provisions made for her, such provisions shall be sequestered and appropriated to compensate defendant for the loss sustained by the assertion of her claim of dower in the lands held by him in the manner aforesaid.

As was the circuit judge (as he confessed, very frankly and appropriately, in his decree) able to reach "a conclusion after much hesitation," so here have we been perplexed in reaching a proper and satisfactory conclusion

in this case. When marriage is entered into by a woman, it is settled law, in this state, that she pays a valuable consideration for all the rights and privileges of a wife, and the estate of dower in all the lands of which her husband was seised as of fee during coverture is one of those rights. It is not in the power of the husband to destroy this right of dower. It is true, he may shut her off from any participation in his property under his will, if he should choose to violate his solemn duty to care for his helpmeet to himself selected, and to ignore the solemn responsibility for a proper care and maintenance of "his better self" after his death, but this one thing he cannot destroy. His wife's estate of dower is beyond his power to destroy. It sometimes happens that a good and generous and loving husband, when he is considering what disposition of his property after death, between his wife and children, will be best for them, may hit upon a plan which includes a disposition of his property, wherein the assertion of the claim of dower by the wife will mar these plans. In such case the husband either in express terms provides in his will that the provision made therein for the wife shall be in lieu of and in bar of her claim of dower, or such husband may evince by the terms of his will, clearly and unmistakably, that the provision for his wife therein shall exclude her claim of dower. In either case, then, the wife is put to her election. This election is made by her freely and voluntarily, and, it is supposed, after she has had furnished to her full information as to the condition of the husband's property. When this is done, no wrong is perpetrated upon the wife. It is a maxim of the law that one cannot claim under and against a deed or will. Of course, therefore, it becomes very important to determine the intention of the testator. This intention should be discovered in the will itself. As before remarked, language may be used expressly denying any provision for the wife if she insists upon asserting her estate of dower. When this is the case, there is little need for construction by the courts of the will. There are cases, however, where the language used importing a denial of the enjoyment by the wife of the provisions of the will in her favor, and her estate of dower in testator's lands, in addition thereto, is so connected with other provisions in the will as to require that the whole should be construed, to ascertain if such was testator's meaning. The case at bar falls under the class of cases we have just mentioned. Hence we feel that we ought to have before us the exact language of testator in this connection: "Item 1st. I give and bequeath unto my beloved wife Anna Stokes during her life the tract of land whereon I live and the Robertson tract containing 347 acres, one horse and carriage, household and kitchen furniture and as much of the plantation tools, and also of stock and one year's provisions, as three sworn appraisers may think she needs, and I give to her in

her own right the sum of four hundred, in lieu of the property that I received with her and in lieu of any dower on my estate." Now, in codicil No. 2 this language occurs: "I will and bequeath to my beloved wife Annie Stokes six hundred dollars in addition to the four hundred dollars given her in my will, making in round numbers one thousand dollars to have and to hold and to dispose of as she may will, I also will and bequeath my beloved wife Annie Stokes a lifetime interest in all my personal property consisting of household and kitchen furniture, stock of all kinds, wagon, buggies and all farming implements. At the death of my beloved wife Annie Stokes it is my will and desire that the said personal property be sold and the proceeds equally divided among my heirs." Thus it is manifest that the testator dealt in no niggardly way with his wife, for by the terms of his will she was given a life estate in more than half of his whole estate, and in all his personal property, as enumerated, and \$1,000 in cash absolutely. Now, the question comes, did testator use the words, "and in lieu of any dower on my estate," as an additional recompense to his widow for the property that he received when he married her, having already provided for that purpose the sum of \$1,000 in cash, or was it that the testator intended all the provisions contained in "Item 1st," as enlarged by codicil No. 2, should be a recompense to her for not claiming "any dower on my estate"? It is suggested the punctuation of this part of the will, to wit, the use of a comma before the words, "in lieu of the property that I received with her and in lieu of any dower on my estate," and the absence of any punctuation before the words, "and in lieu of any dower on my estate," show that the testator meant the latter words to qualify the gift of \$1,000 in cash, and not, on the contrary, to qualify the whole bequest in the first item, including, of course, its enlargement by codicil No. 2. There is nothing in the context of item 1 to show that this restricted view ought to be taken, nor is there anything in the other provisions of the will to so indicate. If a testator is supposed to make his will in conformity to the law, coupled with the fact that he had no other tract of land than that 347 acres he had given to his wife for life, and that she could not claim dower in this 347-acre tract if she accepted the same for life under the will, and if we are bound to exclude the 279-acre tract from our consideration, when the testator used these words, "and in lieu of any dower on my estate," he used words without meaning. To reach such a conclusion this court would be called upon to give a construction to language in a will which would make such words meaningless, whereas, on the other hand, there is a construction to such words that would give them full force and effect. Of course, it is recognized, under the law, that the second construction should be given. We cannot be bound, in construing the words of a statute,

a deed, or a will, to treat the punctuation employed therein, or the absence of punctuation, as anything so serious as controlling one who construes such instruments. It is better that the whole context should be considered when the object is to ascertain the purpose, the intention, the object intended to be set forth in the words used. Our study of this context has led us to adopt the use of these words, "and in lieu of any dower on my estate," to set forth a condition placed by the testator to the acceptance by his widow, the plaintiff here, of the bounty provided for her in the will and codicil No. 2; that the acceptance by her of this bounty in the will is inconsistent with her claim of dower. It is contended, however, that, even granting that this construction should be placed on these words, yet the testator having conveyed this 279 acres of land before his death, and therefore before his will could speak and control, it is not now incumbent upon the widow, if she accepts this bounty under the will, to abate her claim of dower in the lands so conveyed by the testator. We cannot take this view of the matter. The plain import of these words is, "in lieu of any dower on my estate." Now, if the widow should take dower here, it is manifest that the defendant could force the testator's estate to pay the same under the warranty in the deed of the testator to his daughter for this tract of land, and thereby this dower would be "any dower on my estate," as the language expressly states the case.

We think, on the whole, that justice has been done the plaintiff in the decree appealed from, and, such being the case, the decree must be affirmed. We have thus held. It must be apparent that the foregoing views answer all the questions raised by the exceptions, and that they must be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 364)

JOHNSON v. JOHNSON et al.

(Supreme Court of South Carolina. July 10, 1895.)

DELIVERY OF DEED—ADMISSION BY PLEADING—EVIDENCE.

1. The fact that a decree wrongly designates a defendant as heir is not ground for reversal, when no issue as to his heirship has been raised.

2. Where a jury trial in an action at law is waived, errors of law only can be considered on appeal.

3. Where, in answer to a complaint setting up title by deed, the defendant alleges in answer that the deed was one of several executed at the same time to avoid losing the land by reason of a criminal prosecution, and the plaintiff, in his testimony in chief, testifies as to these deeds, the defendant may show the fraudulent purpose of the deeds, and that there was no delivery of the same when they were executed.

4. The fact that a witness, in attesting a deed, has declared that it was signed, sealed, and delivered in his presence, will not preclude him from testifying, in an action on the deed, to facts which will show nondelivery.

5. Where two persons are threatened with a criminal prosecution, and one conveys his land to protect it from seizure, the other is competent to testify as to the fraudulent purpose of the deed.

6. An exception to evidence, which fails to show any fact or conclusions of fact which the court erred in holding competent, cannot be considered.

7. Where, in an action for possession and for rents and profits of land unlawfully withheld, there is a finding that the defendant has been lawfully in possession, the question of rents and profits need not be passed upon.

8. An answer to a complaint alleging a conveyance, which admits the signing, sealing, and recording of the deed, but denies delivery, puts in issue the delivery of the deed.

Appeal from common pleas circuit court of Chesterfield county; J. J. Norton, Judge.

Action by William J. Johnson against J. Henry Johnson and others for the possession of land. From a judgment dismissing the complaint, plaintiff and two of the defendants appeal. Affirmed.

The decree and exceptions thereto were as follows:

"This action was begun 20th June, 1892, for partition among the heirs of Queen Ann Johnson of a tract of land of which it is alleged she died seised in 1880, and for rents from J. Henry Johnson for several years, during which he is alleged to have been in possession. The defendant J. Henry Johnson, one of the heirs of Queen Ann Johnson, alone answers. His answer denies that Queen Ann Johnson was ever seised of said land; admits that Wm. K. Johnson, the father of Queen Ann Johnson and this defendant, being then the owner of said land, at one time, intending to convey it to Queen Ann Johnson, signed and sealed a deed, but did not perfect it by delivery to or for her; and alleges title in himself by a subsequently written deed from the said William K. Johnson. The answer further alleges that this defendant is entitled to the whole of improvements made by him if the issue of title be found against him. The issue as to the title depends upon whether there was or was not a delivery of the deed mentioned by Wm. K. Johnson to Queen Ann Johnson. This, along with the other issues in the case, was referred to W. J. Hanna, special referee. He found that the deed had not been delivered, and I concur with him. I think, however, that I should pass upon the competency of the testimony objected to by the plaintiff, as stated in his exceptions. The answer does not make the admissions alleged in his seventh, eighth, and ninth exceptions. The plaintiff mistakes the introduction of a circumstance tending to prove by giving a reason for the nondelivery of the deed for the setting up a plea for the invalidity of a delivered deed because it was fraudulent. These exceptions are overruled. The tenth and eleventh exceptions are sustained. The declarations of W. K. Johnson are incompetent, not because they are subsequent declarations, but because they are declarations as to the performance of an

act—i. e. delivery—which does not give character as to his possession, concerning which there is no issue, but relates to the state of his title; and therefore could only be admissible if considered as against his interest, and introduced by the plaintiff. The other exceptions are overruled. Those relating to rents and improvements, because, after finding that the deed from W. K. Johnson to Queen Ann Johnson was never delivered, it was not necessary to pass upon these redundant issues. It is adjudged that the complaint herein be dismissed."

"The plaintiff, William J. Johnson, excepts to the decree of his honor, Judge Norton, and will move the supreme court to reverse said decree upon the following exceptions and grounds of appeal: (1) Because his honor erred in finding that the defendant J. Henry Johnson was an heir at law of Queen Ann Johnson, where it is admitted in the pleadings that he is not. (2) Because the declarations and other acts of W. K. Johnson, which were proved by J. Henry Johnson, K. C. Johnson, Edward McIver, and other witnesses, for the purpose of showing a dishonest motive and fraudulent purpose on the part of the said grantor, were not competent and relevant to show that said grantor never intended to deliver the deed to Queen Ann Johnson, and had not done so; and his honor erred in holding that said acts and declarations were competent to show that the grantor had no such intention, and had not delivered it, and in sustaining the finding of the referee to this effect, based upon this evidence. (3) Because his honor erred in sustaining the ruling of the referee that it was competent for the defendant to show that the grantor, W. K. Johnson, never intended to deliver the deed to Queen Ann Johnson, and had not delivered it, by proving the declarations and acts of the said grantor prior to the execution of said deed, showing a dishonest motive and a fraudulent purpose on the part of said grantor. (4) Because his honor erred in sustaining the finding of referee that W. K. Johnson did not intend to deliver the deed to Queen Ann Johnson, and had not done so, when said finding was based upon proof of the declarations and acts of said grantor prior to the execution of said deed, tending to show a fraudulent purpose on the part of said grantor. (5) Because the testimony of Edward McIver, Esq., was incompetent, and should have been ruled out, and his honor erred in sustaining the ruling of the referee holding that it was competent. (6) Because the testimony of K. Calvin Johnson, J. Henry Johnson, and other witnesses, showing that William K. Johnson never delivered certain other deeds to K. C. Johnson, J. Henry Johnson, Mag Johnson, and Nick Johnson, and that said alleged deeds were fraudulently made, and intended as mere shams, was incompetent and irrelevant to show that the said William K. Johnson did not deliver the deeds to Queen Ann Johnson, and did not in-

tend to deliver them; and his honor erred in sustaining the ruling of the referee that it was competent for such purposes, and in sustaining the findings of the referee based upon this testimony. (7) Because his honor erred in sustaining the finding of the referee that the grantor, William K. Johnson, never intended to deliver the deed to Queen Ann Johnson, when the uncontradicted evidence on the part of the defendant showed that he did intend to deliver it, and had delivered it. (8) Because his honor erred in sustaining the finding of the referee that there was no delivery of the deed to Queen Ann Johnson, when there was no evidence to support such a finding, and the evidence was uncontradicted that the deed was delivered. (9) Because his honor erred in sustaining the finding of the referee that Queen Ann Johnson knew nothing of the transaction, when such finding was without evidence to support it. (10) Because his honor erred in sustaining the finding of the referee that the deed had not been delivered, when the admission in the pleadings, the facts found by the referee, and the undisputed evidence, was sufficient, and had established the delivery of the deed. (11) Because his honor erred in sustaining the finding of the referee that W. K. Johnson never delivered the deed to Queen Ann Johnson, but retained said deed in his possession until his death, where said finding is without any evidence whatever to support it. (12) Because the testimony of J. Henry Johnson, K. C. Johnson, and other witnesses, showing that on the same day that W. K. Johnson executed the deed to Queen Ann Johnson he also prepared other deeds for other lands for K. C. Johnson and J. Henry Johnson, Mag Johnson, and Nick Johnson, and that the said K. C. Johnson, J. Henry Johnson, Mag Johnson, and Nick Johnson never claimed title to said lands, and never exercised any acts of ownership over the same, was irrelevant, and incompetent to show that W. K. Johnson did not deliver to Queen Ann Johnson her deed; and his honor erred in sustaining the ruling of the referee that it was competent for such purpose, and in sustaining the findings of the referee, which were supported by this evidence. (13) Because his honor erred in sustaining the holding of the referee that when the deed was to a minor or trustee, delivery to the officer to record is almost conclusive of the question of intention, but when the parties are sui juris the rule was different, and a different rule of evidence governed. (14) Because his honor erred in refusing to consider the question of improvements and rents and profits. (15) Because his honor erred in sustaining the finding of the referee that Queen Ann Johnson was not present on the day when the deed was signed by the grantor and probated, when such finding is without any evidence to support it, and is contrary to the evidence. (16) Because the occasion never arrived for W. K. Johnson to commit upon the United States government

the fraud he meditated, that fact was no evidence to show that he did not intend, and did not deliver, the deed to Queen Ann Johnson, and it was error in his honor to sustain the finding of the referee that it was such evidence as would support that finding."

E. J. Kennedy and W. F. Stevenson, for appellants. R. T. Caston and Edward McIver, for respondent.

POPE, J. The plaintiff commenced this action on the 20th day of June, A. D. 1892, in the court of common pleas for Chesterfield county, in this state. The complaint substantially alleged that Queen Ann Johnson departed this life during the year 1886, leaving her surviving as her heirs at law the plaintiff and the defendants except J. Henry Johnson; that the said Queen Ann Johnson died seised of a tract of land containing 800 acres, situate in Chesterfield county, which tract of land had been conveyed to the said Queen Ann Johnson by her father, W. K. Johnson, by deed bearing date the 23d day of August, 1881; that the said W. K. Johnson, by his deed, conveyed to the defendant J. Henry Johnson his undivided one-seventh interest in said land, and thereafter, to wit, — day of December, 1887, died intestate; that the said J. Henry Johnson has been for several years in possession of the entire tract of land, taking to himself alone all the rents and profits thereof. And the complaint continues by setting up the usual averments to procure a partition of the land, and that the said J. Henry Johnson do account for the rents and profits thereof. To this complaint the defendant J. Henry Johnson alone answered. In his answer he admits the death of Queen Ann Johnson, and that she was survived by the persons named in the complaint as her heirs at law; also that W. K. Johnson died at the time set out in the complaint; but he denies each and every allegation therein contained, except such as are specifically admitted. He alleged that he was the owner in fee simple of the lands in question, and denies that the plaintiff and other defendants have any right, title, or interest in or to the rents and profits thereof. We insert the third paragraph of the answer in its entirety, as great stress is laid upon its terms by the appellants: "He further alleges that he is informed and believes that W. K. Johnson, his grantor, did, in August, 1881, intend to execute to his children deeds to certain tracts of land, he being at that time threatened with prosecution in the federal courts for having in his possession tobacco not properly stamped, and, being advised that he could thereby effect a settlement at less loss and expense, he went so far as to have a deed written purporting to convey the land described in the complaint to the said Queen Ann Johnson; that he signed the same, had same entered on record, and took from said Queen Ann a note as for the purchase money; all of which was done for the purpose

stated. But the defendant alleges that, the said prosecution having been abandoned, and the said charges against the said W. K. Johnson having been dismissed, the said deed was not delivered to the said Queen Ann Johnson, nor was said land claimed by her. He further alleges that the said W. K. Johnson conveyed said land with the full knowledge of said Queen Ann and without objection from her; that these facts were all known to all the parties to this action; and he further alleged that the said tract of land was purchased in the name of his father for this defendant, and that he paid the purchase money at the time of said purchase, and in fact the said land was his before it was deeded to him by the said W. K. Johnson. He further alleges the said claim is pretensive, and that she and her representatives are estopped from setting up the same against this deponent." The answer further alleges that defendant had no knowledge or information of said claim until the commencement of this action; that said land was conveyed to him by his father during the lifetime of said Queen Ann, and he thereupon took possession of the same, with the full knowledge of all parties to this action, and commenced to improve the same, and that his improvements amount to \$1,000. All the issues of law and fact were referred to W. J. Hanna, Esq., as special master, by consent. This special master made his findings of fact and conclusions of law accompanied by all the testimony taken by him. Plaintiff excepted to this report on numerous grounds. When the cause came on to be heard before Judge Norton, he sustained two of the exceptions relating to certain testimony, but he sustained all the other findings and conclusions of said special master, and gave judgment dismissing the complaint. From this judgment the plaintiff and two of the defendants—Mary E. Johnson and Diana Brown—now appeal, and present 16 exceptions. Let the exceptions and judgment of Judge Norton be reported. Counsel engaged in the cause have made it very interesting to us by their ability and ingenuity, but we may be pardoned for announcing, after a careful study of the case and those arguments, that our decision is restricted to a narrow compass.

The first exception imputes to the circuit judge as reversible error the fact that in stating who alone answered the complaint he stated it thus: "The defendant J. Henry Johnson, one of the heirs of Queen Ann Johnson, alone answers,"—when the fact was that in the pleadings it was agreed that said J. Henry Johnson, while a half-brother, was not an heir, of Queen Ann Johnson. No reliance was placed upon the matter of J. Henry Johnson being such an heir. There was no issue of that character in the cause. It was therefore an immaterial circumstance of no practical import whatever. It was an inaccuracy, and should have been avoided by the circuit judge. However, it needs that no argument

shall be made, or authority cited, to establish the proposition that such an immaterial circumstance, in no way affecting an issue in the cause, would not be permitted to play such an important part as reversing a judgment. Let the exception be sustained, but let it be noted that it does not affect the judgment.

The next twelve exceptions, beginning with the second and ending with the thirteenth, inclusive of both named, relate, in one way or another, to the question of delivery of the deed to W. K. Johnson to Queen Ann Johnson of the tract of land in dispute, and may therefore be considered together. In one of the arguments for the appellant it is insisted that the defendant J. Henry Johnson admitted in his answer that the deed was delivered. This question of admission by defendant in his answer, so far as the exceptions show, does not seem to have been presented to the circuit judge, and was not distinctly passed upon by him. If the appellants considered that it was admitted by J. Henry Johnson in his answer, why did they themselves introduce proof on this point? If the fact was admitted by the defendant, they did not need any proof of it. But we suggest that, in our construction of the pleadings of the defendant, he nowhere admitted delivery of the deed. Indeed, it was the basal rock of his defense that such deed, though signed and sealed, was not delivered. It was to show this fact that we quoted that portion of the answer of J. Henry Johnson which related to it. But it is suggested in the argument that the answer of J. Henry Johnson is what is called an "argumentative denial of delivery," and in support of this proposition a quotation is made of the recent work, *Encyclopedia of Pleading and Practice* (volume 1, p. 799), and cases cited. We cannot so regard the answer. The plaintiff, in his complaint, alleged that W. K. Johnson conveyed by deed the land in question to his daughter on the 23d day of August, 1891. Now, for a conveyance to be operative in transferring title to land, the deed must be signed, sealed, and delivered. Therefore, when the defendant answered this complaint, he admitted the signing and sealing, but denied delivery. Not only so, but he gave all the circumstances connected with such signing and sealing, as well as recording under our registry laws. If the appellants had read at page 804 of the *Encyclopedia of Practice and Pleading*, they could have found this statement of law: "While the weight of authority is in favor of allowing a general denial to be coupled with admissions and explanations, still such a form of answer must be clear and unequivocal in its admissions. The court, in construing it, will resolve all doubts against it, and hold that it admits allegations, unless it positively indicates a purpose to make up the question it purports to put in issue one of the contested issues on the trial;" quoting our case of *Lipscomb v. Lipscomb*, 32 S. C. 243, 10

S. E. 929, in support of the text. Applying this principle to this answer, we cannot see how it can be concluded that by its allegations it squarely put in issue the fact of the delivery of the deed of Queen Ann Johnson to this land. *Lipscomb v. Lipscomb*, supra, held that, when the signing a note was admitted, but its delivery to the payee denied, alleging that said note was delivered to a third person, to be held until the adjustment of certain partnership matters between plaintiff and defendant, the delivery to the plaintiff of the note was not admitted.

Before proceeding any further, it may not be amiss to settle the question as to whether, under the pleadings here, so far as title to this land is concerned, there is raised a legal or an equitable issue, for, if it is a legal issue as to the title, primarily, it is triable, under our laws, by a jury. This, however, the parties to the action may waive, as in this case; but when such jury trial is waived, such issue is tried by the special master or circuit judge subject to all the restrictions of a trial by jury, among which restrictions is that this court cannot review any findings of fact, but are restricted to the correction of errors of law. This doctrine is now so firmly established that there is scarcely need to cite any authorities in its support. Attention is, however, called to *Reams v. Spann*, 28 S. C. 530, 6 S. E. 325; *Carrigan v. Evans*, 31 S. C. 266, 9 S. E. 852; *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711; *Sires v. Sires* (S. C.) 21 S. E. 115. In the case at bar, title to the land is alleged on the one hand and denied on the other; thus raising a legal issue. This being so, we are confined to the consideration of the alleged errors in regard to the incompetency of certain testimony. The circuit judge refused to allow any statements as to this title made by W. K. Johnson, deceased, in his lifetime, after the deed was made, to be considered as competent testimony. It is with earnestness and ability contended by appellants' counsel that, inasmuch as the tender by them was an issue as to one title, to wit, that of Queen Ann Johnson, as derived from her father, therefore the defendant J. Henry Johnson should have confined to such issue in his testimony. Appellants forget two things, —one, that J. Henry Johnson, in his answer, alleged that his father, W. K. Johnson, on 23d of August, 1881, did intend to execute deeds to his children to certain tracts of his land, in view of, and to avoid, certain complications, and that this deed was prepared with this view; and, the second, that the plaintiff himself, in his testimony in chief, brought out of his own witness W. J. Hoffman a full reference to those deeds, in which that purporting to be to Queen Ann Johnson was included. It is too late now for him to complain. He has opened wide the door to all this testimony. In addition to all this, we must frankly say that the testimony was pertinent to the issue of fact as to delivery of the deed. Delivery is a question of fact. It cannot shut

off inquiry in a court of justice that a witness to a will has said in his signature to the same that "he saw the will signed, sealed, and delivered by the testator in our presence as his last will and testament, and we, in the presence of the testator, and in the presence of each other, have signed the same as witnesses thereto." If such was not the fact, he can be interrogated touching the same. So, as to deeds, that a witness says, "Signed, sealed, and delivered in our presence," is no impediment to his swearing the truth in court that he saw no such thing, or be allowed to tell what he saw. Many witnesses may not know what the term "delivery" in law imports. They can tell the facts that surrounded the purported execution of the deed, and from these facts it will be determined whether there was a delivery. In speaking of delivery, this court said in *Carrigan v. Byrd*, 23 S. C. 89, "The delivery of a deed is composed of two constituent parts,—an intention to deliver and an act evincing a purpose to part with the control of the instrument." All this testimony related to the fact of delivery. How can you tell what a man intends unless you are allowed to have testified what he said, what he did, or what he wrote, at the time the intention in question is alleged to exist? As we remarked in another place in this opinion, delivery is essential to a deed being operative. It need not be that the delivery be actually made by the grantor to the grantee. There are facts sometimes proved that in law supply such actual delivery. Here the appellants lay a great stress upon the deed being recorded in the office of the register of mesne conveyances for Chesterfield county seven days after its date; also that it was probated by the oath of one of the witnesses who subscribed the same; also that the wife of W. K. Johnson renounced her dower, as showing delivery of the deed. These are but circumstances to be considered in reaching a conclusion as to delivery. No one or all of them amount to proof of delivery. They may all be explained away if it can be done.

Again, appellants suggest that J. Henry Johnson and Edward McIver, Esq., were not competent witnesses. The objection to the testimony as to J. Henry Johnson was that he was attempting to expose a fraud in which he was concerned. It is true, this witness was threatened with prosecution for having unstamped tobacco in his possession at the time his father, W. K. Johnson, was in a similar fix; but it was W. K. Johnson who had the notes and deeds prepared to evade punishment, not J. Henry Johnson. This did not render him incompetent. But it is suggested that he is allowed in this way to attack as fraudulent a deed of his own grantor, and therefore his testimony is incompetent. Appellants make the mistake of supposing that this is an effort to set aside W. K. Johnson's deed to Queen Ann Johnson because of fraud. No such issue exists. The

effort here is to show that no such deed was delivered, and in doing this it is developed in testimony what W. K. Johnson's scheme was touching the preparation of the deed, and how the failure of the prosecution prevented any delivery. The testimony was not incompetent.

Now, as to the question as to Mr. Edward McIver's testimony, exception 5 states: "Because the testimony of Edward McIver, Esq., was incompetent, and should have been ruled out; and his honor erred in sustaining the ruling of the referee holding that it was competent." The respondents insist that the appellant has not complied with rule 5 of this court touching the mode required in stating the exception so as to bring before the court what the error of law is that is complained of. Subdivision 7 of rule 5 says: "When error of law is alleged, the facts or conclusions of fact to which error relates." As we have often held, these rules of our court are designed to guide the bar in their preparation of appeal to this court. They mean to assist, not thwart, appellants. Still they must be enforced, if their infraction is called to our attention. In this case, as we before remarked, respondents have called upon us to enforce the rule. Is there anything in the exception that points out any fact or conclusions of fact wherein the court erred in holding this testimony competent? There is not, and therefore this exception cannot be considered. *Adler v. Cloud* (S. C.) 20 S. E. 393-396. We have thus disposed of the questions of competency of testimony. We have no power to consider the sufficiency of the testimony in a case on the law side of the circuit court.

The fourteenth exception complains that his honor erred in not passing upon the question of rents and profits. When it is remembered that the circuit judge decided that there was no delivery of the deed from W. K. Johnson to Queen Ann Johnson, it would have been a useless act on his part to make any direct finding on rents and profits claimed by plaintiff. If she had no title, of course she could not claim rents and profits.

The fifteenth exception relates to a question of fact, which question we cannot consider on the law side of the court below.

The sixteenth exception is similar to the fifteenth, and is governed by the same rule.

It follows that there was no reversible error here. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 402)

WALL, Sheriff, v. McMILLAN et al.
(Supreme Court of South Carolina. July 13, 1895.)

FORECLOSURE OF MORTGAGE — DEFENSES —
CONFLICTING.

In a suit to foreclose a mortgage given to a sheriff to secure the price of land purchased at his official sale, an answer alleging that the mortgaged land is part of a certain estate which

has not been settled, that defendant is the assignee of certain shares in said estate, and that some of the heirs have been paid in full, and praying that it be ascertained what interest the heirs have in the mortgage debt, cannot defeat the foreclosure, though such facts may influence the court in suspending the enforcement of the judgment until the rights of the parties claiming an interest in the fund can be ascertained.

Appeal from common pleas circuit court of Marion county; J. J. Norton, Judge.

Suit by W. A. Wall, as sheriff, against S. E. McMillan and others, to foreclose a mortgage. Complainant's demurrer to the answer was overruled, and he appeals. Reversed.

W. J. Montgomery, for appellant. Johnson & Johnson, for respondents.

McIVER, C. J. This case, which has been docketed at the present term of this court as two cases, is in fact one case, as will appear from the following statement: The action was originally commenced by the plaintiff, as successor in office of one D. F. Berry, who, as sheriff of Marion county, had sold the real estate described in the complaint, and the same was bid off by the testator, W. C. McMillan, who gave his bond and mortgage to secure the payment of the purchase money to the said Berry as sheriff, as aforesaid, and the object of the action was to foreclose said mortgage. The complaint was in the usual form down to the sixth paragraph thereof, which was as follows: "That the condition of the said bond and mortgage has been broken, and there is due and remaining unpaid upon said bond and mortgage the sum of ten hundred and fifty-one and $\frac{68}{100}$ dollars, with interest from the 30th day of July, A. D. 1875, payable annually, subject to a credit of ninety-five and $\frac{75}{100}$ dollars, of date August 18, 1875." The executors, who alone were made parties defendant, originally answered, admitting all the allegations in the complaint except those contained in the sixth paragraph thereof, all of which were denied except that stating the payment mentioned therein. The answer of the executors sets up as a further defense the fact that the land covered by the mortgage now sought to be foreclosed belonged to the estate of Ann B. Avant, who died intestate many years since, leaving as her heirs at law the persons named in the answer as such, being at the time of her death seised and possessed of this real estate and considerable personal property; that the personal property has been sold by her administrator, and this land, under proceedings for partition, was sold and bid off by one John B. Shackelford, who made considerable payments thereon, and the same was afterwards sold under proceedings to foreclose the mortgage given by him to enforce the payment of the balance due on said mortgage, at which sale the testator, W. C. McMillan, became the purchaser, and gave the bond and mortgage upon which the present action is founded. The answer goes on to state the devolutions of the shares

of some of the heirs of the said Ann B. Avant, by their deaths, upon their heirs, and also the transfers of the shares of some of the parties to the testator, W. C. McMillan. The answer also alleges that the estate of the said Ann B. Avant has never been settled, but that some of the heirs have received more than their shares therein, and the presumption is that others of them have been paid in full. Wherefore said defendants submit that it would be inequitable and unjust to have the mortgage given by the testator, W. C. McMillan, foreclosed, and the money due thereon collected, until it is ascertained what interest the respective heirs of the said Ann B. Avant or their assigns may have in the mortgage debt, which will then be paid without the necessity for a foreclosure of the mortgage; wherefore said defendants demand judgment that the plaintiff be enjoined from proceeding to foreclose said mortgage until the interests of the said heirs or their assigns shall have first been ascertained. To this answer the plaintiff interposed a demurrer upon the ground that the answer does not state facts sufficient to constitute a defense to plaintiff's cause of action as stated in the complaint. The case came before his honor, Judge Earnest Gary, who rendered judgment sustaining the demurrer, and ordering that the cause "be referred to the master for Marion county to compute the amount due on said mortgage, and report his actings and doings to the court with all convenient speed." From this judgment defendants appealed, whereby the only question presented was whether there was error in sustaining the demurrer. But this court, at a former term, after the case was fully opened, finding that neither the heirs nor devisees of the mortgagor, who held the legal title to the land sought to be sold, were parties to the proceeding, directed that the appeal be suspended, and the case be remanded to the circuit court for the purpose of having such heirs and devisees made parties. In pursuance of this direction, the case was remanded to the circuit court, and the plaintiff amended his complaint, bringing in the heirs and devisees of the mortgagor, W. C. McMillan, as parties defendant. To this amended complaint two of the adult devisees and heirs at law answered, very much to the same effect as the answer filed by the executors to the original complaint; while the minor heirs and devisees filed a formal answer. The plaintiff demurred to the answer of the adult heirs and devisees upon the same ground, to wit, that the facts stated in the answer were not sufficient to constitute a defense to plaintiff's cause of action. Upon this demurrer the case was heard by his honor, Judge Norton, who rendered judgment overruling the demurrer, from which judgment plaintiff appeals upon the grounds stated in the record.

In the present attitude of the case it becomes unnecessary to consider the appeal from the judgment of Judge Gary sustaining

the original demurrer to the answer, as that judgment was rendered when all the necessary parties were not before the court. But, as will be seen from what we shall have to say in disposing of the appeal from the judgment of Judge Norton, we do not think there was any error on the part of Judge Gary in sustaining the original demurrer. We are unable to find in either of the answers any allegation that the mortgage debt has either been fully or partially paid and satisfied. There certainly is no allegation that any part of the mortgage debt, except that mentioned in the complaint, has ever been paid to the holder of the bond and mortgage. The allegations, at most, only amount to a claim that some of the parties interested in the fund represented by the bond and mortgage have received their shares therein, but this surely cannot amount to a payment on the bond, for, if so allowed, the interest of others entitled to share in the fund might be seriously jeopardized, if not entirely destroyed. The defendants' testator, by his contract with a public officer, obligated himself to pay to such officer the amount of money mentioned in the bond; and to an action to enforce the performance of that contract it is no defense to say that he had made payments to others not legally authorized to receive the same. It seems to us that the several matters set up in the answers, while not constituting any defense to the plaintiff's cause of action, will be entitled to the fullest consideration when the question comes up as to the disposition of the fund represented by the bond and mortgage now brought to be foreclosed, but they cannot defeat plaintiff's right to a judgment of foreclosure, though they may be potential, when properly presented to the circuit court, in inducing that court to suspend the enforcement of that judgment until the rights of the parties claiming an interest in the fund can be fully ascertained. But, as long as there is anything due and unpaid on the mortgage debt, there is nothing to prevent a judgment of foreclosure. The judgment of this court is that the judgment of Judge Norton overruling the demurrer to the answer be reversed, and that the case be remanded to the circuit court, with instruction to refer it to the master to inquire and report what amount is due on the mortgage debt after giving credit to the testator's estate for all payments properly made thereon, and after deducting the amounts to which the several parties who have assigned their shares in such fund to defendants' testator may be entitled.

(44 S. C. 256)

BUTLER v. ELLERBE, Comptroller General,
et al.

(Supreme Court of South Carolina. July 6,
1895.)

INJUNCTION AGAINST STATE OFFICER—RESTRAINING
DISPOSITION OF PUBLIC FUNDS—REGIS-
TRATION ACT—CONSTITUTIONALITY.

1. Injunction will lie at the suit of a taxpayer to enjoin the illegal disposition of state

funds arising from taxation. Per McIver, C. J.

2. One who has been elected to office by the general assembly, whose members were elected under the registration act of 1882 (Gen. St. 1882, tit. 2, c. 7; Rev. St. 1893, tit. 2, c. 8), is not estopped to institute an action, as a taxpayer, assailing the constitutionality of that act. Per McIver, C. J.

3. Where the purport and effect of a registration law is to add to or to take away any of the qualifications prescribed by the constitution, or where its effect is to obstruct, subvert, or even unnecessarily to impede, the exercise of the right conferred by the constitution, it cannot be sustained, but must be held an unconstitutional invasion of the right of suffrage. Per McIver, C. J.

4. The act of 1882 (Gen. St. 1882, tit. 2, c. 7; Rev. St. 1893, tit. 2, c. 8), providing for the registration of voters is an unconstitutional limitation of the right of suffrage. Per McIver, C. J.

5. A suit against state officers to enjoin them from disbursing public funds for the purposes declared in an act of the legislature is not a suit against the state to which the state is an indispensable party, and which cannot therefore be maintained without its consent. Gary, J., dissenting.

6. An act of the legislature will not be pronounced unconstitutional unless it is necessary to the determination of the case in which the question is presented. Per Gary, J.

7. An action to enjoin state officers from disbursing funds to the purpose declared in the appropriation act of December 23, 1893, providing for the payment of salaries to supervisors of registration and other election officers appointed under the registration act of 1882 (Gen. St. 1882, tit. 2, c. 7; Rev. St. 1893, tit. 2, c. 8), does not necessarily involve the determination of the constitutionality of said registration act. Per Gary, J. McIver, C. J., dissenting.

8. The act of 1882 (Gen. St. 1882, tit. 2, c. 7; Rev. St. 1893, tit. 2, c. 8) provided for the registration of voters and the appointment of supervisors of registration and other election officers. In 1893 the legislature appropriated a sufficient amount to pay the salaries of the supervisors and other election officers for that fiscal year. *Held*, that injunction would not lie to restrain the state officers from paying said salaries, on the ground of the unconstitutionality of the registration act, because the state, if she could be sued, would be estopped from interposing the objection that the services rendered at her instance and for her benefit were illegal. Per Gary, J. McIver, C. J., dissenting.

9. A petition for injunction to restrain state officers from disbursing public funds pursuant to an act of the legislature appropriating moneys for the payment of salaries to the supervisors of registration and other election officers appointed under the act of 1882 (Gen. St. 1882, tit. 2, c. 7; Rev. St. 1893, tit. 2, c. 8), on the ground that such act was an unconstitutional abridgment of the elective franchise, which fails to allege that any one has been deprived of his right to vote by reason of said act, presents a purely abstract proposition of law which it is not the duty of a court of equity to decide. Per Pope, J. McIver, C. J., dissenting.

10. Injunction will not lie to restrain the payment of salaries to certain state officers on the ground that the officers were created by a statute which is unconstitutional, as the petitioner has an adequate remedy at law. Per Pope, J. McIver, C. J., dissenting.

Action in the original jurisdiction of the supreme court by Matthew C. Butler to enjoin defendants, William H. Ellerbe and another, as fiscal officers of the state, from applying public funds to the payment of certain appropriations. Dismissed.

The petition and complaint of Matthew C. Butler alleges: "(1) That he is a citizen and resident taxpayer of the county of Edgefield, state aforesaid, possessing all the qualifications and laboring under none of the disqualifications provided in the constitution and laws of this state for the electors and officeholders thereof, on behalf of himself and other citizens and resident taxpayers of said state in the like plight and condition as himself as to qualifications and disqualifications, too numerous to be made parties to this action, and of other citizens and resident taxpayers of said state possessing the same constitutional qualifications as himself, and laboring under no disqualifications save those imposed by the acts of assembly hereinafter mentioned, alleged hereinafter to have been enacted in violation of the said constitution. (2) That William H. Ellerbe and William T. C. Bates are now, and have been for some time last past, the former the comptroller general and the latter the treasurer of the state of South Carolina. (3) That on the 9th day of February, A. D. 1882, there was enacted by the general assembly of this state, and approved by the governor thereof, an act entitled 'An act to amend title 2 (entitled) "Of Elections," of part I., (entitled) "Of the Internal Administration of the Government,"' of the General Statutes, which has been incorporated into the General Statutes of South Carolina of 1882, and the Revised Statutes of South Carolina, approved by the general assembly of 1893. That section 2 of said act is in these words: 'All electors of the state shall be registered, as hereinafter provided; and no person shall be allowed to vote at any election hereafter to be held unless registered as herein required.' The corresponding section of the General Statutes of 1882 is section 90, and the corresponding section of the Revised Statutes of 1893 is section 132. And that section 5 of said act provides (as does also the corresponding section 93 of the General Statutes of 1882) that, in the months of May and June, 1882, the supervisors of registration should make a full and complete registration of all qualified voters in the manner therein prescribed. (4) That section 6 of said act provides (as does also the corresponding section 94 of the General Statutes of 1882): 'When the said registration shall have been completed, the books shall be closed, and not reopened for registration, except for the purposes and as hereinafter mentioned, until after the next general election for state officers. After the said next general election the said books shall be reopened for registration of such persons as shall thereafter become entitled to register, on the first Monday in each month, to and until the first Monday of July, inclusive, preceding the following general election, upon which last named day the same shall be closed, and not reopened for registration until after the said general election; and ever after the said books shall be opened for registration of such

electors on the days above mentioned, until the first day of July preceding a general election, when the same shall be closed as aforesaid, until the general election shall have taken place.' (5) That section 9 of said act provides (as does also the corresponding section 97 of the General Statutes of 1882) that 'any person coming of age and becoming qualified as an elector, may appear before the supervisors of registration, on any day on which the books are opened as aforesaid, and take oath as to his age and qualifications, as hereinbefore provided; and if the supervisor finds him qualified, he shall enter his name upon the registration book of the precinct wherein he resides.' The corresponding section of the Revised Statutes of 1893 is 140. (6) That section 10 of said act provides that each elector registered shall be furnished with a certificate by the supervisor, and that no person shall be allowed to vote at any other precinct than the one for which he is registered, nor unless he produces and exhibits to the managers of election such certificate. The corresponding section of the General Statutes of 1882 is 98; of the Revised Statutes of 1893 is 142. (7) That section 12 of said act is: 'In case of the removal of an elector from one residence to another in the same precinct, such elector shall notify the supervisor of registration, and shall surrender his certificate of registration to the said supervisor of registration, who shall enter the fact upon the registration book, and shall give such elector a new certificate in accordance with such change of residence.' The corresponding section of General Statutes of 1882 is 100; of Revised Statutes of 1893 is 146. And that section 15 of said act is: 'No elector, moving from one residence, precinct, parish, ward, or county to another, shall be allowed to register or vote without a transfer of registration as above provided.' The corresponding section of General Statutes of 1882 is section 103; of Revised Statutes of 1893 is section 149. (9) That the aforesaid provisions and sections of said act, and section 16 thereof, and divers others of said act, are in violation of sections 14, 21, 31, 33, 34, 36, and 41 of article 1, and sections 2, 8, and 10 of article 2, and of sections 2, 3, 7, 8, and 10, of article 8, of the constitution of this state, and of section 2 of article 1, section 1 of article 14, article 10 of the amendments, and section 1 of article 15 of amendments, and divers other sections of the constitution of the United States of America, and are such essential and main features of said act, and so interwoven with its letter and spirit, as to make said act not a reasonable, uniform, and impartial regulation of the elective franchise, but a denial and abridgement of the constitutional right of the citizen to vote, an impediment, hindrance, and obstruction of the exercise of that right, and so utterly subversive of the constitutional provisions in regard to elections by the people as to render the entire act unconstitu-

tional, null, and void. (10) That, by an act of the general assembly of this state, approved December 23, 1893, entitled 'An act to make appropriations to meet the ordinary expenses of the state government for the fiscal year commencing November 1st, 1893,' there was appropriated, by the ninth subdivision of section 9 thereof, for the salaries of the supervisors of registration, \$7,050; that is to say, to pay the supervisors of registration for each county in the state, except Charleston county, the sum of \$200, for the services to be rendered during the fiscal year commencing November 1, 1893, and to the supervisor of registration for Charleston county the sum of \$250, for services to be rendered during the same period,—said amounts to be paid, one-half on the 1st day of June, 1894, and the remaining one-half on the 1st day of November, 1894, out of any money in the treasury not otherwise appropriated. And there was appropriated by the eighteenth subdivision of said section 9 of said act, 'for the pay of managers of election, twelve hundred dollars'; and by the twenty-first subdivision of said section, 'for the pay of commissioners and managers of election, fifteen thousand dollars; to pay for advertising notices of election, two thousand dollars.' And your petitioner avers, on information and belief, that portions of said appropriations are still in the treasury, undrawn and unpaid, as is also a portion of a previous appropriation for payment of supervisors of registration; that by reason of the premises these appropriations are made for compensation for the performance of illegal and unconstitutional services, and are ultra vires on the part of the general assembly, and illegal, unconstitutional, null, and void, and it is illegal and violative of the said constitutions for the comptroller general of the state to draw his warrant upon the state treasurer for payment of said appropriations, or for the said treasurer to pay them. (11) That, notwithstanding the premises, the said William H. Ellerbe, comptroller general of said state, has heretofore unlawfully drawn, and is now unlawfully drawing, and intends to continue in future unlawfully to draw, warrants upon the said William T. C. Bates, treasurer of said state, for the payment of said appropriations, and that the said treasurer, William T. C. Bates, has heretofore unlawfully paid, is now unlawfully paying, and intends to continue in future unlawfully to pay, all such warrants so drawn or to be drawn by said comptroller general for payment of said appropriations. (12) And your petitioner further shows that the foregoing has worked and will work manifest wrong and irreparable injury to your petitioner and other citizens and resident taxpayers of the state of South Carolina, unless restrained by this court, and that he and they are without adequate remedy at law in this behalf. Wherefore your petitioner prays that said sections of said act, and the entire act, as it appears

in the Acts of 1882, in the General Statutes of 1882, and the Revised Statutes of 1893, be declared unconstitutional, null, and void; that defendants, and the successors in office of defendants, be restrained from any further violation of the rights of your petitioner; and that this court may grant its writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining the defendants, their clerks, agents, servants, or attorneys, to wit, William H. Ellerbe, said comptroller general, and his successors in office, from drawing any warrants upon the said treasurer and his successors in office, for the payment of any amount of said appropriations, and William T. C. Bates, said treasurer, and his successors in office, from making any payment of any of said warrants drawn or to be drawn. And your petitioner prays for such other and further relief as to this honorable court may seem meet and proper."

Bachman & Youmans and Douglass & Obear, for petitioner. Attorney General Buchanan, for the State.

GARY, J. This action was instituted in this court, in its original jurisdiction, for an injunction against the defendants, as state officers, to restrain them from applying the public funds in the state treasury to the payment of certain appropriations made by the legislature, which, it is claimed, are illegal. The appropriations alleged to be illegal are those made in the appropriation act of 1893 for the pay of supervisors of registration and for the pay of commissioners, managers, and messengers of elections for the fiscal year commencing 1st November, 1893. The complaint concludes with the following allegations: "And your petitioner avers, on information and belief, that portions of said appropriations are still in the treasury, undrawn and unpaid, as is also a portion of a previous appropriation for payment of supervisors of registration; that by reason of the premises these appropriations are made for compensation for the performance of illegal and unconstitutional services, and are ultra vires on the part of the general assembly, and illegal, unconstitutional, null, and void, and it is illegal and violative of the said constitutions for the comptroller general of the state to draw his warrant on the state treasurer for payment of said appropriations, or for the said treasurer to pay them. (11) That, notwithstanding the premises, the said William H. Ellerbe, comptroller general of said state, has heretofore unlawfully drawn, and is now unlawfully drawing, and intends to continue in future unlawfully to draw, warrants upon the said William T. C. Bates, treasurer of said state, for the payment of said appropriations, and that the said treasurer, William T. C. Bates, has heretofore unlawfully paid, is now unlawfully paying, and intends to continue in future unlawfully

to pay, all such warrants so drawn or to be drawn by said comptroller general for payment of said appropriations. (12) And your petitioner further shows that the foregoing has worked and will work manifest wrong and irreparable injury to your petitioner and other citizens and resident taxpayers of the state of South Carolina, unless restrained by this court, and that he and they are without adequate remedy of law in this behalf. Wherefore your petitioner prays that said section of said act, and the entire act, as it appears in the Acts of 1882, in the General Statutes of 1882, and the Revised Statutes of 1893, be declared unconstitutional, null, and void; that defendants, and the successors in office of the defendants, be restrained from any further violation of the rights of your petitioner; and that this court may grant its writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining the defendants, their clerks, agents, servants, or attorneys, to wit, William H. Ellerbe, said comptroller general, and his successors in office, from drawing any warrants upon the said treasurer and his successors in office, for the payment of any amount of said appropriations, and William T. C. Bates, said treasurer, and his successors in office, from making any payments of any of said warrants drawn or to be drawn. And your petitioner prays for such other and further relief as to this honorable court may seem meet and proper."

Waiving the question as to the right of the petitioner to equitable relief when the only injury complained of is that which does not affect him differently from all other resident taxpayers of the state (Mauldin v. City Council, 33 S. C. 1, 11 S. E. 434), also waiving the question that an adequate remedy is provided by the Revised Statutes (section 343 of which is as follows: "If any taxes shall be illegally assessed or collected when the same shall become known to the county auditor he shall on demand of the party interested submit the matter to the comptroller general, and if the comptroller general approve thereof in writing, the amount so illegally collected shall be repaid to the party paying the same out of the county treasury on the order of the county auditor; and so much of said taxes as shall have been paid into the state treasury shall be refunded to the county treasury and the county auditor shall retain the same in his next annual settlement and charge the state therewith"), and waiving the question as to the right of the petitioner to equitable relief when the only ground for such relief is the illegality of the acts of the legislature mentioned in the petition (Cooley, Tax'n, p. 760; 10 Am. & Eng. Enc. Law, pp. 857, 859; Dows v. Chicago, 11 Wall. 108; Hannevinkle v. Georgetown, 15 Wall. 547; Railway Co. v. Cheyenne, 113 U. S. 516, 5 Sup. Ct. 601; City of Milwaukee v. Koeffler, 116 U. S. 219, 6 Sup. Ct. 372; Taylor v. Secor, 92 U. S. 575; Car-

roll v. Soffard, 3 How. 442; State Railroad Tax Cases, 92 U. S. 613), we are of the opinion that there are other objections to the petition, apparent upon its face, which show that the prayer thereof cannot be granted: First, the proceeding is in effect a suit against the state; second, the state is an indispensable party; third, the question as to the constitutionality of the acts cannot properly arise, as there are other grounds upon which the court can rest its judgment; fourth, if the state could be sued, she would be estopped from interposing the objection that the services rendered at her instance and for her benefit were illegal. The appropriations show that the state desires the payment of such services. Equity will not, therefore, lend its aid to compel the state indirectly, through the defendants as her fiscal officers, to do that, when the state could not be compelled to do it in a direct proceeding.

In proceeding to consider these several objections to the petition it will be well to keep in mind that the defendants are not proceeded against as individuals, but in their respective representative capacity as state officers, and their successors in office; that there is no allegation in the petition that any act of the defendants is attributable to them as individuals, but only in their respective capacity as state officers; that the funds sought to be affected by this proceeding have already been collected and paid into the state treasury, and are now the property of the state, and that the possession thereof by the treasurer of the state is the possession of the state itself; that the petitioner in this proceeding does not seek to enjoin the doing of any act under the registration acts; that the rights which this proceeding seeks to affect are not those of the defendants, but those of the state.

The objections that the action herein is in effect a suit against the state and that the state is an indispensable party will be considered together. These objections are jurisdictional in their nature, and may be interposed at any time, as shown by the case of Lowry v. Thompson, 25 S. C. 416, 1 S. E. 141, in which this court of its own motion raises such objection. The case of Lowry v. Thompson, *supra*, it seems to us, is decisive of this case. That was an action by James M. Lowry against Hugh S. Thompson, governor, W. E. Stoner, comptroller general, and others, as commissioners of the sinking fund, for the recovery of a title deed. Chief Justice McIver, delivering the opinion of the divided court, says: "It will be necessary first to dispose of the question of jurisdiction, for if it shall be determined that the court has no jurisdiction then it would be not only unnecessary but improper to undertake to decide any of the other questions in the case. That a state cannot be sued in any of its courts without its express consent, which can only be given by the legislative authority, is a proposition so universally conceded

as to render any agreement or authority to support it wholly unnecessary. If, however, authority should be asked for, it will be found in almost every case which will be hereinafter cited, where it will be found that the proposition has been distinctly decided or expressly recognized, and we are not aware of any authority to the contrary. As it is not pretended that any such consent was given in this case, the first inquiry is whether this is really an action against the state. The fact that the state is not named as a party to the record is not conclusive of this inquiry, though at one time it seems to have been so held in the case of Osborn v. Bank, 9 Wheat. 738, followed by Davis v. Gray, 16 Wall. 203; but these cases, so far as this particular point is concerned, are entirely inconsistent with the more recent decisions of the supreme court of the United States, where the rule seems now to be well settled that an action, though in form against an officer of the state, if it is in fact a suit against the state itself, cannot be maintained even though the state is not made a party on the record. Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 123; Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. 292, 609; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608. Indeed, it being universally conceded that a state cannot be sued without its consent, * * * it is only in cases where the state is not named as a party defendant in the record that any real question of jurisdiction can arise; for if the state is named as a party defendant in the record that precludes further inquiry, and the court, it is universally conceded, cannot take jurisdiction. * * * The action is not brought against the defendants, as individuals, but for a tort, from which they are seeking to defend themselves by some act or order of the state government, but the action is brought against them as commissioners of the sinking fund to recover property alleged to be in their possession officially. * * * If, then, the property is to be regarded as in the official possession of the secretary of state, and as such subject to the control of the commissioners of the sinking fund, it would seem to be clear that the action is, in fact though not in form, an action against the state itself; for, in such case, as the state can only hold possession of personal property by or through an agent, the possession of the officer or agent is the possession of the state, and the state is an indispensable party to any contest for the right of possession. Even if the possession of the state was originally acquired by some wrongful act of some of its officers or agents (though it is difficult to see how this could be judicially determined until the question of jurisdiction is first disposed of), still no action could be maintained by the rightful owner to recover possession against an officer of the state government, holding and claiming the property as the property of the state, when sued as such,

because in such case the state, being the real party in interest, would be an indispensable party to the action, and as she could not be made a party without her consent, the action could not be maintained in any court, and the claimant would be remitted to his remedy by petition to the legislature, just as in the case of all other claims against the state, where, if his claim be well founded, it is not permissible to doubt he would receive ample justice. If, however, the action should be brought against the person in possession as an individual, and he in his defense seeks to justify his possession by alleging title to or right of possession in the state, then, as in the case of *U. S. v. Lee*, 1 Sup. Ct. 240, he must establish such title or right of possession, and, if he fails to do so, judgment goes against him as an individual. The reason for the distinction is obvious. In the former case, the party in possession being sued as an officer, judgment can only go against him as such, and not against him as an individual, and as the only property he has as an officer is the property of the state, it is clear that the state is the real party in interest, as it is out of her property alone that the judgment sought to be recovered can be satisfied. But in the latter case, where the party in possession is sued as an individual, the judgment can only be enforced against the individual property of the defendant, and the state is not necessarily interested, and is not therefore the real party in interest." The foregoing case is cited with approval in the case of *Columbia Water Power Co. v. Columbia, etc., Light & Power Co.* (S. C.) 20 S. E. 1002; and see the case of *Green v. Nivers*, 21 S. E. 263, more recently decided by this court. The following authorities are cited in support of these views: *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699; *Reagan v. Trust Co.*, 154 U. S. 418, 14 Sup. Ct. 1062.

There is no difference in principle whether the proceeding against the officers of the state in their representative capacity is to affect the control of the money already in the treasury or a title deed in her possession. This is an equity case, while that of *Lowry v. Thompson*, supra, was an action at law. There is, therefore, stronger reason for interposing objection to the jurisdiction of the court in this case than there was in that case. *Columbia Water Power Co. v. Columbia, etc., Light & Power Co.*, supra. In the case of *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, Chief Justice Waite, in behalf of the court, said: "The treasurer of the state is the keeper of the treasury, and in that way is the keeper of the money collected from this tax just as he is the keeper of other public moneys. The taxes were collected by the collectors and paid over to the state treasurer,—that is to say, into the state treasury,—just as other taxes were when collected. The treasurer is no more a

trustee of these moneys than he is of all other public moneys. He holds, but only as the agent of the state. If there is any trust, the state is the trustee, and unless the state can be sued the trustee cannot be enjoined. The officers owe duty to the state alone, and have no contract relations with the bondholders. They can only act as the state directs them to act, and hold as the state allows them to hold. It was never agreed that their relations to the bondholders should be any other than as officers of the state, or that they should have any control over this fund except to keep it, like other funds, in the treasury and pay it out according to law. They can be moved through the state, but not the state through them. In this connection there is not much that is instructive in the case of *Reg. v. Lords Com'rs, etc.*, L. R. 7 Q. B. 387. There money had been appropriated by parliament for the payment of costs of a particular character, and an application was made for a mandamus to compel the lords commissioners of the treasury to pay certain bills which had been properly taxed; but although the court was emphatic in its declaration that payment ought to be made, the writ was refused, because the lords commissioners held the money as the servants of the crown, and no duty was imposed upon them, as between them and the persons to whom the money was payable. Lord Chief Justice Cockburn in his opinion said (page 394): "Though I quite agree that, according to the appropriation act, they (the lords commissioners) were bound to apply the money upon the vouchers being provided, and had no authority to retax these bills, still I cannot say that there is any duty which makes it incumbent on them to do what I cannot hesitate to say they ought to have done, except as servants of the crown; because in that character they have received the money, and in no other." And Blackburn, J. (page 399): "It seems to me that the obligation, such as it is, is upon her majesty, to be discharged through her servants, and you cannot proceed against her servants." So here the obligation is all on the state, to be discharged through its servants, and the money is held by the officers proceeded against in their character as servants of the state, and no other." After stating the facts in the famous case of *Osborn v. Bank*, 9 Wheat. 739, the chief justice in the case of *Louisiana v. Jumel*, supra, then said: "Under this state of facts the order for its return involved no question of power to interfere with what was actually in the treasury. The officers stood in the place of a sheriff who had levied an execution on goods and was sued to test his right to keep them, and the principle applied in the decision is thus stated in the headnote of the report: 'A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable stocks and securities.' Thus, the money seized was kept out of the treasury be-

cause, if it got in, it would be irretrievably lost to the bank, since the state could not be sued to recover it back. No one pretended that if money had been actually paid into the treasury, and had become mixed with the other money there, it could have been got back from the state by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and could have no effect on the money which was held by the state. Certainly, no one would ever suppose that, by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the state incurred by reason of the unlawful exaction." Mr. Justice Matthews, delivering the opinion of the court in *Re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, uses this language: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals, without their consent and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment, requires that it should be interpreted, not literally and too narrowly, but fairly and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is nevertheless the only real party, against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates."

We come now to a consideration of the objection that the question as to the constitutionality of the acts can not properly arise, as there are other grounds upon which the court can rest its judgment. In *Cooley's Constitutional Limitations* (pages 159 and 160) the following language is used: "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously, and with due regard to duty and official oath, decline the responsibility. The legislative and

judicial are co-ordinate departments of the government, of equal dignity. Each is alike supreme in the exercise of its proper functions, and cannot, directly or indirectly, while within the limits of its authority, be subjected to the control or supervision of the other without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it. * * * The task is, therefore, a delicate one, and only to be entered upon with reluctance and hesitation. It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold; and it is almost equally so when the act which is adjudged to be unconstitutional appears to be chargeable rather to careless and improvident action, or error in judgment, than to an intentional disregard of obligation." In the case of *Ex parte Board of Com'rs of Florence Graded Schools*, *In re McDuffie* (S. C.) 20 S. E. 795, Chief Justice McIver, for the court, said: "We do not think that the question of the constitutionality of so much of the act of 4th January, 1894, as authorizes the board of commissioners of the Florence graded schools to assess upon each scholar supplementary tuition fees, except in certain cases, can properly be considered or determined in this proceeding, for two reasons: (1) It is a well-settled and most salutary rule that a court should never undertake to pass upon the constitutionality of an act of the legislature—an ordinate branch of the government—unless it is necessary to the determination of the case in which such a question is presented; * * * for, as is said in *Cooley's Constitutional Limitations* (2d Ed.), at page 163: 'Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. * * * In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable.' But, in addition to this, it seems to us more than questionable whether it is competent for respondent to raise the constitutional question in this case; for, as is said in *Cooley's Constitutional Limitations*, at pages 163, 164: 'Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no

interest in defeating it. * * * The statute is assumed to be valid until some one complains whose rights it invades. *Prima facie*, and on the face of the act itself, nothing will generally appear to show that the act is not valid, and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers.' In this case it appears that petitioners are doing nothing more than what they are expressly authorized to do by the sixth section of the act of 4th January, 1894, * * * and if it is claimed that such provision is unconstitutional, and invades or infringes upon the constitutional rights of any citizen, it is for such citizen to raise the question by some proper proceeding against the petitioners, and not for the respondent, whose constitutional rights, so far as we can discover from anything appearing in this case, have neither been invaded nor infringed upon by said act or the action of the petitioner thereunder."

We will now consider the fourth objection, which is as follows: If the state could be sued, she would be estopped from interposing the objection that the services rendered at her instance and for her benefit were illegal. The appropriations show that the state desires the payment of such services. Equity will not, therefore, lend its aid to compel the state indirectly, through the defendants as her fiscal officers, to do that which the state could not be compelled to do in a direct proceeding. In support of this objection we quote from Cooley's Constitutional Limitations, page 488: "It must always be conceded that the proper authority to determine what should and what should not properly constitute a public burden is the legislative department of the state. * * * And, in determining this question, the legislature cannot be held to any narrow or technical rule. Certain expenditures are not only necessary to the continued existence of the government, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. The officers of government must be paid, the laws printed, roads constituted, and public buildings erected; but with a view to the general well-being of society it may also be important that the children of the state should be educated, the poor kept from starvation, losses in the public service indemnified, and incentives held out to faithful and fearless discharge of duty in the future by the pay-

ment of pensions to those who have been faithful public servants in the past. There will, therefore, be necessary expenditures, and expenditures which rest upon consideration of policy alone, and in regard to the one as much as the other the decision of that department to which alone questions of state policy are addressed must be accepted as conclusive." See, also, *State v. Whitesides*, 30 S. C. 585, 9 S. E. 661. The acts of the legislature making appropriations for the payment of services performed by the supervisors of registration are separate and distinct from the registration acts, and the legality of the acts making such appropriations does not depend upon the constitutionality of the registration acts. Time and again the legislature has made appropriations for the payment of services which had not been performed, as when an officer dies before the expiration of his term of office. In the case of *Daniels v. Tearney*, 102 U. S. 415, the court says: "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect." In the case first cited an injunction was applied for, to prevent the collection of a tax authorized by an act of the legislature, passed during the Civil War, to enable the people of a county to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked: "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?" See, also, *Tompkins v. Railroad Co.*, 21 Fed. 382.

It is the judgment of this court that the petition be dismissed.

POPE, J. This is an application to this court, in its original jurisdiction, for a writ of injunction whereby the respondents, as state officers, shall be perpetually enjoined from paying to the supervisors of registration in each county of this state their respective salaries, provided for them in the act of the general assembly of this state making appropriations, to be paid to such officers for their services as such during the fiscal year beginning on the 1st day of November, 1893, and ending on the 31st day of October, 1894, and also from paying to the messengers of elections, commissioners of elections, and managers and clerks of elections in this state, the amounts appropriated under the same act

for such purposes and for the same fiscal year. A preliminary restraining order was granted by this court, on the 26th November, 1894, forbidding the comptroller general from drawing his warrants on the state treasurer and likewise the state treasurer from paying any warrants drawn by the comptroller general upon such state treasurer, in favor of any supervisor of registration in this state for services rendered during the fiscal year beginning 1st November, 1893, and ending on the 31st of October, 1894. The grounds upon which the petitioner based his application for the remedy invoked were that the act of the general assembly of this state whereby a registration of the voters of this state should be made by such supervisors of election was in sundry particulars in violation of the constitution of this state, as well as that of the United States, and that such violations were so interwoven with all the other provisions of said act for registration of voters that the whole act was void, and, being void, such salaries were illegal, and the payment thereof should be enjoined. In order to insure accuracy in our statements of the pleadings, we will reproduce the allegations of the pleadings both as to parties and facts. The petitioner is M. C. Butler, who sets out in his petition that he is a citizen and resident tax payer of the county of Edgefield, in the state aforesaid, possessing all the qualifications and laboring under none of the disqualifications provided in the constitution and laws of this state for the electors and office-holders thereof, and this action is brought "on behalf of himself and others, citizens and resident taxpayers of said state, in the like plight and condition as himself as to qualifications and disqualifications, too numerous to be made parties to this action, and of others, citizens and resident taxpayers of said state, possessing the same constitutional qualifications as himself, and laboring under no disqualifications save those imposed by the acts of assembly hereinafter mentioned, alleged hereinafter to have been enacted in violation of the said constitution." The petitioner next alleges that William H. Ellerbe and William T. C. Bates are now, and have been for some time last past, the former the comptroller general and the latter the treasurer of the state of South Carolina. The petitioner, in the third paragraph of his petition, alleges "that on the 9th day of February, A. D. 1882, there was enacted by the general assembly of this state, and approved by the governor thereof, an act entitled 'An act to amend title 2 entitled "Of Elections," of part I., entitled "Of the Internal Administration of the Government,"' of the General Statutes, which has been incorporated into the General Statutes of South Carolina of 1882, and the Revised Statutes of South Carolina, approved by the general assembly of 1893. That section 2 of said act is in these words: 'All electors of the state shall be registered as hereinafter provided; and no person shall

be allowed to vote at any election hereafter to be held unless registered as herein required.' The corresponding section of the General Statutes of 1882 is section 90, and the corresponding section of the Revised Statutes of 1893 is section 132. And that section 5 of said act provides (as does also the corresponding section 93 of the General Statutes of 1882) that, in the months of May and June, 1882, the supervisors of registration should make a full and complete registration of all qualified voters in the manner therein prescribed." The petitioner, in the fourth paragraph, of his petition, alleges: "That section 6 of said act provides (as does the corresponding section 94 of the General Statutes of 1882): 'When the said registration shall have been completed, the books shall be closed, and not reopened for registration, except for the purposes and as hereinafter mentioned, until after the next general election for state officers. After the said next general election the said books shall be reopened for registration of such persons as shall thereafter become entitled to register, on the first Monday in each month, to and until the first Monday of July, inclusive, preceding the following general election, upon which last named day the same shall be closed and not reopened for registration until after the said general election; and ever after the said books shall be opened for registration of such electors on the days above mentioned, until the first day of July preceding a general election, when the same shall be closed as aforesaid.'" The petitioner, in the seventh paragraph of his petition, alleges: "That section 12 of said act is: 'In the case of removal of an elector from one residence to another in the same precinct, such elector shall notify the supervisor of registration, and shall surrender his certificate of registration to the said supervisor of registration, who shall enter the fact upon the registration book, and shall give such elector a new certificate in accordance with such change of residence.' The corresponding section of General Statutes of 1882 is 100; of Revised Statutes of 1893 is 146. And that section 15 of said act is: 'No elector moving from one residence, precinct, parish, ward, or county to another, shall be allowed to register or vote without a transfer of registration as above provided.' The corresponding section of General Statutes of 1882 is section 103; of Revised Statutes of 1893 is section 149." The petitioner, in the ninth paragraph of his petition, alleges: "That the aforesaid provisions and sections of said act, and section 16 thereof, and divers others of said act, are in violation of the following sections 14, 21, 81, 33, 34, 36, and 41 of article 1, and sections 2, 8, and 10 of article 2, and of sections 2, 3, 7, 8, and 10 of article 8, of the constitution of this state, and section 2 of article 1, section 1 of article 14, article 10 of the amendments and section 1 of article 15 of amendments, and divers other sections of the constitution of the United States

of America, and are such essential and main features of said act, and so interwoven with its letter and spirit, as to make said act not a reasonable, uniform, and impartial regulation of the electoral franchise, but a denial and abridgement of the constitutional right of the citizen to vote, an impediment, hindrance, and obstruction of the exercise of that right, and so utterly subversive of the constitutional provisions in regard to elections by the people as to render the entire act unconstitutional, null, and void." The petitioner, in the tenth paragraph of his petition, alleges: "That, by an act of the general assembly of this state, approved December 23, 1893, entitled 'An act to make appropriations to meet the ordinary expenses of the state government for the fiscal year commencing November 1, 1893,' there was appropriated, by the ninth subdivision of section 9 thereof, for the salaries of the supervisors of registration, \$7,050; that is to say, to pay the supervisors of registration for each county in the state, except Charleston county, the sum of \$200 for the services to be rendered during the fiscal year commencing November 1, 1893, and to the supervisor of registration for Charleston county the sum of \$250, for services to be rendered during the same period,—said amounts to be paid, one-half on the 1st day of June, 1894, and the remaining one-half on the 1st day of November, 1894, out of any money in the treasury not otherwise appropriated. And there was appropriated by the eighteenth subdivision of said section 9 of said act, 'for the pay of managers of election twelve hundred dollars'; and by the twenty-first subdivision of said section, 'for the pay of commissioners and managers of election fifteen thousand dollars; to pay for advertising notices of election two thousand dollars.' And your petitioner avers, on information and belief, that portions of said appropriations are still in the treasury, undrawn and unpaid, as is also a portion of a previous appropriation for payment of supervisors of registration; that by reason of the premises these appropriations are made for compensation for the performance of illegal and unconstitutional services, and are ultra vires on the part of the general assembly, and illegal, unconstitutional, null, and void, and it is illegal and violative of the said constitutions for the comptroller general of the state to draw his warrant upon the state treasurer for payment of said appropriations, or for the said treasurer to pay them." The petitioner in the eleventh paragraph of his petition, alleges: "That notwithstanding the premises, the said William H. Ellerbe, comptroller general of said state, has heretofore unlawfully drawn, and is now unlawfully drawing, and intends to continue in future to unlawfully draw, warrants upon the said William T. C. Bates, treasurer of said state, for the payment of said appropriations, and that the said treasurer, William T. C. Bates, has heretofore unlawfully paid, is now un-

lawfully paying, and intends in future to unlawfully pay, all such warrants so drawn or to be drawn by said comptroller general for payment of said appropriations." And the twelfth paragraph of petitioner's petition alleges: "And your petitioner further shows that the foregoing has worked and will work manifest wrong and irreparable injury to your petitioner and other citizens and resident taxpayers of the state of South Carolina, unless restrained by this court, and that he and they are without adequate remedy at law in this behalf. Wherefore your petitioner prays that said sections of said act, and the entire act, as it appears in the Acts of 1882, in the General Statutes of 1882, and the Revised Statutes of 1893, be declared unconstitutional, null, and void; that defendants, and the successors in office of defendants, be restrained from any further violation of the rights of your petitioner; and that this court grant its writ of injunction, issuing out of and under the seal of this honorable court, perpetually enjoining the defendants, their clerks, agents, servants, or attorneys, to wit, William H. Ellerbe, said comptroller general, and his successors in office, from drawing any warrants upon the said treasurer and his successors in office, for the payment of any amount of said appropriations, and William T. C. Bates, said treasurer, and his successors in office, from making any payment of any of said warrants drawn or to be drawn. And your petitioner prays for such other and further relief as to this honorable court may seem meet and proper." By the order of this court, passed on the 3d of December, 1894, the Honorable James Norton, as the successor in office of the Honorable William H. Ellerbe as comptroller general of this state, was by his consent substituted as a defendant or respondent herein. The return of the comptroller general and treasurer was on that day submitted to this court, and by its terms it denies petitioner's right to maintain this proceeding, and also denies that the act of 9th of February, 1882, is unconstitutional, in whole or in part, and also denies that the petitioner has correctly set forth the provisions of said act in his petition herein, and further avers that the petitioner is estopped from raising this question as to the constitutionality of the registration laws of this state because he has been twice elected to the United States senate by the general assembly of this state, whose members were all elected by and under the registration laws of this commonwealth, receiving as his salary the sum of \$6,000, and has not returned or offered to return one dollar of this salary before he brought this action.

I am unable to agree with my brethren, and hence this separate opinion. The delay in rendering the judgment of this court is owing to my failure to prepare this separate opinion at an earlier day. Let it be understood, however, that when a grave constitutional question is to be passed upon,

unless it is imperatively necessary that there shall be no delay, I am disposed to view it as my duty to pause and consider thoroughly what is presented. All respectable authority in this country agrees that there can be no graver demand made upon the supreme court of the general government or of the state government, respectively, than to pass upon the action of a co-ordinate branch of the government, when such action is alleged to be in violation of the constitution of one or both. Primarily the court should see that it possesses jurisdiction in such special instance. This is absolutely necessary; for, if a court passes upon a contest in which it has no jurisdiction, its judgment is a nullity. I said I could not agree with my brethren. Let me explain. Chief Justice McIVER has prepared an opinion in which he reaches the conclusion that the entire act in question is unconstitutional, but he passes upon but one phase of the question of jurisdiction. If this court is without jurisdiction to hear and determine these issues here presented, involving as they do questions of constitutional law, his error is potent. Associate Justice GARY, however, believing that the action is without equity, etc., concludes that the proceeding should be dismissed. I agree with him that the proceeding should be dismissed. But I am unwilling to base such a conclusion upon the views he presents with rare ability,—that this is virtually an action against the state, and that, inasmuch as the state cannot be sued without her consent, which latter she has not given, the proceeding by plaintiff should be dismissed. I cannot agree that this is an action against the state. In my judgment, a citizen taxpayer, if he has sufficient equities therefor, can assail the action of either state or municipal officers, if they are proceeding to dispose of public property, including public money, under an act that is unconstitutional. Otherwise, I fail to see where the citizen is completely protected in his rights. I know that Mr. Justice GARY points to the case of Lowry v. Thompson, 25 S. C. 416, 1 S. E. 141, as a case in point. But twice in the year 1893, at a grave exigency, this court asserted its right in equity to grant relief to the citizen, if he could show himself entitled thereto. I refer to the cases of Evans v. Tillman, 38 S. C. 238, 17 S. E. 49, and Robertson v. Tillman, 39 S. C. 298, 17 S. E. 678, in regard to the \$5,250,000 of state bonds then in process of being issued to redeem the state bonds which would mature on the 1st July, 1893. In each of those cases an injunction was prayed for. This relief was denied, not upon any question of jurisdiction, but because, upon the merits disclosed at the hearing, the petitioner in each case was found not to be entitled to the writ of injunction prayed for. Other cases might be cited on the same line, in this state and from other states. As I have already stated, in

my view the recognition of this right of a citizen or citizens to invoke the power of the court of equity to prevent the despoliation of his property by officers acting under an illegal, because unconstitutional, act of the general assembly, is necessary to his complete protection,—a right guarantied to him under the organic law of the state and general governments. Hence, I announce myself as unable to agree to so much of the opinion of Mr. Justice GARY as contravenes this doctrine.

I have taken the pains to copy into my opinion the exact paragraphs of the plaintiff's complaint in order that it may be seen, at a glance that any references by me to the complaint are fully supported by the text. First and foremost, I wish to call attention to the fact that the plaintiff has not reproduced the text of the act in question so far as some of its provisions are concerned, when he quotes the same in his complaint. For instance, take section 5 of the act of February, 1882. Here is that section in its integrity: "After the approval of the act, the supervisor of registration in the months of May and June next, *shall make a full and complete registration of all qualified voters* in the following manner: He shall give three weeks notice of the time and place of registration by advertising in one or more county papers, or by posting in a public place in each voting precinct where no paper is published in the county. The time for registration shall not be less nor more than three days at each registration precinct. Immediately after the closing of the registration at the precincts, he shall open his books at the county seat to correct errors in registration, and to register such electors who failed to register at their respective precincts and who shall then and there present themselves for that purpose, entering the names of such voters in his book for their proper precincts. At the conclusion of such registration hereinbefore provided for the supervisor of registration shall revise the list, and in case it be made to appear to his satisfaction that there is a qualified voter in a precinct who has failed to register, he may upon such evidence as he may think necessary, in his discretion, permit the name of such voter to be placed on said list and issue a certificate therefor. That for the purpose of registration each township as now laid out and defined be and is hereby declared a registration precinct, and in those counties in which there are no such townships, that the parish as formerly known and defined be and is hereby declared such precinct, and in the cities of Columbia and Charleston each ward shall be a registration precinct." (Italics mine.) Thus it is made manifest that by the express terms of this act every voter who possesses the constitutional qualifications is declared to be entitled to registration; that the supervisor of registration is imperatively commanded to register each of such

voters, and, to enable him to do so, he is required to give public notice of time and place of registration for three weeks in one or more county newspapers, or, if none such, by posting notices in the precincts; then, first, he is to keep his books open for such registration from one to three days at each precinct, and, second, thereafter, at the county seat, he is required to register such as failed to register at their respective precincts, and, third, thereafter any voter's name may be entered upon such books upon proper notice. But these are not all of the provisions in behalf of the voters entitled, in May and June of 1882, to be registered. Upon a demand by any one entitled to be registered, if the supervisor refuses for any cause to do so, an appeal is provided to a board of supervisors, composed of the supervisor himself and two assistant supervisors, who are required to pass upon the voter's right to be registered, and if the decision of this board is adverse to the voter, such voter may apply by appeal therefrom to a circuit judge. See section 3 and also section 8 of the act of 1882. Let it be borne in mind that this system of registration is believed to be peculiar to this state, and is an innovation upon the old plans for that purpose. In other states registration is a temporary arrangement, and dependence for the enforcement of such provisions is had to temporary board appointed for that purpose. With us the supervisors of registration are regularly appointed officers, whose services extend throughout the year and from year to year. It is a salaried office. The two assistant supervisors for each county are also appointed by the governor, and are also commissioned officers. The provisions of this act also supply the machinery for the registration of all those who attain the full age of 21 years after May and June, 1882, and also of all those who shall move into the state after the months of May and June, 1882. See sections 6, 8, 9, and 10, as well as last subdivision of section 3.

Now, where is there any allegation in the complaint here in question that any one or more citizens of this state, whether white or black or colored, has been deprived of their right to vote by or under any one or more of the provisions of the registration laws of this state? I challenge any one to point to any one or more instances, set out in the complaint, of a practical denial of the right of suffrage in this state under the enforcement of our registration laws, whose constitutional ity is here assailed. The only paragraph of the complaint that even squints at any such allegation is the ninth, wherein, by a reference to the text of such paragraph hereinbefore quoted, it is asserted that certain sections of the registration law are contrary, in letter and spirit, to certain sections of the constitution of this state and that of the United States. Then follows this language: "And are such essential and main features of said

act, and so interwoven with its letter and spirit, as to make said act not a reasonable, uniform, and impartial regulation of the elective franchise, but a denial and abridgement of the constitutional right of the citizen to vote, an impediment, hindrance, and obstruction of the exercise of that right, and so utterly subversive of the constitutional provisions in regard to elections by the people as to render the entire act unconstitutional, null, and void." It must be obvious to every thoughtful mind that, in the quotation just made, there is an entire absence of any charge that any elector who was of full age in May or June, 1882, or who has since attained his full age, or who has since removed from another state to this state, all or any of whom were possessed of all the constitutional rights to vote, has been denied his right to vote at elections in this state. From the beginning to the end of the complaint here being considered, there is an entire absence of the charge that the petitioner or plaintiff is not duly registered as a voter. Can the existence of a statute on our statute book alleged to be contrary to the state or federal constitution, furnish any justification to a court of equity, or any other court, for entering upon a consideration of such questions unless such alleged unconstitutional legislation is set out in the pleadings as affecting the rights of some citizen or class of citizens? To state the question is to answer it. Certainly, this court has not been slow in announcing, in positive terms, that it will not engage in the discussion and decision of abstract questions of law which have no reference to or are not based upon a concrete case before us. *State v. Gathers*, 15 S. C. 370, and several cases since that case was decided which hold the same views. It must be patent to everyone that this is an effort to place upon this court a political duty,—to have this court pass upon the labors of a co-ordinate branch of the government set up by the people of this state. I admit that it is the duty of this court to do so when a citizen or citizens have their rights invaded by a statute that is unconstitutional, but I deny that it is the duty of this court in an equity suit, when the question as presented is an abstract principle of law.

Besides all this, it is an admitted principle in our jurisprudence, and the same principle is enforced in the courts of equity of the United States, that when there is a plain and adequate remedy at law, there is no jurisdiction in equity. As was well said by the late Chief Justice Dunkin, in the case of *Boo v. Calder*, 14 Rich. Eq. 154: "It is an original principle in the administration of equity jurisprudence that the aid of the court cannot be successfully invoked when adequate relief can be afforded in the ordinary forum. But the legislature of South Carolina has not thought proper to leave this to inference, or to the authority of usage, which might be changed by the court. It was therefore provided by the act of the assembly that suits in equity

should not be maintained where the party had a plain and adequate remedy at law." To the same effect, and in express recognition of the authority of this case just cited, and this, too, since the adoption of our present constitution, Mr. Justice Willard, in *Hall v. Joiner*, 1 S. C. 190, said: "In this state the exclusion of a court of equity from jurisdiction, in cases in which an adequate remedy is conferred at law, rests on the statute." In the case at bar the plaintiff seeks in equity to enjoin the payment of salaries to certain officers of the state because he says the officers in question are created by a statute of the state which is unconstitutional. In other words, these supervisors of registration are attempting to exercise the duties of, and receive compensation for, public offices that do not exist, because the legislation providing the same is unconstitutional. Is there not a plain remedy at law to test the terms of office? Certainly there is. Is there not a plain and adequate remedy of a taxpayer to test the constitutionality of any tax imposed by the general assembly? Instead of one, there are at least two. If this court is without jurisdiction in the premises, this should be the end of the matter.

The judgment of this court is that the petitioner or plaintiff is not entitled to the relief prayed for, and that the petition or complaint be and is hereby dismissed.

McIVER, C. J. (dissenting). This is an action, instituted in the original jurisdiction of this court, for an injunction restraining the defendants, as fiscal officers of the state government, from applying the public funds in the state treasury to the payment of certain appropriations which, it is claimed, have been illegally made by the legislature. The particular appropriations claimed to be illegal are those made in the appropriation act of 23d December, 1893, for the pay of supervisors of registration, and for the pay of commissioners, managers, and messengers of elections, for the fiscal year commencing 1st November, 1893, and the prayer of the complaint is that the defendant, Ellerbe, and his successors in office as comptroller general of the state of South Carolina, be perpetually enjoined from drawing any warrant on the state treasurer for the payment of any of the said appropriations, and that the said Bates, and his successors in office as treasurer of the said state, be perpetually enjoined from paying any of the said warrants. The ground upon which this claim is based is, that the registration law, as it may be briefly termed for convenience, is unconstitutional, null, and void, and any appropriations of the public funds in pursuance of any of its provisions are without constitutional authority, and should be prohibited. Inasmuch as a copy of the complaint, or petition, as it is styled, should be incorporated in the report of this case, we do not deem it necessary to make here any more detailed or particular statement of the nature and scope of the ac-

tion than has been made, in general terms, above, except to say that the action is brought by the plaintiff as "a citizen and resident taxpayer of the county of Edgefield, state aforesaid, possessing all the qualifications and laboring under none of the disqualifications provided in the constitution and laws of this state for the electors and officeholders thereof, on behalf of himself and other citizens and resident taxpayers of said state in the like plight and condition as himself as to qualifications and disqualifications, too numerous to be made parties to this action, and of other citizens and resident taxpayers of said state possessing the same constitutional qualifications as himself, and laboring under no disqualifications save those imposed by the acts of assembly hereinafter mentioned, alleged hereinafter to have been enacted in violation of the said constitution." The main object of the action, unquestionably, is to test the constitutionality of the registration laws of this state. But, before proceeding to the discussion of this main question in the case, it is necessary, first, to dispose of two preliminary objections presented by the attorney general. The first of these objections, as we understand it, is that such an action as this cannot be brought by a single taxpayer, either on his own behalf, or on behalf of himself and others in similar plight and condition, upon the ground that no one can be allowed to assail the constitutionality of an act of the legislature, by an action, unless he shows that he has been injured, either in his rights of person or property, by such act, or, to use the language of the attorney general, in his argument, "The validity of a statute cannot be questioned on the application of a mere volunteer, or person whose right it does not specially affect." Inasmuch as the object of this action is to prevent the application of the public funds in the state treasury, arising from taxation, in which every taxpayer has a direct interest, to an illegal purpose, it would seem clear that there is no foundation for the objection. But we do not deem it necessary to discuss the question, for we think it has been determined by express adjudication in this state in at least two cases, *Mauldin v. City Council*, 33 S. C. 1, 11 S. E. 434, and *McCullough v. Brown* (S. C.) 19 S. E. 458, supported by numerous authorities elsewhere. 1 *Pom. Eq. Jur.* p. 277, § 260; *Cooley, Tax'n*, 704; 2 *Dill. Mun. Corp.* § 736, and cases cited in note; *Crampton v. Zabriskie*, 101 U. S., at page 609, where Mr. Justice Field used this language: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county * * * there is at this day no serious question." While it is true that the case of *McCullough v. Brown*, supra, has been overruled in so far as it held the dispensary law unconstitutional, by the subsequent case of *State v. City Council of Aiken* (S. C.) 20 S. E. 221, yet that case does

not affect the point for which the case of *McCullough v. Brown* is now cited, for that point was in no way alluded to in the *Alken Case*, and it is there stated that the case of *McCullough v. Brown*, and those decided upon its authority, "are overruled in so far as they are antagonistic to the principles upon which this case is decided." (Italics ours.)

The next preliminary objection is that the plaintiff herein is estopped from assailing the constitutionality of the registration law by reason of the fact that he has, for many years, been in the enjoyment of the emoluments and honors of an office to which he has been chosen by elections held under the provisions of the registration law. How this can affect the right of the plaintiff, as a taxpayer, to institute an action to prevent the application of the public funds arising from taxation, in which he as well as any other taxpayer is interested, to an illegal purpose, it is impossible to conceive. The question here is not as to the validity of any election held under the registration law, for the record presents no such facts, and no proper parties for the consideration of any such question. The sole question here is whether the fiscal officers of the state government shall be restrained from applying the public funds to an illegal purpose; and that question turns entirely upon the result of the inquiry whether the registration law, in pursuance of which such application is threatened to be made, violates the constitution of the state. If it does, then, of course, it is null and void, and any appropriation of the public funds in pursuance of the provisions would be illegal, and should be restrained. We see no ground whatever for the estoppel claimed.

Coming, then, to the main question in the case, we find that the question of the constitutionality of a statute requiring the registration of voters has been very frequently before the courts of the several states, and it seems to be settled that, even in states whose constitutions are silent upon the subject, a statute requiring a registration of voters is not per se unconstitutional, as such a statute is regarded as a mere regulation of the constitutional right to vote, and is designed to furnish evidence of the fact that the voter is possessed of the qualifications fixed by the constitution. But it seems to be as well settled that where the purport and effect of a registration law is to add to or to take away any of the qualifications prescribed by the constitution, or where its effect is to obstruct, subvert, or even unnecessarily to impede, the exercise of the right conferred by the constitution, it cannot be sustained, but must be held an unconstitutional invasion of the constitutional right of suffrage. These views are fully supported by the authorities elsewhere (for so far as we are informed we have no case in this state upon the subject), which, though not binding on us, are recommended to our approval by the reasoning upon which

they are founded, as well as by the high character of the courts from which they come. See *Capen v. Foster*, 12 Pick. 485, reported also with elaborate notes in 23 Am. Dec. 632, frequently referred to as the leading case upon the subject. In *Kinneen v. Wells*, 144 Mass. 497, 11 N. E. 916, the question was as to the constitutionality of the registration law of that state, containing a provision forbidding any naturalized person to be registered as a voter within 30 days after his naturalization, and it was held that such provision was unconstitutional because it purported to add to the qualifications of a voter as fixed by the constitution the further qualification that such voter should be possessed of the qualifications named in the constitution for a period of 30 days before he could be registered as a qualified voter. The court, after noticing the further objection that such a provision was unconstitutional because it was not impartial, inasmuch as it imposed a restriction upon a certain class of voters—naturalized persons—not imposed upon any other class, goes on to say that, even if the provision were general in its character, applying alike to all classes of voters, it would still be unconstitutional, because it added to the qualifications of a voter, as fixed in the constitution, the further requirement that he should be possessed of such qualifications for a specified time before he offers himself for registration, whereas every person who is possessed of the necessary qualifications at the time he offers himself for registration is entitled to be registered, without any regard to the length of time he has been possessed of the necessary qualifications. In delivering the opinion of the court, Devens, J., uses this language: "It is not an unreasonable provision that all persons entitled as voters shall be registered as such previously to depositing their ballots, and if the legislature deems that such an inquiry could not proceed concurrently with the actual voting or election, and both be conducted in a deliberate and orderly manner, it is not unreasonable that it should provide that such an inquiry should terminate before the election actually commences at a previous time sufficiently long to make proper preparations therefor." Again, after referring to *Capen v. Foster*, supra, as a leading case on the subject, he says: "But, while it is held to be within the proper limits of legislative power to provide suitable regulations for exercising the right of suffrage in a prompt and orderly and convenient manner, the court, speaking through Chief Justice Shaw, was careful to add: 'Such a construction would afford no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain, the right itself.'" And again he says: "Every system of registration of voters contemplates that the registration will be completed and that the lists of voters will be prepared before voting actually commences. No system would

be just that did not extend the time of registration up to a time as near that of actually depositing the votes as would be consistent with the necessary preparation for conducting the election in an orderly manner, and with a reasonable scrutiny for the correctness of the list." In the case of *City of Owensboro v. Hickman* (Ky.) 14 S. W. 688, the registration law there considered provided for a registration of voters in the city of Owensboro, to be made on the first Monday in July and the two succeeding days, at which those only could be registered who would be entitled to vote at the August election ensuing, and also provided that no vote shall be received at any election held within a year unless the voter's name is on the registry made in July. Held, that the act was not a reasonable regulation of the elective franchise, and was void under the constitution of Kentucky providing that every male citizen, 21 years of age, who had resided in the state 2 years, and in the county, town, or city 1 year, next preceding the election shall be a voter. In that case the court, while conceding the power of the legislature to enact a uniform and reasonable registration law, used this language: "The true theory upon which those laws are based is that they must not impair or abridge the elector's privilege, but merely regulate its exercise by requiring evidence of the right. The right cannot be impaired, but it may be regulated. * * * A registration law, however, will not be held valid which, under the color of regulating the manner of voting, really subverts the right." Without quoting from or referring more particularly to the cases on the subject, we think the foregoing views will be found to be supported by numerous other cases which we have examined, and to which we will simply refer by their titles: *Dellis v. Kennedy*, 49 Wis. 560, 6 N. W. 246, 381; *Daggett v. Hudson* (Ohio Sup.) 3 N. E. 546; *Brooks v. Hydome* (Mich.) 42 N. W. 1122; *Attorney General v. City of Detroit* (Mich.) 44 N. W. 388; *Page v. Allen*, 58 Pa. St. 338; *Patterson v. Barlow*, 60 Pa. St. 75; *State v. Baker*, 38 Wis. 71; *Edmunds v. Banbury*, 28 Iowa, 267; *Perry v. Whitaker*, 71 N. C. 475; *People v. Canaday*, 73 N. C. 198; *Monroe v. Collins*, 17 Ohio St. 686.

In the light of these principles we will proceed to an examination of the provisions of the registration law of this state, with a view to ascertain whether any of the provisions of that law are in conflict with any of the provisions of our constitution. For this purpose we will first inquire what are the provisions of the constitution in reference to the right of suffrage. In article 1, § 31, the provision is as follows: "All elections shall be free and open, and every inhabitant of this commonwealth possessing the qualifications provided for in this constitution shall have an equal right to elect officers, and be elected to fill public office." Section 33 of article 1 provides as follows: "The right of suffrage shall be protected by laws regulating elec-

tions, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult or improper conduct." In article 8, § 2, the qualifications of electors are specifically declared as follows: (1) He must be a male citizen who has attained the age of 21 years; (2) he must have resided 1 year in the state, and in the county in which he offers to vote 60 days, next preceding any election; (3) he must not be laboring under any of the disabilities named in the constitution. In addition to the qualifications of a voter thus specifically declared, it is expressly provided that every person possessed of these qualifications "shall be entitled to vote for all officers that are now or hereafter may be elected by the people and upon all questions submitted to the electors at any elections." But, in addition to this, in section 8 of the same article it is expressly declared that the general assembly "shall never pass any law that will deprive any of the citizens of this state of the right of suffrage except for treason," and other offenses named in the section, "whereof the person shall have been duly tried and convicted." The provision of section 3 of article 8 is as follows: "It shall be the duty of the general assembly to provide from time to time for the registration of all electors." The original provisions for the registration of voters will be found in the act approved 9th of February, 1882 (17 St. at Large, p. 1110), and these provisions are incorporated in Gen. St. 1882, beginning with section 89 and ending with section 106; and such provisions, as subsequently amended, are incorporated in the Revised Statutes of 1893 as sections 131-156, both inclusive. From a careful examination of the various statutory provisions thus referred to, it seems to us that the manifest scope and intent of such legislation was that there should be but one general registration of voters, to wit, that provided for in 1882, and that when the registration books were closed for that year a person who was there a qualified voter, but who had failed from any cause, whether from sickness, absence, or other cause, to register, was ever thereafter deprived of this right of suffrage, for there is no provision by which such a person could afterwards be allowed to register; and section 132 of the Revised Statutes expressly declares that "no person shall be allowed to vote at any election hereafter to be held unless he shall have been heretofore registered in conformity with the requirements of chapter 7 of the General Statutes of 1882, and the acts amendatory thereof, or shall be registered as herein required." Now, on turning to the chapter of the General Statutes of 1882 and the acts amendatory thereof, we find that, while provision is made in section 94 of that chapter, corresponding with section 137 of the Revised Statutes for opening the books of registration after every general election, not, however, for the purpose of registering voters generally, but "for registration of such persons as shall thereafter be-

come entitled to register" (italics ours), there is no provision for the registration of persons who had previously become entitled to register. Hence it follows, necessarily, that one who had been a qualified voter, and, as such, entitled to register before such general election could not then avail himself of the privilege offered by that section. The language found in section 94 of the General Statutes of 1882 is stronger than that found in section 137 of the Revised Statutes from which we have quoted, for in the General Statutes of 1882 the language is prohibitory, and forbids reopening the registration books except for the purpose of registration of such persons as shall become entitled to register after the next election; and even as to this privileged class, their day of grace expires on the first day of July preceding a general election,—something over four months before the general election, which is fixed by law for the first Tuesday after the first Monday in November in every second year, reckoning from the year 1870. Const. art. 2, § 11; Rev. St. § 162. It is true, also, that sections 96 and 97 of the General Statutes of 1882, as well as the corresponding sections of the Revised Statutes (140 and 141), do make special provisions for a certain class of voters, to wit, minors who come of age and are otherwise qualified, but this provision is confined to that particular class, and is, therefore, not an impartial provision. It seems to us that this feature of the registration law, to say nothing of other constitutional objections, renders it obnoxious to that provision of the constitution above quoted, which makes it the duty of the general assembly to provide from time to time for the registration of all electors. The language of that constitutional provision necessarily implies that its purpose was to require the general assembly to provide every facility for the registration of all electors, by providing for the registration of all electors "from time to time," so that, as far as practicable, no elector should be deprived of his right of suffrage, and that this law, which provided for one general registration more than ten years ago, and afforded no other opportunity to any elector, except those of a certain class, to comply with its provisions, even though his failure to avail himself of the first and only opportunity ever offered him to register resulted from sickness, absence, or other good cause, must be regarded as a violation both of the spirit and letter of the constitution.

Inasmuch as the right of suffrage is provided for and guaranteed by the constitution, and the general assembly is expressly forbidden from passing any law depriving any citizen of the right of suffrage, except in certain cases not pertinent to the present inquiry, it would seem, at first blush, as if any law making it a prerequisite to the exercise of this constitutional privilege that the voter should be registered would be in violation of the constitution, as adding an additional require-

ment to those mentioned in the constitution for the exercise of this right. But, as we have seen, this is not the correct view of a registration law, which is a mere regulation as to the mode and manner in which this constitutional right may be exercised. The constitution simply provides that every citizen, possessed of certain specified qualifications, shall be entitled to exercise the right of suffrage, but it makes no provision as to how the fact shall be ascertained that a citizen claiming the right to vote is possessed of the required qualifications. It is, therefore, not only proper, but necessary, that the legislature should make such regulations as it may deem best for the purpose of determining the question of fact whether a person offering to vote is possessed of the necessary constitutional qualifications; and this, in our judgment, is the true office of a registration law. It is also nothing but reasonable and proper that such an inquiry should terminate prior to the election, as it might greatly delay and possibly defeat the full exercise of the right of suffrage if it had to be conducted while the election was going on; and hence a law which provides for closing the registration books for such a length of time as would be reasonably necessary to enable the supervisor of registration to prepare and furnish the managers of elections at each polling precinct with a copy of the list of registered voters for such precinct, would not, probably, be regarded as an unreasonable regulation. If, however, the law provides for closing the registration books for such a length of time before the election as would be manifestly unreasonable and unnecessary for that purpose, then such a law could not be defended as a legitimate exercise of legislative power; for, under color of regulation, it would have the effect of subverting and injuriously restraining the right of suffrage, and would, in some cases, totally defeat such right. It seems to us that the law under consideration is open to this objection, for it provides that the registration books shall be closed on the first day of July preceding every general election, which, as we have seen, is fixed for the first Tuesday after the first Monday in November in every second year, reckoning from the year 1870, and shall not be reopened prior to such general election, except for the purpose of enabling minors coming of age and possessed of the other necessary qualifications to register. Surely a period of four months is wholly unreasonable and entirely unnecessary for the closing of the registration books previous to a general election, and the inevitable effect is to deprive a certain class of citizens of the right to vote at such election, to wit, those who, being otherwise qualified, complete their required term of residence, either in the state or county, within such period of four months. Take, for instance, the case of a person who, being possessed of other constitutional qualifications, only completes the required term of residence, either

in the state or county, on the first day of October immediately preceding any general election. By this provision of the law he is deprived of his right of suffrage, although it may be susceptible of proof to a demonstration that on the day of the election he is, and for more than a month preceding has been, fully possessed of all the qualifications of an elector as fixed by the constitution, simply because he had not performed an impossible act by registering prior to the preceding July, which, under the case supposed, it would have been impossible for him to have done, as he had not, prior to the preceding July, completed his required term of residence. It is manifest that such a law cannot be defended as a reasonable and necessary regulation of the mode of exercising the elective franchise, and is in direct conflict with the constitution; for, in the case supposed, which no doubt has frequently occurred, the constitution guarantees the right to vote, but the registration law forbids the exercise of such right because the person in question had not shown, four months previous to the election, what it was impossible for him then to have shown,—that he was then possessed of all the constitutional qualifications,—notwithstanding the fact that there was ample time for him to have shown, if allowed the opportunity, that he was on the day of election, and had been for at least one month, fully possessed of all the qualifications of an elector.

Much complaint has been made in the argument against what may be designated as the certificate feature of the act, which, it is claimed, is peculiar to the registration law of this state, by which it is provided that the supervisor of registration is required to furnish to each registered voter a certificate, in the form prescribed in section 142 of the Revised Statutes, which he is required to exhibit to the managers of election before he can be allowed to vote, and which forbids him from voting at any other polling precinct than that mentioned in such certificate. We must say, however, that we are not prepared to condemn this act simply on account of that feature. Indeed, if the proper construction of the act is that the exhibition of such certificate is conclusive of the voter's right to vote, we are inclined to think that such a feature is not only unobjectionable, but preferable to a provision whereby the voter's right to vote is made to depend upon the fact that his name is found on the list of registered voters furnished the managers of election by the supervisor of registration; for in the former case the voter is made the custodian of the evidence of his right to vote, whereas in the latter case his right is made to depend upon the act of another, and he may entirely lose his right by the carelessness or incompetency of an official in making out the list, to say nothing of the danger of his being deprived of his right by the willful omission of his name from the list by a corrupt official. If, however, under a proper

construction of the act, it is necessary, as is supposed by some,—for which supposition the language of section 155 of the Revised Statutes affords some warrant,—that to entitle one to vote he must not only exhibit his certificate to the managers of election, but his name must also appear upon the list furnished the managers by the supervisors of registration, then it does seem that such double requirement is unnecessarily burdensome, well calculated to impede the exercise of the right of suffrage, and sometimes entirely defeat such right, without any fault on the part of the voter; for, though he may have carefully preserved and promptly exhibited his certificate of registration to the managers of election, he yet may lose his right to vote solely because his name does not appear on the list furnished by the supervisor, for the act makes no provision for the publication of the list of registered voters prior to an election, whereby the voter can ascertain whether his name appears on such list and, if it had been omitted through carelessness or even oversight on the part of the official charged with the duty of preparing such list, have it inserted.

We do not deem it necessary to go into any detailed consideration of the various provisions of the act, in regard to the substitution of a new certificate for one which has been lost or destroyed by no fault on the part of the voter, or of the provisions of the change of certificate where the holder changes his place of residence, even from one point to another in the same precinct, but must say that these provisions seem to be unnecessarily harsh and burdensome, and, whether so intended or not, are well calculated to impede and obstruct the exercise of the right of suffrage.

There is one feature of this act which is not without significance. Sections 151-154, Rev. St., expressly require that the supervisor of registration "shall immediately preceding each election, revise the registration of electors and mark off the names of such electors as have died, and such as have removed from one residence precinct, parish, ward or county to another without notifying him and obtaining a certificate of transfer," and the other sections referred to make provision for obtaining the names of persons who, within the two preceding years, have been convicted of any offense disqualifying a person from voting, which names shall be erased from the registration list; but there is a singular absence of any like provision for revising the registration list "immediately preceding each election" by adding thereto the names of qualified electors, whose names, from any cause, may have been omitted from the list. The revision thus expressly provided for is altogether one-sided, and cannot, therefore, be regarded as either reasonable or just.

The features of our registration law which have thus been shown to be unconstitutional

are so intimately connected with and so interwoven with its other provisions that the whole act must be declared unconstitutional. If those features which have been specially commented on are eliminated from the act, as they must be if in conflict with the constitution, then the effect would be that we would have upon the statute book a law in a form which never received the sanction of the legislature; and this cannot be. To use the language of the Michigan court in *Attorney General v. City of Detroit* (Mich.) 44 N. W. 388, we may say: "This law, being in the respects pointed out both unreasonable and in conflict with the constitution, and it being apparent that the legislature would not have enacted the other portions of the act had it foreseen that the courts would declare these parts unconstitutional, the whole act must fall, and be held unconstitutional and void." We must, therefore, conclude that the registration law of this state is unconstitutional, null, and void, and hence any appropriation of the public moneys for the pay of the supervisors of registration for carrying out the provisions of this unconstitutional statute is without the warrant of law, and should be forbidden.

Since the preparation of the foregoing opinion, which was, as usual, submitted to my associates for their consideration, they have both prepared separate opinions in which, while not considering or deciding what I regard as the real question in the case, they both concur in holding, though differing on one point at least, that the action cannot be maintained on jurisdictional grounds, and hence concur in rendering judgment that the complaint, or petition, as it is called, must be dismissed. Of course, if these jurisdictional grounds are tenable, and this court is without jurisdiction in the case, that is an end of the matter, and any consideration of the merits of the case would be at least superfluous, if not absolutely improper; for if the court is without jurisdiction, then, as was said in *Lowry v. Thompson*, 25 S. C., at page 419, 1 S. E. 141, "it would be not only unnecessary but improper to undertake to decide any of the other questions in case." But as I do not think that any of these jurisdictional objections are tenable, and, on the contrary, am entirely satisfied that this court has jurisdiction, and is, therefore, bound to decide the issue presented, I must adhere to the views hereinbefore expressed. A proper respect, however, for the views of my associates, which it is always a pleasure to me to pay them, as well as a due regard for the gravity of the issue presented, require that I should not content myself with a simple declaration that I do not consider the jurisdictional objections tenable, but should go on and consider the grounds upon which these objections are based, and this I propose to do as briefly as the importance of the inquiry will permit.

First. It is objected that this is practically

an action against the state, and to which she is an indispensable party. If this be the true nature of the action, then it is clear that this court has no jurisdiction, in the absence of any consent, of which there is no pretense, on the part of the state. The important inquiry, therefore, is, whether this action can, in any proper sense, be regarded as an action against the state. I do not think so, for the following reason: The object of this action is not to affect injuriously any property or right of property of the state. If the plaintiff should obtain judgment in this case no interests of state could possibly be affected injuriously thereby. In this respect the present case differs widely from the cases of *Lowry v. Thompson*, supra, *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, and *Columbia Water Power Co. v. Columbia, etc., Light & Power Co.* (S. C.) 20 S. E. 1002; for in each of those cases some interest or property right of the state was sought to be affected, while such is not the case in the present action. I think it is clear, therefore, without going further into the authorities, that this case cannot properly be regarded as an action against the state to which she is an indispensable party.

Second. While it is quite true that a question as to the constitutionality of an act of the legislature should not be considered or decided in a case where such case can be decided upon other grounds, as that is, in fact, nothing more than saying that the constitutionality of an act of the legislature should not be unnecessarily assailed, for considerations of comity and respect, which should always exist among the different departments of the government, would forbid the judiciary department of the government from unnecessarily assailing the action of its co-ordinate department, yet when a case is presented to a court for its decision, in which it is necessary for a proper decision that the question of the constitutionality of an act of the legislature should be considered and determined, then it is not only the right but the duty of the court to consider and determine such question, and if the act in question is found to be in conflict with the constitution, the court should not hesitate so to declare. That, in my judgment, is precisely the attitude of the case now under consideration. The object of the action is to restrain and enjoin certain public officers of the state, who are the custodians of the public funds, from applying any part thereof to an illegal purpose, to wit, the payment of the salaries of certain so-called public officers, supervisors of registration, upon the ground that there is no valid law providing for the appointment of such officers; so that the vital question in the case, and the one which lies at the very foundation of it, is, whether there is any valid law providing for the appointment of supervisors of registration, for, if there is no such valid law, then it is clear that the public

funds cannot properly be applied to the payment of the salaries of persons claiming to hold offices not established by law. Now, as there is no doubt of the fact that what purports to be an act of the legislature has been spread upon the statute books, providing for the establishment of such offices and fixing the salaries thereof, and the only claim is that such so-called act is without constitutional authority, and for that reason only has not the force of law, it follows conclusively that the question as to the constitutionality of what has been termed for convenience the registration law necessarily arises in this case, and the solution of that question is absolutely essential to the decision of the case. Indeed, outside of questions of jurisdiction and procedure, it is the only question in the case.

Third. Another objection is stated in these words: "If the state could be sued, she would be estopped from interposing the objection that the services rendered at her instance and for her benefit were illegal. The appropriations show that the state desires the payment of such services. Equity will not, therefore, lend its aid to compel the state indirectly, through the defendants as her fiscal officers, to do that which the state could not be compelled to do in a direct proceeding." It seems to me that this objection ignores the important and vital distinction between the legislature and the state. The legislature is not the state, but is simply one of the agencies or departments of the government called into existence by the voice of the people, who are the source of all power, as expressed in their constitution. The legislature can only act lawfully within the limits prescribed in the constitution, and any action on their part in conflict with the provisions of the constitution is without lawful authority and, therefore, null and void, and not binding on the organic body called the state, or upon the people composing such organic body. Hence, the inquiry inevitably comes back to the question whether the registration law, establishing the office of supervisor of registration and providing for the salary of such office, is constitutional. If it is, then, clearly, the present action cannot be maintained, but, if it is not, then it necessarily follows that the public funds cannot be lawfully applied to the payment of such salary; and it seems to me that nothing can be clearer than that any taxpayer, whether one or more, may invoke the aid of the court to prevent the fiscal officers of the state from applying the funds in the treasury to any purpose not authorized by law, for, besides the fact that such funds are derived from taxes levied and collected by the people of the state, and in which, therefore, every taxpayer is more or less interested, the constitution expressly provides that "no money shall be drawn from the treasury but in pursuance of an

appropriation made by law" (article 2, § 22), and this prohibition is repeated, in practically the same terms, in article 9, § 12. It is not correct to say that the state has expressed any desire upon the subject until it is shown that there is some valid act of the lawmaking department of the government establishing the office of supervisor of registration and fixing the salary of such office.

Fourth. All the other objections to the jurisdiction of this court, except the last, which will be presently considered, are based, as it seems to me, upon a misconception of the true nature and real object of the action. This is not an action by which the plaintiff seeks to obtain relief against a wrong either done or threatened against him as an elector or voter, and the fact that there is no allegation in the complaint that either the plaintiff or any other citizen of the state has been deprived of the right of suffrage by reason of the provisions of the registration law is a matter of no consequence, for such an allegation would not be pertinent to the issue presented by this action. Conceding, for the purpose of this inquiry only, that no citizen of the state, entitled to exercise the right of suffrage, has ever yet been deprived of such right by the operation of the registration law, I am unable to perceive how that could affect the real issue presented by this case. The wrong complained of is that the fiscal officers of the government have expressed their purpose to apply, and are about to apply, a portion of the public funds under their custody to an illegal purpose, and the remedy sought is to prevent such illegal diversion of the public funds from the purpose to which they can alone be lawfully applied. The action is brought by the plaintiff as a taxpayer, and the allegation that he is also a duly-qualified elector is wholly superfluous; for I am unable to see any reason why any citizen of the state, who is a taxpayer, —a female, for example,—whether an elector or not, may not bring an action like this to prevent any illegal diversion of the public funds, in which all the taxpayers, whether electors or not, are interested.

It only remains to consider the last objection to the jurisdiction, which is based upon the well settled doctrine that a court of equity will not take jurisdiction of a case where the plaintiff has a plain and adequate remedy at law. The bare statement of the doctrine is sufficient to show that, in order to sustain this objection, it must appear that the plaintiff has a plain and adequate remedy at law, and, in my judgment, this has not been and cannot be made to appear. What other remedy a taxpayer has to prevent an illegal diversion of the public funds by the fiscal officers of the government than that adopted in the present case has not been suggested, and I am at a loss to conceive of any. It will be observed that the

fund here in question was derived from taxes levied under and by virtue of the act to raise supplies for the fiscal year commencing 1st November, 1893, "for the purpose of meeting appropriations to defray the current expenses of the government" for that fiscal year, and, so far as I am informed, there never was any special or separate levy of taxes to pay the salaries of supervisors of registration. How, then, was it possible for the taxpayer to raise the issue here presented by refusing to pay his taxes, or by paying the same under protest, and bringing an action to recover them back? The action does not and could not proceed upon the ground that any wrong was done to the taxpayer in levying and collecting the taxes from which the fund in question was derived, for such taxes were levied and collected for an entirely lawful and proper purpose,—the payment of the current expenses of the state government,—and hence no resistance, in any form, could have been made to such levy and collection. But the wrong complained of is that, after the fund derived from taxation had been properly placed in the treasury, a portion of it is about to be diverted from the legal purposes to which it is properly applicable, and applied to an illegal purpose; and how that wrong can be prevented, except by an injunction forbidding the officers charged with the custody of the fund from so misapplying it, I must confess I am utterly unable to conceive.

I cannot, therefore, concur in the conclusion reached by the majority of the court that the complaint should be dismissed for want of jurisdiction. On the contrary, I am satisfied that this court has jurisdiction, and is bound to decide the real question in the case, viz., the question as to the constitutionality of the registration law. Upon that question I have hereinbefore set forth the reasons for my conclusion, to which I still adhere, that the said law is clearly unconstitutional. I am, therefore, of opinion that the prayer of the complaint, in so far as it seeks to enjoin the comptroller general from drawing any warrant on the state treasurer for the pay of any supervisor of registration, and to enjoin the state treasurer from paying any such warrant, should be granted.

(44 S. C. 383)

BANK OF MANNING v. MELLETT et al.
(Supreme Court of South Carolina. July 11, 1895.)

POWERS OF JUDGES AT CHAMBERS — VACATING JUDGMENT.

Under Rev. St. § 2247, which provides that the judges shall have power at chambers to grant certain writs, and to hear and determine motions to set aside and stay executions in the same manner as if the court was actually sitting, a judge cannot vacate a judgment at chambers.

Appeal from common pleas circuit court of Clarendon county; D. A. Townsend, Judge.

Action by the Bank of Manning against Emma J. Mellett and another to foreclose a mortgage. There was judgment by default, and Emma J. Mellett filed a petition to vacate the judgment, and that she be allowed to answer. From an order vacating the judgment, plaintiff appeals. Order reversed.

The following is the decree referred to in the opinion: "This is a motion by Emma J. Mellett to set aside the judgment rendered herein against her by default at the October term of this court at Manning. The action is based on the ground of nonservice. Upon the affidavit of Emma J. Mellett I granted an order at Georgetown, November 9, 1894, that the plaintiff show cause before me on the 17th of November, why the said judgment should not be set aside. After hearing affidavits from both parties, I was still in doubt as to the real status of the matter, and hence referred it to Thomas B. Fraser, Jr., Esq., as special referee to take testimony upon the disputed point of service of summons and complaint. The referee went to Manning, and took the testimony of such witnesses as were brought before him, and he made his report, finding, in substance, that there was a service as provided by law. I am surprised that the most important witness, except Emma J. Mellett, was not sworn. I refer to John B. Mellett. If there is anything wrong in the testimony of Emma J. Mellett, he is probably the only person living who knows it; and yet he was not sworn, and the omission not accounted for. Emma J. Mellett swears that she was not served, and that she knew nothing of the action until after judgment had been rendered. The deputy who was sent to make service swore in his return of service that he did serve her personally. He afterwards, in an affidavit made for the said hearing on the 17th of November before, swore, if I mistake not, that he gave a copy for Emma J. Mellett to John B. Mellett, and that John B. Mellett went into the room where Emma J. Mellett was, and that he (the deputy) heard her say, 'It is all right; no message for the sheriff.' (As the affidavit of the deputy was not returned to me and is not before me now, I may be mistaken as to this, but the above is my recollection of it.) In his testimony afterwards before Mr. Fraser he swore that this language was used by John B. Mellett. I would not impute anything wrong to the deputy, but he must have been to some extent uncertain as to what actually did occur. This, of course, is not surprising, as he did not expect to be questioned about it in this way. I am fully convinced that Emma J. Mellett was not legally served with the summons and complaint. It is not contended now that she was personally served, and, while the law permits a service by leaving a copy of the summons and complaint at the residence of the party to be served, with a person of discretion, yet it contemplates that through this person of discretion the party to

be served will either receive such copy or become acquainted with its existence; and when a party to an action makes oath, as in this case, that she did not receive the papers, and knew nothing of their existence, nor of the action, until after judgment, she is entitled to the relief asked for. It is therefore ordered, adjudged, and decreed that the report of special referee be reversed, and that the said judgment be, and the same is hereby, set aside and vacated as to Emma J. Mellett."

A. Levi and R. O. Purdy, for appellant.
B. Pressley Barron, for respondent.

GARY, J. This was an action by the plaintiff against the defendants to foreclose a mortgage executed by Emma J. Mellett in favor of the Bank of Manning. The only allegation of the complaint in regard to John B. Mellett is that he is the husband of Emma J. Mellett, and resides with her on the premises described in the mortgage. T. B. Fraser, Jr., Esq., who was appointed special referee herein, made his report, in which he finds as matter of fact that on the night of the 12th of September, 1894, one B. F. Ridgill, a deputy sheriff of Clarendon county, served the defendant Emma J. Mellett by leaving a copy of the summons and complaint herein with her husband, John B. Mellett, at her residence. Neither party answered, and there was judgment of foreclosure by default. The plaintiff advertised the land for sale, whereupon Emma J. Mellett filed her petition, addressed to the Honorable D. A. Townsend, circuit judge, in which she prays as follows: "Wherefore your petitioner prays that the judgment be vacated, and your petitioner be allowed to answer the complaint; that your petitioner have such other and further relief as the equities of the case present, and to your honor seem meet." His honor, Judge Townsend, while in the circuit, granted a rule to show cause before him at Union, S. C., on the 17th day of November, 1894, why the prayer of the petitioner should not be granted; also a temporary restraining order. On the 17th day of November, 1894, his honor, Judge Townsend, by consent of plaintiff and defendants' attorneys, made an order that it be referred to T. B. Fraser, Jr., special referee, to take testimony as to the service of the summons and complaint upon Emma J. Mellett in the above-stated case, and to report the testimony, and his conclusions therein, within five days after the holding of said reference; and that said reference be held on the 22d day of November, or some subsequent day, to be appointed by said referee. After the special referee, T. B. Fraser, Jr., Esq., made his report, his honor, Judge Townsend, filed his decree, which will be incorporated in the report of the case. To this

decree the plaintiff's attorney filed several exceptions, one of which is: "Because his honor was wholly without jurisdiction in granting the order complained of, and the same is null and void." His honor, in his decree, says this is a motion by Emma J. Mellett to set aside the judgment rendered herein against her by default. The decretal part of his order is that the report of the special referee be reversed, and that the said judgment be, and the same is hereby, set aside and vacated as to Emma J. Mellett. Section 2247, Rev. St., provides that: "The judges of the courts of common pleas shall have power at chambers, to grant writs of prohibition, mandamus, and certiorari, and to hear and determine motions to set aside or stay executions, in the same manner in every respect, as if the court was actually sitting; and, with the consent of all such adult parties as may have answered, or their attorneys in the cause, and of the guardian ad litem of infants therein, to hear and determine any matter not properly triable before a jury," etc. Section 2248, Id., provides that: "Every judge, while holding the circuit court for any circuit pursuant to the provisions of the law of this state, shall be invested with powers equal to those of the judge of such circuit, and may hear and determine all causes and motions and grant all orders in open court or at chambers at which it is competent for the judge residing in such circuit to hear, determine or grant, any law, usage or custom to the contrary notwithstanding." Subdivision 4 of section 402 of the Code provides that: "Motions upon notice must be made within the circuit, in which the action is triable, or in the absence or inability of the judge of the circuit, may be made before the resident or presiding judge adjoining that in which it is triable." We do not think Judge Townsend had jurisdiction in the premises, because, even if it should be conceded that consent of the parties would have enabled him to hear the case at chambers at Union, S. C., no such consent was given as is contemplated by the statute, and the setting aside and vacating a judgment at chambers is not one of the powers conferred upon a circuit judge by section 2247, Rev. St. The following authorities bear more or less upon this question: *Thomas v. Raymond*, 4 Rich. (N. S.) 347; *Ex parte Parker*, 6 Rich. (N. S.) 472; *Chafee v. Rainey*, 21 S. C. 11; *Coleman v. Keels*, 30 S. C. 614, 9 S. E. 270; *Barrett v. James*, 30 S. C. 329, 9 S. E. 263; *State v. Black*, 34 S. C. 194, 13 S. E. 361; *Calhoun v. Railway Co.* (S. C.) 20 S. E. 30. As Judge Townsend did not have jurisdiction in the premises, it would not be proper for this court to decide the question raised by the other exceptions. It is the judgment of this court that the order of the circuit judge be reversed.

(44 S. C. 413)

HALTIWANGER v. WINDHORN et al.
(Supreme Court of South Carolina. July 20, 1895.)

LIABILITY OF ADMINISTRATOR—WIDOW'S EXEMPTION.

An administrator will not be liable to the widow of his intestate for the balance of her homestead exemption on claim made by her more than a year after he took charge of the estate, when it appears that on his complaint against all the heirs, made as soon as he took control of the estate, which consisted chiefly of horses and incumbered land, the court, with consent of all the heirs, turned over to her three horses as part of her exemption, and that the balance of the estate has been consumed in the care of the estate and in the payment of debts.

Appeal from common pleas circuit court of Richland county; T. B. Fraser, Judge.

Action by Paul H. Haltiwanger, as administrator, against Amanda J. Windhorn and others, for a settlement of an estate. Defendant Amanda J. Windhorn answered, claiming balance of her homestead exemption, and from a judgment denying it she appeals. Affirmed.

The decree of the lower court and exceptions thereto were as follows:

"This case was heard by me at the term of the court in April, 1894. The action was brought by the plaintiff, as administrator, for the settlement of the estate of Theodore Windhorn, deceased, against Amanda J. Windhorn and others. There were no children, and Amanda J. Windhorn seems to have constituted 'the family' of the intestate. Amongst the orders in this case was one requiring the administrator to account before the master. Instead of an accounting, the master, by the consent of the counsel, has only reported the testimony as to the administration and as to the claims against the estate. I therefore will confine my attention to the single point raised by the arguments before me,—the widow's right of homestead. It appears that the personal property of the intestate consisted almost entirely of horses, vehicles, harness, and other articles used in carrying on the livery stable business, amounting in value to considerably over \$500. The exact amount was not furnished me in any of the papers furnished me at the hearing. The plaintiff became the administrator at the request of the widow. The letters were granted on the 26th day of June, 1891. On August 6, 1891, on a petition by the administrator, an order was made by the judge of probate, authorizing the administrator to sell the property at public or private sale. No time was fixed for sale, and the terms of sale were left in the discretion of the administrator. Constant efforts were made to sell the property, a portion of it at private sale. But sales could not be made at what was considered fair prices. A large amount of property remained until a sale was made under an order made in this case, after the commencement of this action, in October, 1892. In the meantime the administrator caused, with this

stock in the livery stable business, a heavy expense, and, as it turned out, a heavy loss. When the property was finally sold, the expenses had consumed the property, and nothing was left for the creditors or distributees,—even for the homestead,—unless the administrator had made himself personally liable for it by his method of dealing with the estate. By an order made in this case some personal property was turned over to the widow on account, and as part of her homestead, amounting to \$225. Besides this, several other articles have been turned over to her, the value of which may be ascertained if necessary. The widow now claims that the administrator is liable to make good this loss to her, and that he must be required to pay her the full amount of the homestead, in the same way as if the sales of the property had been sufficient to leave a balance in his hands, for that purpose, over and above expenses. Let us assume that all of the property of the intestate passed into the hands of the administrator, in trust for the preservation of the family homestead, and thereafter for the creditors and distributees. This I take to be the better view, at least until the homestead is severed and is set apart. In *Lamb v. Lamb, Speer*, Eq. 301, 302, the court declined to hold an administrator liable 'for losses in a lot of cotton held for some three months after a positive order to sell it. He acted in good faith, and, as he thought, for the benefit of the estate. He is not to be held liable for an error of judgment.' In *Rainsford v. Rainsford, Rice*, Eq. 389, the court used this language: 'The obligation imposed on a trustee is that he shall manage the trust in the same manner that a discreet man would manage his own business; and he is accountable if he neglects this duty.' The administrator seems to have acted under the advice of counsel,—to have acted with great care,—but to have been very unfortunate. There is no absolute rule which requires that an administrator shall at once proceed to convert chattels into money as soon as practicable after the death of the intestate. At one time, and until very recently, such a course would have been the exception, and not the rule, in this state. I think, therefore, that the administrator is not liable for loss to the creditors and the distributees; and, on the theory that he is also trustee, to preserve the homestead until it is severed and set apart, he should not be liable to the family for the homestead which has been lost in the process of the administration. It may be said, however, that the homestead forms no part of the estate which comes to the administrator. *Thomp. Homest. & Ex.* 546. If this view be correct, then it is a simple case where the goods of the two parties are commingled; and, if the party in possession takes the same care that a reasonably prudent man would do of his own, he ought not to be liable for the losses, if the owner neglects to claim his property. I have been furnished with no au-

thorities, and can find none to this purpose. My view is this: When the administrator took charge of the estate, he was bound to take charge of everything left by the intestate. He cannot know—officially, at least—that there will be any necessity of laying off a homestead. If he did know this, he was powerless until the 'family' (in this case the widow) resorts to the proceedings provided by law for setting off the homestead. The law has not provided any proceeding in which he is the actor. If this property remained in his hands, mixed with other property, it was the widow's fault, and not his. He could not turn out this stock to stray off, or keep it unfed and uncared for. He cannot certainly be blamed if he endeavored to make the property earn something by continuing the old business in the proper way. If we take the view that no legal title to this property passed into the administrator, then he and the widow were simply cotenants. The cotenant in possession is responsible for due care. *Freem. Coten.* The work done did not cover the loss; but continued to pay off some of the expenses. There is no positive evidence on the subject, but the widow must have known what was going on. There certainly has not been any protest on her part against it. In the absence of any proper demand made on him for the homestead, I confess that I do not see what the administrator could have done other than to act as trustee of the whole property which came into his hands, including the homestead. In the view I have above presented, he acted with the best judgment and care he could, and in good faith, and is not to be held responsible for the unfortunate result. I, therefore, hold that the plaintiff is not liable to the widow for the amount of the homestead which has not been paid, and it is so ordered and adjudged. All questions not herein adjudicated are reserved."

The following are the grounds of exception:

"The defendant Amanda J. Windhorn excepts to the decree and judgment herein of his honor, Judge Thomas B. Fraser, dated the 8th day of May, 1894, and filed in the office of the clerk of the court of common pleas for the county and state aforesaid, on the 15th day of May, 1894: (1) For that his honor erred in holding that the plaintiff administrator is not liable to the defendant Amanda J. Windhorn for the value of the property retained by said administrator in his hands, and to which she was entitled under the homestead and exemption laws of this state, and which property was lost to the said defendant Amanda J. Windhorn by reason of the unauthorized acts of the said plaintiff, administrator. (2) For that his honor erred in holding that plaintiff, as administrator as aforesaid, could lawfully carry on the business of a livery stable with the property of his intestate; and that, when such business had resulted in a total loss, he could lawfully apply the proceeds of sales of intestate's property to pay the indebtedness

incurred in prosecuting such business, to the exclusion of the claims of the widow of intestate for her homestead exemption in the said property. (3) For that his honor, after making a citation from Thompson on Homestead Exemptions, to the effect that the homestead forms no part of the estate which comes to the administrator, erred in holding: 'If this view be correct, then it is a simple case where the goods of the two parties are commingled; and, if the party in possession takes the same care that a reasonably prudent man would do of his own, he ought not to be liable for the losses, if the owner neglects to claim his property.' (4) For that his honor erred in not holding that, if the foregoing citation be correct law, then the facts proven in this action make a case where the plaintiff administrator unlawfully used the homestead property to which the widow of deceased was entitled in carrying on a livery stable business in behalf of the estate without her consent; and, said business having resulted in a loss, the plaintiff administrator is liable to said widow for so much of the property of her deceased husband's estate as she was entitled to by way of homestead. (5) For that his honor erred in holding: 'If this property remained in his [the administrator's] hands, mixed with other property, it was the widow's fault, and not his;' and in further holding: 'In the absence of any proper demand made on him [the administrator] for the homestead, I confess that I do not see what the administrator could have done other than to act as trustee of the whole property which came into his hands, including the homestead.' (6) For that his honor erred in not holding that the answer of the defendant Amanda J. Windhorn in this cause, dated 8th September, 1892, wherein she alleges 'that she is entitled, out of any and all the personal property belonging to said estate of her deceased husband, and out of any money derived from any portion of said decedent's estate, to a personal property exemption of five hundred dollars,' was a sufficient demand of her homestead exemption; and that any holding and using without her consent, by the plaintiff administrator of the property in question (at least after said date), was tortious and illegal; and that said administrator is liable to the widow of deceased for the loss of said property in his hands, caused by his acts. (7) For that his honor erred in holding that 'the widow must have known what was going on,'—that is, what course of action in regard to the property was being pursued by the administrator,—when, as his honor himself admits, 'there is no positive evidence on the subject.' (8) For that his honor erred in holding that the administrator 'acted with the best judgment and care he could, and in good faith, and is not to be held responsible for the unfortunate result.' (9) For that his honor erred in not holding that the plaintiff, as a merchant, having sold to himself as ad-

ministrator the articles whose price constitutes the principal claim against the estate, the transaction is one that the law will not uphold, even where there is no proof of bad faith. (10) For that his honor erred in not holding that the administrator has no legal right or power to apply the property of the intestate, or the proceeds of sales thereof, to the payment of a debt contracted by him while administrator, and acting as such, with himself as a merchant, prior and in preference to the widow's claim of homestead. (11) For that his honor erred in holding that, if 'no legal title to the property passed into the administrator, then he and the widow were simply cotenants.' (12) For that his honor erred in not holding that it was the duty of the administrator, as soon as he had become appointed and qualified, or at any rate as soon as the defendant Amanda J. Windhorn had served her answer in this case, to set apart personal property of the estate of intestate to the value of five hundred dollars, or that amount of money (provided property to that value or that amount of money came to his hands), to be delivered to the said Amanda J. Windhorn, as the widow and 'family' of intestate, for her homestead. (13) For that his honor erred in not holding that no sufficient reason had been shown why the plaintiff administrator had not delivered the balance of her homestead to the widow; and, such homestead having been lost by the acts of the administrator, he is liable to the widow for the amount of the homestead which has not been paid. (14) For that his honor erred in not holding that the widow's claim of homestead is paramount to all claims (except mortgages of the property and claims due the state) against the estate of her deceased husband, including debts contracted by the administrator as 'expenses of preservation.' (15) For that his honor erred in not holding that the plaintiff administrator is estopped from asserting that no proper demand for the homestead had been made upon him. (16) That while it is true, as stated by his honor, that the administrator could not turn out the stock to stray off, or keep them unfed and uncared for, yet his honor erred in not further holding that the administrator could have turned over, or, at least, tendered to the widow, so much of said stock as was required to make good her homestead exemption; that, if she refused to accept them, he could then charge the estate with the expense of their maintenance, provided good management required that they should be retained, and not sold; and that, having failed so to do, and by his subsequent conduct lost the property to the estate, he is responsible therefor. (17) For that his honor erred in not holding that the plaintiff administrator had no power to contract a debt so as to bind the estate and be superior to the widow's claim of homestead, and especially not to so contract with himself."

Obear & Douglass, for appellant. Clark & Muller, for respondent.

POPE, J. Theodore Windhorn departed this life intestate on the 6th day of June, 1891, possessed of a tract of land containing 141 acres, about six miles from the city of Columbia, and 6 horses, 9 vehicles, and other things pertaining to a livery stable, in which business the deceased was engaged at the time of his death. The plaintiff, at the instance of the widow of intestate, had himself appointed to the office of administrator of the personal estate, and possessed himself thereof on the 26th day of June, 1891. The intestate was survived by his widow, the defendant Amanda J. Windhorn, a sister, and a nephew as his only heirs at law and next of kin. The plaintiff found the livery stable of his intestate without food to feed the horses, and with no one to care for the same, in a stable rented from another. On his call for creditors, he found that one of the creditors held a mortgage on the 141 acres of land belonging to intestate for the sum of \$500 and some interest. He himself held claims for more than \$400, and there were others besides. In fine, his intestate had died insolvent. He bought food to feed the stock, hired help to care for the same, and paid rent on the stables occupied as a stand by the intestate when he died. The plaintiff applied to the probate judge for Richland county for leave to sell the horses at public or private sale, and an order was passed by such judge therefor. On the 5th day of October, 1891, he exhibited his complaint in the court of common pleas for Richland against all the heirs at law of deceased and the holder of the only lien on his real estate as parties defendant. On the 5th of November, 1891, Judge Aldrich passed an order, which was consented to by every heir at law and the creditor who held the aforesaid lien, by which the plaintiff was authorized to turn over to the widow, Amanda J. Windhorn, on account of her homestead, one horse, or one horse and a carriage. The plaintiff still conducted the business of the livery stable, using alone in such business the property of his intestate, until about the close of the year 1891. We found that he sold one horse in July and one in November, 1891, and that he attempted to sell the balance of the property on the 12th December, 1891; but, on account of the severity of the times, all of the property could not be sold at remunerative prices, and some of it was withdrawn from sale after offer by the auctioneer. In 1892, about April, he turned over two other horses and a surrey, with its harness, to the widow on further account of her homestead. Notwithstanding the fact that the widow, the defendant Amanda J. Windhorn, had appeared by her attorney in this action in November, 1891, yet her answer was not filed until September, 1892.

In her answer she set up a claim to the homestead, but acquiesced in the prayer of plaintiff's complaint, which was that he might be ordered to sell the personal property, and account therefor in this action. In November, 1892, Judge Wallace passed a consent order in action, validating the turning over of the three horses, valued in the aggregate at \$225, to the widow as her homestead, and directing a sale by the master of the land in question, and directing the master to advertise for claims against the estate of intestate, pass upon the account of the administrator, etc. When the land was sold by the master, its proceeds paid the costs and the debt it was intended to secure. When the master had the parties before him for an accounting touching the actings and the doings of the plaintiff as administrator, his accounts showed that he had paid out the whole estate, except \$14.37, in the course of his administration, leaving still due the counsel fees to his attorneys, and a balance of \$275 to the widow on account of her homestead, while his own claims, and those of others in like plight with himself, were left without any payment at all. When his accounts as said administrator were examined, it was discovered that the food of the horses and the hire of persons to take care of them, as well as rent for the stables, had exhausted the estate; no creditors complained at this unexpected turn in the affairs of the estate, but the widow, on account of the unpaid balance of her claim of exemption of purchased property, has assailed the actions and doings of said plaintiff most vigorously, not his want of good faith, or that his accounts are not accurately made as to his receipts and disbursements, but solely because, as she views it, it was his duty to pay her balance of \$275. All these matters came on to be considered by his honor, Judge Fraser, on the equity side of the court of common pleas, at the spring term, 1894, of said court for Richland, and on the 8th day of May, 1894, he filed his decree, wherein he held that the plaintiff was not liable to the widow for the amount of the homestead which has not been paid. His decree will be set out in the report of the cause. From this decree the defendant Amanda J. Windhorn has appealed to this court upon 17 grounds, which will also be set out in the report of the case.

It is certainly the duty of an administrator to take care of all perishable property of which the intestate died as owner and possessor. Induced by law, its ownership is devolved upon him. This case includes seeing that the horses are housed, fed, and cared for, and that such property as carriages shall be under a roof, so as to be free from the effects of exposure to the sun and rain. But the greater the expense, usually the quicker should the administrator move

to have sale, though the latter should be governed by business principles. It is no part of an administrator's business, as such, to run a mercantile establishment, or, for that matter, a livery stable, if his intestate died leaving either one or the other of such establishments, that passed into the hands of his administrator. We desire to speak emphatically upon this point. It is too dangerous a custom for this court to sanction. In the case at bar no distributee or creditor of the intestate complains of this administrator. Does it lie in the power of this defendant to complain of the plaintiff because he had not paid the balance of her exemption of \$500 of the personal property belonging to her husband's estate, under the circumstances of this case? She is now in the court of equity, and must be controlled by its principles. Under the laws of this state it was in her power to require that this property should be set apart to her. Under the law it was no part of the duty of the administrator to set it apart for her. Therefore, to begin with, we have this defendant (appellant) clothed with a legal right and legal process requisite to the enforcement of this right. On the contrary, the plaintiff owed the defendant no such duty under the law, and, under the law, was clothed with no process to set apart this exemption to her. This plaintiff promptly brought his action in the court of the county to settle the estate of his intestate. The appellant was made a party to such action, and yet for nearly one year she did not even answer the complaint, setting up her rights. Before she did answer, all the harm had been done. The estate had been spent. How was it spent? Not in buying more horses and more vehicles, not in renting additional stables, but, purely and simply, the six horses "ate their heads off" as the popular phrase states it; the cost of their food, stabling, and care exhausted the estate. The result would not have obtained if the appellant had taken the three horses that she afterwards obtained on account of her exemption promptly upon the accrual of her right, but she waited until the expenses of feeding, stabling, and care of the same three horses she received had exhausted more than the amount of balance due her. We have examined the accounts of the administrator, and the foregoing facts appear therein. Wherever these exceptions refer to the findings of fact of the circuit judge, we find there is testimony in the case sustaining such findings, and, under the well-settled rule of law governing such matters, we would not overrule the circuit judge. Wherever the exceptions relate to alleged errors in the conclusions of law by the circuit judge, our foregoing observations fully answer them. It is the judgment of this court that the judgment of the circuit court be affirmed.

(96 Ga. 774)

SHEFFIELD et al. v. PARKER et al.

(Supreme Court of Georgia. May 13, 1895.)

ADMINISTRATION—RECEIVERS—RESTRAINING ACTION AT LAW.

Under the pleadings and evidence, as disclosed by the record, there was no abuse of discretion in refusing to grant an injunction and appoint a receiver, as prayed for.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by J. W. Sheffield & Co. against Melissa Parker and others. Defendants had judgment, and plaintiffs bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

On October 21, 1893, Sheffield & Co. presented their petition to the superior court of Sumter county, alleging: In 1889, Barney Parker died, leaving a large estate to his widow, Mrs. Melissa Parker, and his children, Mary J., Laura A., Lou E., Jennie B., N. J., R. E., and T. Granberry Parker, by his will, which has been duly probated, and a copy of which is attached. By the third item of this will Mrs. Parker inherited and came into possession of a plantation of 5,000 acres of fertile and valuable land, known as the "Barney Parker Home Place," in Sumter county, together with a large number of horses, mules, cattle, etc., and everything necessary for the proper cultivation and successful operation of the farm, all of which was worth some \$50,000, for her natural life or widowhood. By the terms of said item, after her death or marriage said described estate was to descend to certain children of Barney Parker, above named. Said estate was charged with a trust, to wit, out of the proceeds and income thereof minor children of Barney Parker above named were to be maintained and educated. During 1890, 1891, and 1892, the net income or rental value of the estate was reasonably worth \$3,500 per annum, besides what might be obtained from the income of two grist mills and a cotton gin, which was also a part of the estate so bequeathed, and an additional source of revenue thereto. During said years, relying upon the annual value of the estate as above set forth as a basis of credit, petitioners furnished to Mrs. Parker, through her duly-authorized agents, her son-in-law, E. C. Speer, and her son, J. C. Parker, who were managing the estate for her, supplies of divers articles of hardware necessary for the actual and successful operation and cultivation of the estate, and used for said purpose. An itemized account is attached. Mrs. Parker is very old and feeble, and her death in the near future would not be a surprise to any one. Since her husband's death she has not attempted to personally supervise and manage the es-

tate, but has intrusted it entirely to said son-in-law and son, as well as her other business as one of the executors of the will of Barney Parker. During said years petitioners furnished the goods to the value of some \$500, and Mrs. Parker, through her agents, made payments on accounts, so that on January 6, 1892, she owed petitioners on the account \$247.14. When they presented the account for payment to Speer he referred them to J. C. Parker, saying he was no longer agent for Mrs. Parker. When they presented it to J. C. Parker and Mrs. Parker they said it was all right, and they would make arrangements to get the money and pay it. They failed to pay it until January 24, 1893, when petitioners sued Mrs. Parker upon the account, and the first notice they had that there was any defense was through a plea filed by Speer, as attorney at law for Mrs. Parker. The case was continued from term to term by Speer, as such attorney, until August, 1893, when petitioners obtained a judgment against Mrs. Parker, and she appealed the case in forma pauperis to the superior court. Said estate of Mrs. Parker, under the management of her said agents, has become largely involved, and owes some \$10,000. No one was more thoroughly advised of this, and had more thorough knowledge of the condition of the estate of Mrs. Parker, than Speer. Notwithstanding this, in utter disregard of petitioners' rights, and to delay and defeat them in the collection of said claim, Speer connived, colluded, and traded with Mrs. Parker in May, 1893, and had transferred and deeded from her to him, all of said estate so bequeathed to her, leaving her a pauper, as by her own affidavit. Knowing that petitioners' claim was about to ripen into judgment, and other claims which were maturing into judgment against Mrs. Parker, Speer representing her in each, Speer took the whole estate, together with the growing crops, with the expressed and evident purpose of defeating petitioners, as well as others, in the collection of their just claim. Without any legitimate cause for undue haste, in the middle of the year, when the crops were growing, and nothing unusual occurring, save the unusual money panic, the deed from Mrs. Parker to Speer was made at midnight, and so urgent were they to make the trade before said judgment ripened into maturity that they persuaded an old, crippled, and infirm justice of the peace to get out of bed and go, in the dead hours of the night, from Americus to the home of Mrs. Parker, to attest the deed, copy of which is attached. The consideration of this deed was ostensibly, as expressed therein, the sum of \$2,000, which is less than the value of the emblements of said life estate for 1893, which had already, under the law, vested in Mrs. Parker. No such consideration passed between the parties. It

was a totally inadequate price, and the sale was merely a pretended one, to defeat petitioners' rights. Speer had no such sum of money at the time of the purchase, nor could he have gotten, nor did he get, the said sum to pay for the estate; but about that time he bought other property, ostensibly upon a cash transaction,—about \$10,000 worth. While Speer apparently owned a large amount of property, it is not his bona fide, and he is individually insolvent. He is collecting and appropriating to his own use the rents and profits of the estate for 1893. Unless petitioners collect their claim out of the annual profits of the estate, even though the sale to Speer should be proved invalid, it being a life estate, with the remainder to the minors, it will be impossible for petitioners to collect the same.

Speer and Mrs. Parker were named as defendants. Discovery was waived. Petitioners prayed for a receiver to take charge of and operate the estate, and pay petitioners and others their just claims therefrom; for an accounting from Speer to the receiver for the money he has collected in the way of rents, etc.; for injunction against Speer; for judgment against Speer and Mrs. Parker for the amount due petitioners on the account, general relief, etc.

By amendment, petitioners charged: Numerous creditors are levying attachments upon personality of the estate, and there are various suits pending against Speer and Mrs. Parker, and Mrs. Parker and J. C. Parker as executor and executrix of Barney Parker, all seeking to recover for articles of necessity furnished said estate and the several beneficiaries of the same. Litigation will be necessarily involved, etc. Petitioners prayed that the attachment of the Americus Guano Company against Mrs. Parker, already levied, and the case of Wheatley against J. C. Parker and Mrs. Parker as executrix [be enjoined]; that the sale of the land be declared [void], and the income of the estate be preserved by the receiver to satisfy petitioners and other just claims of creditors of the estate. The will of Barney Parker was attached as an exhibit. The nature of the third item has been sufficiently indicated. By the fourth item testator directed: "The proceeds, or a reasonable portion thereof, above described, to be applied to the maintenance and education of my beloved children." By other items various bequests were made to children of the testator or their guardians, etc. Williams Parker, testator's brother, Joseph Parker, testator's son, and Mrs. Melissa Parker, were named as executors and executrix. Council & McGarrab, claiming an indebtedness to them for guano sold to Mrs. Parker to be used on her plantation to the amount of \$630.12; the Americus Guano Co., claiming an indebtedness of a similar character of \$716.60; and G. A. Wheatley, claiming an indebtedness to him for goods

furnished to Mrs. Parker and J. C. Parker, executrix and executor, of \$313.58, for necessary articles for the maintenance of the minor children, and for the preservation and use of the estate,—were allowed to intervene, and become parties plaintiff. They made various allegations, the nature of which will sufficiently appear from the report of the testimony hereinafter.

Defendants demurred to the petition of Sheffield & Co., upon the grounds that there was no equitable cause of action set forth, and that plaintiffs have a full and complete remedy at law by their suit already pending, or by attachment, or by attachment and garnishment. Speer answered: N. J. Parker died before Barney Parker, and Granberry Parker died since testator's death, without having married. The plantation left to Mrs. Melissa Parker was of 3,637 acres. There was some 16 or 17 old mules, 35 cattle and hogs, and some farming implements. Much of the land was old, and well worn. Some of the stock belonged to the tenants, and some of it was old, and of little value. There was but a small quantity of corn, etc. The other personalty was sold by J. C. Parker, as the executor of Barney Parker, and was not turned over to Mrs. Parker as part of her life estate, and never came into her possession, and either paid out to the heirs at law or charged to himself as executor in his return. The fee-simple title to the property which was turned over to Mrs. Parker was not worth \$50,000. Some of the live stock which came into her hands had died or been consumed at the time of the purchase by respondent. When he bought, she was old, and in bad health, and her life estate of no great value. The will provided that the children who remained with the family should have reasonable support and education out of the property, which respondent has been giving, as well as supporting the widow, since he bought from her, and expects to continue to do so as long as she lives, unless the property is taken out of his hands by the court. At most, only the executor or legal representative would have any right to interfere in behalf of the children who are remaining with the family, and, as the children are not complaining, but are content, it does not behoove the creditors to move in the premises. The only two children remaining with the family are Mary J. and R. E., the former having arrived at age, and the latter being represented by his next friend, J. I. Howell, who are both satisfied to let the property remain in respondent's hands under his purchase. There are only five remainder-men, to wit, Mary J. Parker; J. I. Howell, as heir of his deceased wife, formerly Laura A. Parker; R. E. Parker; Lou E. Speer, wife of respondent, and formerly Lou E. Parker; and Cooper Dorman, heir at law of his wife, formerly Jennie B. Parker. All of these, except Dor-

man, would prefer that the life estate and remainder interest should remain in the possession, management, and control of respondent, and have so expressed themselves to him, rather than for it to be put in the hands of a receiver. They feel that, as his wife is equally interested with them in remainder, he will be interested in preserving the same; and also being a near kinsman to them will be an additional reason why they so consider it best. In 1890—the only time he had charge of the property and managed it for Mrs. Parker—there was no complaint about the manner of his management and treatment of their remainder estate. In fact he left it in as good or better condition than he found it, and in a much better condition than when he bought the life estate from Mrs. Parker. It is not true that for 1890, 1891, and 1892 the net income or rental of the estate was worth \$3,500, or other such sum. Whatever lands were cultivated were rented out by Mrs. Parker through her agents, except a very small farm, which made about two bales of cotton and a little corn and fodder, all of which the family consumed. The rentals were about 48 or 49 bales of cotton, and, with the above, were consumed by Mrs. Parker and family in support of them and education of the children, and in fact did not support the family in the manner they lived, as respondent subsequently learned that Mrs. Parker got indebted, and did not pay out. Only one of the mills has run for any considerable length of time, and that realized but little, which was consumed by the family. In fact the mills and gin, since Barney Parker's death, have not more than paid expenses of repairs and for running them. It is not true that the articles charged in petitioners' account were used for the preservation and maintenance of the estate, but most of them were bought for the tenants, and were consumed by them the years they were purchased, and the crops, towards the making of which any of the articles charged in the account went, have long since been consumed by the family. If any vestige of the items charged in the account, or the proceeds thereof, was embraced in any of the property respondent purchased from Mrs. Parker, he had no knowledge of it. Very few of said items were bought by him, and what few were bought by him were bought in 1890. After 1890, Mrs. Parker discharged him, and employed J. C. Parker as her agent to manage her property. Respondent paid to petitioners on said account much more than the items he purchased. Respondent had nothing to do with the management of the estate, as the agent or representative of Mrs. Parker, except in the fall of 1889, other than as employed by J. C. Parker, executor, as attorney at law to represent certain cases for the estate of Barney Parker, and for professional advice; and only for 1890 did he have

anything to do with the management of Mrs. Parker's property. For all of respondent's action, both as agent for Mrs. Parker, as executrix, in the fall of 1889, and as agent for her about her life estate or individual property in 1890, and as agent for her for 1889, he has had a full and satisfactory settlement with her, through her attorney at law, B. P. Hollis, and her agent, as attorney in fact, J. C. Parker; and Hollis expressed himself as well pleased. Respondent bought the property from Mrs. Parker in good faith, and paid what he considered a full, reasonable value for it, without the knowledge of any lien, either actual or constructive, that petitioners had on any of the property. The property had been offered to another at the price he paid for it. Respondent had advanced money from time to time to Mrs. Parker for the support and use of her family, and to keep up her property, and she owed his wife for money she had used, coming to his wife out of her father's estate, and by consent of his wife that he might use the same in the collection of both their debts, and in order to secure the same, thinking that by a proper management of the life estate he might be able to get the value of said claim before the life estate terminated. He had been on the trade for nearly a month before he finally consummated it. It is not true that Mrs. Parker's deed was made at midnight, or that he persuaded a crippled and infirm magistrate to get out of bed to go in the dead hours of night to witness it, and all such charges are unfounded. His attorney, to whom he had spoken to go with him to write the deed in the afternoon, being engaged, they did not get off from the city until sundown and dark. They were otherwise delayed, but arrived at Mrs. Parker's, and the deed was read over to her, and signed by her and attested, before she had gone to bed. Respondent was abundantly able to make the trade, and pay for the same. When he bought the property in May, 1893, he went into possession of it. He put his deed on record the day after it was made, and has been in possession of the property ever since, except some of the crop and personalty which has been levied upon for Mrs. Parker's debt, and for which he has interposed a claim. When he bought, there were scarcely any supplies to make a crop; some of the crop had been planted; some of the hands were threatening to leave for want of supplies, and some had already left. He took hold of the farming operations and the renters, furnished supplies to them out of his own means to enable them to make the crop, hired a man to look after the farming interest, and gave a great deal of his own time and attention to the management of the same, and the crops were thus made; and none of the goods charged in petitioners' account were furnished since his purchase, or for this year, 1893. It is not true that he

knows the financial condition of Mrs. Parker's estate, or that it became involved under his management. He has not been connected with its management for nearly three years, did not know how much she owed, and in fact knew very little of the details of her business. He was employed a few times by her attorney in fact, Parker, to represent some cases of no large amount. It is not true there were suits pending against him, except this suit, a suit of Chapman, guardian, and of Dorman, commenced about the same time this suit was. Otherwise he has not been sued for about seven years. He is abundantly solvent, and able to respond to any judgment plaintiff may recover against him. He paid the consideration as stated in the deed of Mrs. Parker, and thought it a reasonable price at the time. He denied the charges of conspiracy and fraud. He is advised and believes that the same attorneys who filed the suit of Chapman and Dorman co-operated in the preparation and filing of the suit of Sheffield & Co. Since the filing of the suit of Sheffield & Co., the Chapman and Dorman suit against him and Mrs. Parker has been settled. He is claimant of some money and property in one or two cases, but they are unimportant. After paying the reasonable proper expenses of the cultivation of the crop on the place he purchased from Mrs. Parker, the crop of 1893 did not yield enough profit to pay him a fair compensation for his actual services, and there was just about enough to pay Mrs. Parker's family expenses and the expenses of cultivating the crop. He has no recollection as to the continuance of the case of Sheffield & Co. v. Mrs. Parker more than once, and then it was for providential cause. It is not true that the price he paid for the property was less than the value of the emblements of 1893. Attached was a copy of the power of attorney executed by Mrs. Parker to J. C. Parker, May 16, 1891, both as executrix and individually rescinding power of attorney previously granted to Speer. This power of attorney to Parker was recorded May 18, 1891, and it empowered him to act as her attorney, both as executrix and individually.

Mrs. Parker and J. I. Howell, as heir of his deceased wife and as next friend of R. E. Parker, Mary J. Parker, and Mrs. Lou E. Speer, filed answers corroborating the answer of Speer; and the answer of Howell stated, among other things, that he and those he represented would prefer, for the preservation of the remainder estate, that the property should remain in the hands of Speer, because his wife was interested in said estate, and because during 1890, while Speer superintended the property for Mrs. Parker, it was well taken care of, and improved, and afterwards, when J. C. Parker became manager for Mrs. Parker, it got into a worse condition; and because Speer is a good business manager, prudent and careful, and financially entirely responsible.

The case was heard by the judge below on the petition, interventions, exhibits, answers, and evidence. He refused the injunction and receiver as prayed, to which decision plaintiffs excepted. Plaintiffs offered in evidence a suit filed in Sumter superior court in favor of J. I. Howell, next friend of R. E. Parker, E. C. Speer, and Mary J. Parker, against J. M. Green, L. G. Council, and J. O. McArthur, alleging that Barney Parker died in 1889, and by his will a large trust estate was left to R. E. Parker, Mary J. Parker, and Mrs. Parker; and it was directed that the income of said estate be applied to the support and education of R. E. and Mary J. Parker and the support of Mrs. Parker; that Mrs. Parker had sold her interest to Speer; that defendants, in September, 1893, had wilfully and fraudulently procured an attachment, and had it levied upon said trust estate, knowing that the same was a trust estate, and thus not subject to levy and sale; that the levy was excessive, and the levy on tenants' property caused them to leave the premises, and thus hindered Speer from collecting the rents and carrying out said trust, thus injuring and damaging petitioners in the sum stated. This was signed by E. C. Speer and others as attorneys. This testimony was insisted on by plaintiffs in rebuttal of defendants' answer contending that the estate was not a trust estate. The judge refused to admit it in evidence, and to this ruling, also, plaintiffs excepted.

The evidence introduced, briefly stated, was, for plaintiffs: The last will of Barney Parker. The deed from Mrs. Parker to Speer. An affidavit of Gen. Jackson. He was a tenant on the plantation of Mrs. Parker, and well acquainted with all the tenants on the place during 1893. There were 20 or 21 tenants on the place, renting land; and the rent cotton amounted to 53 bales of 500 pounds each. A number of these tenants rented mules from her, and others had stock of their own. The tenants owed her \$125 for mule rent during the year. She rented other land to tenants, amounting to \$87. The tenants on the place, during 1893, used 16 tons of guano they bought from her through her agent, J. C. Parker, in the spring of 1893. Also tax returns of Mrs. Parker, by E. C. Speer, agent, for 1890. The total return amounted to \$34,310. The land was valued at \$28,800; money, notes, and accounts at \$2,600; horses, mules, etc., \$1,906. Also tax returns of Mrs. Parker, by J. C. Parker, agent, for 1892. The total of this return was \$26,790. The land was valued at \$23,400; money, notes, and accounts at \$1,000; horses, mules, etc., at \$1,500. Also the inventory and appraisement of the property of the estate of Barney Parker, made July 31, 1889, showing its total value \$37,895. Also the tax returns of Speer for 1888, showing a total of \$210, and including no real estate. Also returns of Speer and Guice for the year 1888, showing a total of \$740. Also the returns of Speer for

1893, showing a total of \$30,780, including 4,550 acres of land at \$22,000; city property at \$5,900; horses, mules, etc., \$1,155; money, notes, and accounts, \$650. Also returns of E. C. Speer & Co., and E. C. Speer and L. J. Blalock, and E. C. Speer and J. C. Parker, for 1895, showing total of \$1,300, of which Speer and Parker returned \$800. Also returns of J. C. Parker for 1892, showing total of \$9,608. Also certificates of the tax collector of Sumter county, showing that J. C. Parker and Mrs. Melissa Parker were residents of that county for 1893, and gave in no property for taxation. Also affidavit in forma pauperis, made by Mrs. Melissa Parker, September 4, 1893, in the case of Sheffield & Co. against her; similar affidavits of her and J. C. Parker in the case of the Bank of Southwestern Georgia against them; complaint on notes, amounting to about \$450, made September 4, 1893. Also proceedings in four cases in the court of ordinary of Sumter county: (1) J. I. Howell, next friend of Robert Parker, against J. C. Parker, executor, and Melissa Parker, executrix, of Barney Parker. Petition for settlement, etc.; process, May 20, 1893; service, May 22, 1893; judgment, July 11, 1893, against defendants, and against them as testamentary guardians, for \$1,928.07. (2) Mary J. Parker against the same. Similar suit and judgment at the same time against defendants for \$1,101.57. (3) Chapman, guardian of Jennie B. Dorman, against the same. Judgment July 10, 1893, against defendants, for \$1,987.09. (4) J. I. Howell against the same. Judgment against defendants, July term, 1893, for \$382.92. Also affidavit of the ordinary, showing, among other things, that these suits were begun long before May 11, 1893, and were continued from term to term by the defendants until the July term of his court; that E. C. Speer and J. A. Ansley represented the defendants as attorneys in these cases during the whole of the litigation; and that Speer had full knowledge of the litigation, and of the fact that said suits were ripening into judgment, long prior to May 11, 1893. Also certificate of the judge of the county court of Sumter county to the correctness, etc., of the judgments of that court in favor of Sheffield & Co. against Mrs. Parker, and of the Bank of Southwestern Georgia against Mrs. Parker and J. C. Parker; and that Speer represented the defendants as attorney at law, etc., in each of said cases. Also a contract between Mrs. Parker and Speer, dated May 11, 1893, in substance as follows: "For a consideration, which has been fully paid off and discharged, it being for a valuable consideration, which has been fully paid off and discharged by the said Mrs. Melissa Parker to the said E. C. Speer," Speer bound himself, his heirs, etc., to support and maintain Mrs. Parker during her life, furnish her with a sufficiency of food and clothing, such as were suitable, proper, and fit for her in her condition and circumstances, furnish her with all necessary

medical attention, and pay for all proper doctor's bills, medicine, and nursing, and allow her to remain in the possession and enjoyment, free of any charge, of the house, yard, lot, and garden. This was signed and sealed by Speer, in the presence of the same persons who attested the deed from Mrs. Parker to Speer. Also deed from J. C. Parker to Speer, conveying 12 head of horses and mules, a buggy, wagons, cattle, hogs, 1,000 bushels of corn, 4,000 pounds of cotton, 1,000 pounds of hay, other personalty, 50 acres of cotton planted on the place Parker had that day sold to Speer, and all crops of corn planted on said land by Parker; Parker agreeing to take charge of all of said property as the agent of Speer, and manage the farm for Speer until January 1, 1894, beginning April 12, 1893; all in consideration of \$1,955. Also seven deeds from J. C. Parker to Speer, each dated April 11, 1893, duly executed, delivered, and recorded, conveying various pieces of plantation and other lands and town property, upon considerations amounting to \$10,675. Also deed from Speer to J. I. Howell to three-fourths of a half interest in 1,400 acres of land described (part of the property conveyed by J. C. Parker to Speer), for a consideration of \$1,225, dated May 29, 1893, duly executed, delivered, and recorded. The consideration in the deed from Parker to Speer to the same property was stated at \$1,850. Also affidavit of J. I. Howell: "I was in business with E. C. Speer & Co. during 1893, the firm being composed of Speer, Gulce, and myself. The firm bought the old Carter stock of shoes about March 20, 1893, paying about \$2,200 for the same, and borrowed part of the money from the Planters' Bank of Americus. We were equally interested in the business, and have never realized any profits out of it. The firm dissolved in August, 1893, and had then not paid back all the money borrowed for said purchase. I had had a settlement with Mrs. Parker, executrix, and J. C. Parker, executor, and guardians testamentary, prior to my judgment against them as to my deceased wife's interest in the Barney Parker estate. I think my claim amounted to \$1,275 against them. They were not under any bond for the faithful administration of said estate. I did not know that Speer was going to buy all the property of Mrs. Parker and J. C. Parker. The deed Speer made to me on May 29, 1893, in consideration of \$1,275, was in payment of my claim against Mrs. Parker and J. C. Parker." Also a deed from E. C. Speer to Cooper Dorman, as heir at law of Jennie B. Dorman, formerly Parker, conveying to Dorman 500 acres of land in Sumter county in settlement of an award made in the suit of Chapman, guardian of Jennie B. Dorman, against Mrs. Parker and J. C. Parker, executor and executrix and testamentary guardians, and of Chapman, guardian of Jennie B. Dorman, and Cooper Dorman, as heir at law of Jennie B. Dorman, against Mrs. Parker, J. C. Parker, and Speer,

in Sumter superior court. This deed was made December 6, 1893, and recited that it was in pursuance of said award, and for the consideration in said award expressed, as per the terms of said award. Also the affidavit of L. P. Dorman that the land last mentioned was part of the plantation formerly owned by J. C. Parker (conveyed by Parker to Speer, April 11, 1893). Also affidavit of W. P. Wallis and G. D. Wheatley: On May 23, 1893, Wheatley held an account against Mrs. Parker and J. C. Parker, executors, etc., for \$224.58. Wheatley and Wallis approached Parker about it, who told them he thought Speer would pay it; that Speer had bought Mrs. Parker's property, but he didn't know what Speer was to pay her for it; and that he was present when the sale was made and the deed was signed, with his mother and Speer, up town, in an office, but that it was all like a dream to him. Thereupon deponents went to see Mrs. Parker, and she told them the account was all right; that she wished she had the money to pay it; that Speer had bought all of her property, but hadn't paid her a cent for it; and that she sold her property because Ed. and Joe told her it was best. She thought that Ed. would pay the account, and gave deponents an order on said Speer. The same day deponents found Speer, and presented the order, and Speer refused in emphatic and harsh language to pay the same, saying that if Mrs. Parker thought he owed her anything she was an old fool, and crazy; that he owed her nothing. All this occurred May, 23, 1893. Affidavit of Sheffield, Wheatley, and others: For the past several years they have known Speer, and prior to the death of Barney Parker he was comparatively poor. Immediately thereafter he sold out, and abandoned his business on Forsyth street, in Americus, and since that date he has engaged in no business of a remunerative nature, as they are advised and believe and have observed, save as follows: During 1890 he superintended the valuable estate of Mrs. Parker, and his services for that year were reasonably worth \$600. Since 1890 he has read law, and been admitted to the bar, and since his admission his practice has been extremely meager. During 1893 he bought a lot of whisky and groceries, for which he paid \$300, and a second-hand lot of shoes. For that year he practically abandoned the practice of law. Outside of the above enumerated sources of income, they knew of no other that he has had since 1889, and from said sources he could not have saved anything like \$18,000. Also affidavit of Shaw that he sold the Carter stock of shoes to Speer & Co., March 17, 1893, and received \$2,158.45, which they paid with check on the Planters' Bank of Americus. Also the affidavit of the cashier of that bank that the following is a correct abstract of Speer's dealings with it during 1893: January 23d he borrowed \$330, due September 23d, and May 23d, \$100, due October 15th, which sums were paid back at

various dates from April 17th, to October 26th. Mrs. Parker and J. C. Parker, on January 30, 1893, borrowed \$745.17, due November 1, 1893, and it has not been paid. E. C. Speer & Co., about March 20, 1893, borrowed \$1,545, and June 26, \$943.76, and the same has been paid in several different payments. Also affidavit of the assistant cashier of the Bank of Commerce that it had no dealings with Speer from January 1 to October 1, 1893, save that he was indorser on two notes, one for \$100 and one for \$27. Also affidavit of the assistant cashier of the Bank of Southwestern Georgia that it owed Speer nothing during 1893, and Speer owed it nothing during that year; and that Speer applied for a loan of \$200, which was refused, July 6, 1893. Also affidavit of the cashier of the People's National Bank of Americus that Speer did not borrow any money from January 1 to October 1, 1893, nor did Speer & Co.; and that Speer at one time had about \$125 to his credit during that year, which was all the transaction he had with the bank. Also affidavit of the assistant cashier of the Bank of Sumter that that bank had no dealings whatever with Speer during 1893. Also affidavit of a salesman of Sheffield & Co. during 1890, 1891, and 1892 that he sold Speer goods, as agent for Mrs. Parker, on the account sued upon, up to May 11, 1891, both by order and person. Also orders signed by E. C. Speer, agent, for various articles of hardware, at various dates in 1891, up to May 10, 1891. Also the power of attorney from Mrs. Parker to J. C. Parker, hereinbefore mentioned. Also the affidavit of W. B. F. Oliver: He is justice of the peace. On the night of May 11, 1893, Joe Parker carried him to his home, a mile and a quarter from Americus, and he, Speer, and J. A. Ansley took supper with Parker, after which Ansley did some writing; that about 11 o'clock they went to the home of Melissa Parker, and when they arrived she had retired, and they woke her up. Before she came in the room where deponent was, Speer said he wanted deponent to witness a deed from Mrs. Parker to himself to the property out there. When she came into the room the deed was not read over to her. There was no consideration offered. There was nothing said about the contents or consideration of the deed. There were no notes signed, no money passed, nor anything said during the whole transaction as to how she was to be paid for the property. She was merely shown where to sign her name. Immediately afterwards deponent returned to Americus, about a mile and a quarter away, arriving there between 12 and 1 o'clock. He is well acquainted with the plantation owned by Barney Parker during his life, and it is a very valuable farm. Also affidavit of W. J. Mauk: On October 23, 1893, he was requested by J. A. Hixon, attorney for plaintiff in the case of Sheffield & Co. against Mrs. Parker and Speer, and J. F. Watson, attorney for plaintiff in the case of Chapman, guard-

lan, against Mrs. Parker and others, to go with them to the home of Mrs. Parker, to do stenographic work in getting affidavits, etc., in said cases. Hixon and Watson applied, in deponent's presence, to Speer and Ansley, attorneys for Mrs. Parker in said cases, to go with them to see her, and both refused. Hixon and Watson insisted on one of them going, on the ground that she was a lady, their client, and mother-in-law to Speer. Both still refused, Speer urging as a reason that he had a sick child, and could not leave town. When Hixon insisted that Robert Parker, son of Mrs. Parker, go with them, that proposition also was refused, and Hixon and Watson replied that they and deponent would go out there, and see Mrs. Parker, provided there was any male member of the family at home; but would not attempt to get an affidavit unless some male member of the family were present. When they arrived, they stopped at some distance from the house, and sent in to ascertain if any male member of the family was at home, when Speer and one Tom Gulce in great haste drove up, and requested to be allowed to pass, in an abrupt and extremely discourteous manner. As they passed, Hixon and Watson asked Speer why he had changed his mind so quickly, when he made no reply. Hixon then asked him what he meant by his conduct, and if he meant to refuse to allow them to see Mrs. Parker, and request an affidavit of her, and Speer replied, "These are my premises; you may come, if you will," whereupon deponent, Hixon, and Watson returned without seeing Mrs. Parker. The conduct and manner of Speer on said occasion towards Hixon and Watson was abrupt and discourteous in the extreme, to the extent of amounting to forbidding and repulsion. Also so much of the original petition in the case of Chapman, guardian for Dorman, against Speer, J. C. Parker, and Mrs. Parker, as was to the effect that defendants had schemed, connived, and traded together and overreached Mrs. Parker, and agreed between themselves that J. C. Parker and Mrs. Parker should sell all of their property to Speer during April and May, 1893, for the purpose of delaying, defrauding, and defeating the creditors of Parker and Mrs. Parker individually and as testamentary representatives of Barney Parker. The allegation in the petition of the total insolvency of Speer, exclusive of the property he had thus obtained; and the affidavit of Chapman, attached to the petition, that the facts therein stated were true.

Defendants put in evidence the affidavit of Early Dozier: He was a tenant on the Barney Parker place when the latter died, and has been ever since. During 1890, Speer managed the life estate of Mrs. Parker; was a good business man; easy to get along with; and all the tenants on the place liked him, because he kept the accounts correct, and was a close business man, and never gave the hands any trouble in settlements. All the

hands much preferred him to manage the estate, and when he left the estate it was in much better fix than when he found it. The articles charged in the bill of particulars did not go to the upbuilding of the place, but said goods were bought by Parker, agent, for the tenants, and which were charged to the tenants, and which they paid Parker for. Also similar affidavit of Isaiah Scott, except as to the goods having been bought by Parker, and as to their not going to the upbuilding of the place. Also affidavit of Mose Henderson: He was a tenant on the Mrs. Parker place during 1893. He contracted with J. C. Parker, her agent, and J. C. Parker promised to furnish supplies as he had done before. He failed to furnish the supplies, saying he could not get the money, for which reason deponent was about to abandon the crop, when Speer bought the place. Speer furnished deponent, as well as several other tenants, with some things to run their crops with. During 1890, Speer was agent of Mrs. Parker, and ran the place. He had a great many improvements made, and put the mills and gin in good order. Had a number of hands a long time, at a dollar a day, in doing the work. Deponent has had a good deal of experience in repairing mills, and thinks that the cost of repairing the mills and gin was a large sum. From 1890 to the spring of 1893, Speer had nothing to do with the place. Also affidavit of Steve Barlow, another tenant on the land, similar to the affidavit of Henderson, except as to what Speer did upon the place in 1890. Also affidavits of two millwrights: Speer agent, hired them in 1890 to repair the Parker mills, which were in great need of it, and had shut down by reason of the same; and they worked a long time for him on the mills at two dollars a day and board; labor being high at that time. Had the mills been run successfully, it would have taken 18 months to have paid for said repairs. Also affidavit of J. I. Howell: Is well acquainted with the life estate. For several years past the farming interest has been allowed to run down. The life tenant is old and feeble, and the estate liable to terminate at any day. Most of the personalty left by Barney Parker has been sold by the executor and executrix, and there was very little left in the spring of 1893, by reason of which facts \$2,000 at that time was a reasonable price, he thinks, for the life estate. He would not have given that much for it. He was spoken to in reference to the purchase of it, but did not consider it of any great value, and, besides, having his property invested otherwise, was not in a condition to buy. In 1892, Speer paid him \$400 for necessities, which had been bought by J. C. Parker, agent. Speer is solvent, and able to respond in damages. He has found him careful and honest in business. Speer owes but little to the amount of his property. He feels safe in saying that Speer is worth ten or eleven thousand dollars, inside of the property he bought from Mrs. Parker and of the

Barney Parker estate. He is satisfied Speer will improve the life estate, which is a question of much interest to the remainder-men. It would be much to their detriment to have the estate put in the hands of a receiver. Also affidavit of W. B. F. Oliver: It is not true that he was waked up to go out and witness the deed from Mrs. Parker to Speer. Some time during the day, Speer asked him if he could go out to Mrs. Parker's; that they would be ready to go in an hour or two; and about sundown he started out to J. C. Parker's, who lives about 200 yards this side of his mother's, just outside the limits of Americus. Some time after getting there, they ate supper. After supper, they talked pleasantly, and fixed up papers. J. C. Parker was Mrs. Parker's agent, and they went up to Mrs. Parker's house. It is nothing unusual for deponent to be asked to attest deeds. If the deed was read over to Mrs. Parker, he did not see it, or hear it. He is in reasonably good health. Also affidavit of Gen. Jackson: The affidavit he gave plaintiffs was not read by him, or in his presence. He does not know what the rents were worth on the place for 1893, nor whether the tenants have paid the rents, nor to whom they paid, of his own knowledge. The articles in the bill of particulars were not used for upbuilding the estate, but were used and consumed by the tenants. He has known Speer a long time, and Speer is a good business man, and easy to get along with the tenants. Speer gave his personal attention to the place during 1893, and furnished supplies to the tenants. If he had not done so, most of the hands would have quit the place. Mrs. Parker and J. C. Parker had refused to run the tenants, saying they were not able. Also affidavit of J. C. Matthews: Speer is a good business manager, and prudent and careful in all his dealings. Also affidavits of B. W. Bagley: Has known Speer a long time to be a shrewd, energetic business man. He used to sell Speer & Guice goods. They always discounted their bills, and Speer made money rapidly while in business. Speer is worth \$15,000 over his liabilities, and is able to respond in damages. Also affidavit of Tom Guice: He was in business with Speer from 1888-89, until Barney Parker died, and Speer was worth at least \$2,000; thinks he was worth more, because he borrowed money from Speer afterwards, and had real estate dealings with him, and made some money. Always found Speer to be honorable, discreet, sober, and a good business manager. Speer bought and kept books for the firm, and he always found them correct. Deponent has been on the Parker place while Speer was manager. Everything seemed to flourish, and the tenants expressed themselves as well satisfied. Also affidavit of Mims: Has known Speer seven or eight years, and has had business transactions with him. Several years ago had a note against Speer for \$1,800, and discounted it at the bank. Thinks Speer worth more now than then.

Also affidavit of J. A. Ansley: He thought the request of Hixon and Watson to go to Mrs. Parker's with them to get affidavit an unreasonable one, and so told them. Has been practicing law about 25 years, and this was the first time he had ever been requested by counsel to go with them to get an affidavit from his client. In this case they had waived discovery, and he did not know and had never heard of any law requiring of him such duty. Requested counsel to take her interrogatories, and they did not seem to desire to do it. He did not feel that the rules of politeness required him to go. At that time he was sole counsel of defendant, except Speer, who was a party. He advised Speer not to go, and also advised him to go out and tell Mrs. Parker her legal rights; that she was under no obligation to give any affidavit, inasmuch as the lawyers, justice of the peace, and stenographer had gone to see her, and she in feeble health, etc. The petition had just been filed, and deponent had not consulted with her since it had been filed. Also affidavit of Speer: All such charges as those contained in the affidavit of Huntington, Council et al. are without any foundation. He is advised and believes that the affidavit was prepared by plaintiffs' attorney. He was a young lawyer, but from the March term of the county court, 1892, to April term, 1893, he had 24 cases; and plaintiffs' counsel, who had been practicing law long before he had, had only 26. In the quarterly county court he had more cases than plaintiffs' counsel, and he had more mortgage executions issued than plaintiffs' counsel. In the superior court he had represented 42 cases, and plaintiffs' counsel only 47. At Barney Parker's death he had \$2,300, realized from the firm of Speer & Guice, and some other money. His wife had some property in Americus her father had given her, and some store property left her by her father's will, all of which had been rented out since at fair price. Since, he has invested all his money in realty that has been paying good rent. His home expenses have not exceeded \$20 per month since Barney Parker's death. Up to 20 months ago he lived in the country, where his expenses were not anything to amount to anything. Never kept a servant, save when his wife was sick. Has made several real-estate trades, and in one made nearly \$500 in possibly less than a month. Has made numerous others with good profits. Has invested his money and his wife's in paying real estate. For a long time he got \$115 per month for realty mentioned in the affidavit. He made \$75 per month during 1890, as agent for Mrs. Parker. He was urged by the heirs of the Parker estate to quit his mercantile business and attend to the estate. Only accepted it with the view of protecting the estate and preserving the interest of his wife and other heirs. In the fall of 1889 the ordinary allowed him and J. C. Parker five or six hundred dollars for extra services, and, besides,

deponent got all the commissions, amounting to possibly \$1,200 or \$1,500. During the fall of 1892 he made \$800 or \$1,000 in trades and investments, besides other little trades. He makes all the money he can, and lives close. Thus he has made what he has "without any thought of defeating others of their just rights. He bought the property from Mrs. Parker to collect just accounts that she owed himself and wife." Gen. Jackson owed \$80 for rent, \$42 for supplies, and \$26 for guano for 1893, and deponent has not been able to collect but \$67.15. Did not act as agent for Mrs. Parker longer than 1891. She did not get another agent immediately. Deponent furnished in the spring of 1891 some supplies to the tenants on the place on his own hook. As to the orders that have been exhibited with his name signed to them as agent, and for the goods he bought himself for the tenants, he told plaintiffs to furnish a statement of the same, and that he would pay for all the goods he bought. Also affidavit of J. C. Parker: The life estate of Mrs. Parker, left her under the will, consisted of 3,637 acres of land, 16 or 18 horses and mules, 20 cattle, farming implements, wagons, buggies, etc., 107 bushels of corn, 400 bundles of fodder, and no provisions. The other personalty was sold as the estate of Barney Parker. The property she got was not worth over \$3,000. The horses and mules were old; other property well worn, and land poor, except four-horse farm around the house. The place has been let out to tenants for about 50 bales of cotton, some of which was not collected. Cotton was low-priced. Deponent managed the place from 1891 until Speer bought. Mrs. Parker's family consisted of Mary J., Jennie B., R. E., and T. Granberry Parker, and Miss Whitehead. Was very extravagant, and lived much beyond the net income of the estate,—instances of extravagance being detailed. All the provisions on the place at Barney Parker's death were consumed by the family. The mills were badly dilapidated, and shut down part of the time for want of repairs, and, with the ginnery, have not paid expenses since Barney Parker's death. The articles furnished in plaintiffs' bill were sold to hands, and none went into enhancing the value of the property. The income of the estate was inadequate to meet such extravagant expenses as those of Mrs. Parker, and thus she became involved in debt. She only turned Speer off as agent in 1891. Deponent thinks Speer objected to her extravagance, and that Speer wanted to protect his wife's interest in the estate, as well as others. Deponent, as agent of Mrs. Parker, employed Col. Hollis to assist him in making a settlement with Speer, and found everything correct except a small amount, which Speer corrected immediately. Speer managed the estate discreetly, and kept it in a good state of preservation, in spite of the extravagance. Deponent retained Speer as an attorney for the estate after he was admitted to the bar.

Speer gave him good advice. Speer has been very indulgent with Mrs. Parker and other members of the family since Barney Parker's death. For some months after Barney Parker's death, papers, money, etc., were locked up in the safe, during which time Speer furnished some \$500 or more. Speer is worth \$10,000 or more above exemptions and liabilities. Has often gotten money from Speer for the purpose of paying off hands. Speer stood Mrs. Parker's security to get money to run the place, and some of the money is not yet paid back. He paid J. I. Howell \$400 for necessities furnished Mrs. Parker. Mrs. Parker owed Speer's wife for money coming to her out of Parker's estate, and sold the place to Speer to pay him and his wife. It is impossible for Mrs. Parker to live but a short while. Speer gave a fair price, is now supporting Mrs. Parker and her children, and has been ever since the sale. Deponent thinks she owes Speer and his wife more than the price paid for the lands. The deed was not made at midnight. They talked the matter over, and agreed upon the price, and some time during the evening asked Justice Oliver to go out and witness the deed. All took supper at deponent's. After supper, Judge Ansley wrote the deed, and read it over in the presence of deponent, Speer, and Oliver, after which they went to Mrs. Parker's. She had not gone to bed. Judge Ansley read the deed over to her, and it was executed in deponent's presence. As soon as Speer bought the place, he went into possession of it, and has been ever since. There were then no supplies on the place, and tenants were threatening to leave. Speer furnished the tenants supplies to enable them to make the crops.

Fort & Watson, W. P. Wallis, and Cutts & Hixon, for plaintiffs in error. E. C. Speer, Ansley & Ansley, and L. J. Blalock, for defendants in error.

PER CURIAM. Judgment affirmed.

(91 Va. 473)

SHIPMAN v. FLETCHER.¹

(Supreme Court of Appeals of Virginia. June 13, 1895.)²

EQUITY—REPORTS OF COMMISSIONER—REVIEW BY TRIAL COURT—ACCOUNTING BETWEEN PARTNERS—DECREE—CORRECTION.

1. When alleged errors in the report of a commissioner in chancery are brought to the attention of the court, it is the duty of the court to examine the evidence and review the conclusions of the commissioner.

2. Where the evidence before the commissioner in chancery is conflicting, the court will review the evidence, and if not satisfied will overrule the findings of the commissioner.

3. Where the accounts of a partnership

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

² Rehearing denied.

were complicated, so that absolute accuracy in their settlement was impossible, and the court reached the decision very nearly the same as that reached by experts selected by the parties, the judgment will not be disturbed.

4. Code 1887, § 3451, providing for the correction of errors in decrees rendered by default, and also in litigated cases, does not permit the court, after a final decree had been entered on the report of a commissioner in chancery at the instance of the commissioner, to correct the decree because of a mistake of the commissioner in omitting an item in the accounting.

Appeal from circuit court of city of Alexandria; James Keith, Judge.

Bill by John J. Shipman against William Fletcher for an accounting. From the decree, John J. Shipman appeals. Affirmed.

W. Willoughby and John W. Daniel, for appellant. Edmund Burke, A. W. Armstrong, Staples & Munford, and Moore & Son, for appellee.

RIELY, J. This is the sequel of the case of Shipman v. Fletcher, reported in 82 Va. 601, and in 83 Va. 349, 2 S. E. 198. By the first decision made by this court (82 Va. 601), the award of John A. Baker and F. L. Moore, to whose arbitration William Fletcher and John J. Shipman had submitted all matters of indebtedness between them except such as arose from the work done by them on the James Creek canal, was set aside and annulled, and the matters embraced by the arbitration directed to be referred by the circuit court to one of its commissioners in chancery for account and report. While the appeal assailing the validity of the award was pending in this court, an account was taken and settled, and report thereof made to the circuit court, by a special commissioner appointed by it for the purpose, of the matters of indebtedness between Shipman and Fletcher growing out of the James Creek canal contract. In taking and settling this account, the commissioner excluded from consideration all matters embraced in the arbitration, because they had been adjudicated and were covered by the award. The second appeal was taken from the decree of the circuit court confirming the report of the special commissioner, and was based on the ground that the commissioner had erred in not considering and embracing in his settlement all the partnership transactions between the parties, which were alleged to be so connected and related as to cause injustice if settled separately. By the decision of this court on this appeal (83 Va. 349, 2 S. E. 198), the decree of the circuit court, confirming the report of the special commissioner, was reversed, and an account directed to be taken of all of said matters, as well those embraced in the arbitration as those relating to the work done under the contract for the James Creek canal. In pursuance of these mandates of this court, the circuit court, by its two decrees of March 21, 1887, and June 2, 1887, appointed John S.

Fowler a special commissioner to state and settle and make report of all of said matters between John J. Shipman and William Fletcher. The commissioner, upon such settlement, brought William Fletcher in debt to John J. Shipman in the sum of \$14,457.28, with interest thereon from April 1, 1876. To his report, 18 exceptions were taken by John J. Shipman and 55 by William Fletcher. Some of the exceptions of each party were sustained and the others overruled by the court, and the commissioner directed to reform his report in accordance with the rulings of the court. His report, when reformed, brought John J. Shipman in debt to William Fletcher in the sum of \$500.33 with interest from April 1, 1877. To the reformed report, the plaintiff, John J. Shipman, filed 30 exceptions, and the defendant, William Fletcher, filed 6. A part of these exceptions were sustained, and the others overruled. After giving the credits and making the deductions made necessary by the disposition by the court of the exceptions, a balance of \$828.88, with interest thereon from April 1, 1887, was ascertained to be due from John J. Shipman to William Fletcher, and for this sum and the costs of the suit a decree was entered by the court in favor of William Fletcher against John J. Shipman. To this decree John J. Shipman obtained an appeal from this court. The account settled and returned by Commissioner Fowler was made up, not only from the books and papers produced before him by the parties, but also from the depositions of witnesses. Much of the testimony of the witnesses is very conflicting and eminently unsatisfactory. It was earnestly argued, and pressed with much force upon the attention and consideration of the court, that, the matters which the commissioner was called to pass upon and settle being matters of fact, the court should have accepted his findings as conclusive, overruled the exceptions taken to his report, and confirmed it, and decreed according to the indebtedness ascertained by the commissioner. This argument involves the consideration of the office of a commissioner in chancery, and the weight and effect to be given by the court to his report.

In a suit in equity, unlike an action at law, matters of fact as well as questions of law are by the constitution and immemorial practice of the court determined and adjudicated by it. It is impracticable for the chancellor to investigate the matters of fact arising in a cause, and take the testimony to that end, to state and settle the necessary accounts, which are often very complicated, to ascertain and classify the liens upon property, and to perform other functions of a similar nature necessary to the proper adjudication of the matters of law and fact arising in the varied and important litigation which pertains to its jurisdiction. Commissioners in chancery are appointed to assist

the chancellor, and to relieve him in a large measure of these and other duties incidental to the progress and determination of the cause. For this reason they have been aptly termed the "arms of the court." But from the very necessity of their appointment and the nature of their office, their work is subject to the review of the court. It may accept it or reject it, in whole or in part, as its judgment upon such review may dictate, whether it be of law or fact. Commissioners are to assist the court, not to supplant it. There is a wide difference between the trial and decision of a suit in equity and of an action at law. In the former, the court finds and decides upon both the facts and the law; while in the latter the jury are the triors of the facts, and the court expounds the law. There is no proper likeness between the report of a commissioner upon matters of fact and the verdict of a jury. In an action at law jurors are, under the law, the judges of the facts, and where the testimony is conflicting their verdict is conclusive. They are not in any sense the agents or assistants of a court of law, but perform within their appointed sphere a principal function of judicial trial. The court has a limited revisory power over their action, and may within certain limits set aside their verdict and award a new trial, but cannot find the facts. The facts are within the domain of the jury, and the court may not intrench upon it. But not so with the commissioners of a court of equity. They are its assistants, and their work is subject to the absolute review of the power they are appointed to assist. A court of equity cannot abdicate its authority or powers, nor confide or surrender absolutely to any one the performance of any of its judicial functions. It may rightfully avail itself of the eyes and arms of its assistants in the proper preparation for judicial determination of the many complicated, difficult, and intricate matters upon which its judgment is invoked, but in it resides the authority, and to it solely belongs the responsibility, to adjudicate them. In it remains the right to form its own conclusions from the results laid before it by its commissioners, and to pronounce its own judgments. Their entire work is subject to its review, consideration, and judgment, and it is in no wise precluded from doing so by their findings or conclusions. There is no propriety, therefore, as is frequently claimed should be done, in holding that, where the evidence is conflicting, the report of a commissioner in chancery is entitled to the same weight, and should be given the same effect, as the verdict of a jury. While the court possesses this absolute power of review, it is the practice to accept the report as *prima facie* correct, and to adopt it unless there is dissatisfaction with the report, and the dissatisfaction is expressed in the form of exceptions filed to it. 2 Rob. Old Prac. 383; *Peters v. Neville*,

26 Grat. 549, 559; *Oralle v. Oralle*, 84 Va. 198, 201, 6 S. E. 12; *Bank v. Sprague*, 23 N. J. Eq. 81; *Van Ness v. Van Ness*, 32 N. J. Eq. 670. The alleged errors must in this way be brought to the attention of the court. When this is done, it is both the province and the duty of the court to examine the evidence and review the conclusions of its commissioner, provided the evidence on which his conclusions are based is returned with his report, or the proper steps are taken to put it before the court. *Jaques v. Methodist Episcopal Church*, 2 Johns. Ch. 543; *Jackson v. Jackson's Ex'r*, 3 N. J. Eq. 96. The court is presumed to be more competent to pass upon the evidence and draw correct conclusions from it than the commissioner. Where the testimony of the witnesses is not taken by the commissioner or in his presence, the same avenues to the truth and to the right are open to the court as to the commissioner. All the evidence is in writing, and the court, by special training, learning, and experience, is better qualified to analyze, discriminate, and weigh it, and draw correct conclusions from it, than the commissioner, who is frequently neither a lawyer, nor a skilled accountant. When the evidence consists of the depositions of witnesses, and they are taken by the commissioner or in his presence, he would have the advantage of noting the demeanor of the witnesses and their manner of testifying, which is important in judging of their credibility and the weight to be attached to their evidence when they contradict each other. When, therefore, the commissioner has seen and examined the witnesses, and the testimony is conflicting, and his conclusions are clearly supported by competent and unimpeached witnesses, the court will not set aside or disturb his report, unless the weight of the testimony which is contrary to his conclusions is such, on account of the number of the witnesses and the nature of their evidence, as to make it clear that the commissioner has erred. *Haulenbeck v. Cronkright*, 23 N. J. Eq. 409; *Clark v. Condit*, 21 N. J. Eq. 322. But even in such case the court will review and weigh the evidence, and if not satisfied that the commissioner has reached a right conclusion, will overrule his finding. *Holmes v. Holmes*, 18 N. J. Eq. 141; *Boyd v. Gunnison*, 14 W. Va. 1. These views of the office of a commissioner in chancery, and of the weight and effect to be given to his report, seem to us in accordance with right, and best calculated to attain the ends of justice,—to be in accordance with the high and responsible duties of the chancellor, and with the special duties of the commissioner. They are also in accord with the decisions of courts of the highest respectability, and of the greatest weight and influence. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Worrall's Appeal*, 110 Pa. St. 349, 362, 1 Atl. 380, 765; *Boyd v. Gunnison*, 14 W. Va. 1; *Handy v. Scott*, 26 W. Va.

710; *Smith v. Yoke*, 27 W. Va. 639; 2 Bart. Ch. Prac. 656. In *Kimberly v. Arms*, supra, Justice Field, in delivering the opinion of the court, said: "The information which he [a master in chancery] may communicate by his findings in such cases, upon the evidence presented to him, is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence. * * * It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers." In *Holmes v. Holmes*, supra, in considering the finding of its commissioner upon a question of fact where the evidence was very conflicting, the chancellor said: "Did the master arrive at a correct conclusion from the evidence? To determine this, it is necessary to review and weigh the evidence. For this reason, the master's report is entitled to no special consideration beyond the soundness of his reasoning, and the advantage of seeing the demeanor of the witnesses while examined, which is of importance in judging of their credibility when they contradict each other. But the report has not the position of a verdict on a motion for a new trial in courts of law. That will not be set aside merely because the court would have come to a different conclusion from the evidence." And the chancellor in that case, while admitting that the testimony in regard to the matter under consideration was "painfully conflicting," reviewed it and arrived at a result which he expressed to be entirely satisfactory to himself, and yet different from that reached by the master.

Counsel for the appellant in the brief, and especially in the oral argument, in support of their contention that the report of a commissioner, where the evidence is conflicting, is to be accepted as conclusive, cited and relied on several cases decided by this court. We have been at the pains of examining and considering not only such as were cited, but all others that could be found bearing on the question under discussion. We are not certain that they were intended to lay down a different rule as to the weight to be given to the report of a commissioner than we have above indicated, but, if so, we have no hesitation in qualifying it in accordance with the views we have herein expressed. The question in the original case of *Bowers' Adm'r v. Bowers*, 29 Grat. 697, to which all the other cases refer, was not what weight or effect should be given to the report of a commissioner in chancery, but whether an attorney could act as such commissioner in a suit in which he was of counsel. It was rightly and wisely decided that he could not. The commissioner, like the judge, must be wholly disinterested. He must be free from all suspicion of interest or liability to

bias. In discussing the importance of the office of commissioner in chancery, and the responsible duties often devolving upon him, the learned judge who delivered the opinion of the court, by way of illustrating and enforcing how necessary it was that the commissioner should be wholly impartial, said: "He is confronted with the witnesses. He sees their deportment, their manner of testifying, their capacity for recalling and accurately detailing past occurrences; whereas the court, which only sees the testimony on paper, is denied the opportunity of applying these obvious tests of accuracy and fidelity. When, therefore, a question of fact is referred to a commissioner, depending upon the testimony of witnesses conflicting in their statements and differing in their recollection, the court must, of necessity, adopt his report, unless in a case of palpable error or mistake." We do not understand that it was here intended to declare or prescribe a rule by which courts should be guided in dealing with the report of a commissioner. It is obvious from the language used that it was not intended to declare that the report should be conclusive, because of conflict in the testimony, in a case where the testimony was not taken by the commissioner, nor the witnesses seen by him when giving their testimony; for in such case he, as well as the court, only sees the testimony on paper, and the court has equal opportunity with him of judging of the credibility of the witnesses. Yet the statement relied on for the contention of the counsel of the appellant is without qualification. If the court had intended, in the case cited, to declare a rule of such broad application as is claimed by them, that the report of the commissioner must be accepted as conclusive when the testimony is conflicting, then, out of regard for consistency, it would at least have limited it to cases where the commissioner personally examined the witnesses or saw them when testifying. But the court did not mean to declare or prescribe any rule. Whether the report was to be accepted as conclusive in all cases of conflict of testimony, or in what cases of conflict of testimony the court should not interfere with it, or whether the court should not in all cases examine and weigh the testimony to test the correctness of the conclusions of the commissioner, was not the question there involved, nor the subject of the decision. That was not in the mind of the court, or the learned judge who delivered the opinion. It was merely a general statement, to illustrate the dignity and importance of the office of commissioner in chancery, from which we do not mean, by anything stated in this opinion, in any wise to detract. We do not, therefore, think that the case of *Bowers' Adm'r v. Bowers*, supra, is authority for the rule contended for. The statement there made, which it is attempted to give such

general application, may possibly have been so applied in the subsequent cases (*Stuart v. Hendricks*, 80 Va. 601; *Jones v. Degge*, 84 Va. 685, 5 S. E. 799; *Porter v. Young*, 85 Va. 49, 6 S. E. 803; *Robinson v. Allen*, 85 Va. 721, 8 S. E. 835; *Bowden v. Parrish*, 86 Va. 67, 9 S. E. 616; *Armentrout v. Shafer*, 89 Va. 566, 16 S. E. 726; *Magarity v. Succop's Adm'r*, 90 Va. 561, 19 S. E. 260; and *Moore v. Butler*, 90 Va. 683, 19 S. E. 850) in which it is quoted for such rule. Apparently this is true. It is not, however, wholly clear. But, if it was intended in these cases to lay down a rule so general and of such broad application as contended for, we are well satisfied from the reports of this court that it is contrary to the practice in chancery prevailing prior thereto, and is calculated to work injustice. It would be giving too great weight to the findings of the commissioner, and supplant the authority of the court. So, if the cases referred to were intended to prescribe so broad a rule, we would be constrained to withhold our assent from it, and return to the long-established practice in this state,—that the report of a commissioner is always subject to review by the court, and only to be accepted as conclusive, when the testimony, though conflicting, is evenly balanced, and the report is supported by the testimony of competent and unimpeached witnesses.

A different rule, such as was contended for by the counsel of the appellant, would be a convenient one, save the court from much labor, and often relieve it of an arduous and irksome task, but it would be inconsistent with our views of the nature of the office of chancellor, and his duty, and of the office of a commissioner in chancery, and might and often would defeat the right. The commissioners in this state are generally lawyers or other competent men, who are both skilled accountants and also capable of weighing testimony and drawing correct conclusions from it, but it is nevertheless true that there are some communities where it is not always practicable to appoint to the office capable and proper men. We cannot concede, therefore, that, because the testimony in the case at bar is conflicting, the judge of the circuit court erred in not accepting the report of the commissioner, but considered the exceptions to it, examined the evidence, and reached a conclusion adverse to the finding of the commissioner. A great part of the testimony was taken before the appointment of the commissioner, and before he had any connection with the case. He had no opportunity to see those witnesses or to observe their manner of testifying. He thus possessed no advantage over the judge of the court in judging of their testimony and the conclusions to be drawn from it. The record shows that the reports of the commissioner were not acted upon during the session of the court, when, on account of the pressure of business and

the limited time available for their consideration, the examination would have necessarily been imperfect, but that, on the return of each report, the cause was taken by the judge for decision and decree in vacation, that he might have ample opportunity to consider fully and carefully the matters in controversy, and to decide them after mature deliberation. His action, in disposing of the many exceptions taken by the plaintiff and defendant, respectively, to the original and reformed reports, aggregating 109, evinces, as disclosed by his decrees, great care and pains. Some of the exceptions were wholly sustained, and others wholly overruled, while others were sustained in part and overruled in part, and the parts sustained or overruled particularly specified, thus manifesting the great labor bestowed on their consideration, the minuteness of his examination, and the thoroughness of his action. And it was the work of a judge of long and wide experience on the bench, and eminent for his learning and ability. The result of his labors, as heretofore stated, was to bring John J. Shipman in debt to William Fletcher in the sum of \$828.88, with interest thereon from April 1, 1877.

The partnership between the parties began about October 1, 1874, and the work on the Canal road contract, out of which has mainly arisen the matters in dispute, was completed early in the year 1876. Within a short time thereafter, in February, 1876, John J. Shipman employed a Mr. Lawrence, an accountant, to make up an account of the transactions relating to the said work, which is referred to in the record as the "Lawrence Balance Sheet"; and this account, together with the partnership books and papers, was submitted to John A. Baker and James Dalley, who were selected by Shipman and Fletcher, respectively, to make a settlement between the partners. These referees, with the aid of the clerks, Murray and Pettis, settled and balanced the accounts, and found that Fletcher was indebted to Shipman in the sum of \$5,000 in bonds of the District of Columbia. This indebtedness was discharged by Fletcher. Shipman having sometime thereafter expressed his dissatisfaction with the result of the settlement, he and Fletcher, on February 7, 1877, submitted all matters between them, except those connected with the work on the James Creek canal, to the arbitration of F. L. Moore and the said John A. Baker, who, with the assistance of two expert accountants,—one of them, John Morris, being selected by Shipman, and the other, John W. Daniel, by the arbitrators,—made a settlement of the said matters, and ascertained that Shipman owed Fletcher the sum of \$1,291.96. This award, as has been already stated, was set aside by this court. It was not set aside because the balance found to be due was erroneous, for its correctness was not considered, but solely for misconduct on the

part of the arbitrators. In December, 1877, a settlement was made by Pettis, the clerk, and a Mr. Rector, who had been employed by Shipman for the purpose, of the transactions pertaining to the James Creek canal contract, and they found that Shipman owed Fletcher \$42.80, for which Shipman gave an order in favor of Fletcher in payment, "in accordance with the settlement made by Pettis and Rector, December 8, 1877." These settlements were made when the transactions to which they relate were fresh in the memory of the partners and of their clerks. They were made, too, when the partnership book in which the transactions were kept was in existence, and before the arbitrators and persons who made the settlements. It was afterwards, and before Commissioner Fowler had aught to do with the case, lost or abstracted, about which there has been much crimination and recrimination. How or by whom it was taken it is unnecessary to discuss. The partnership matters embraced countless transactions, and involved nearly a quarter of a million of dollars. Out of any given number of accountants undertaking to adjust them, it may be safely affirmed that no two of them would deduce from the mass of materials furnished by the record the same result. The settlements aforesaid are referred to for the purpose of showing how nearly they, in the general result, and the decree of the court approximate to each other. It is asserted in the petition for the appeal, and perhaps truly, that "the accounts are of the most complicated character that ever came before a court,"—so complicated that "absolute accuracy was impossible." The approximation between the result of the settlements adverted to and the indebtedness found by the court, differing only a few hundred dollars, is, therefore, all the more remarkable. The settlements, considering all the circumstances, when and by whom they were made, and that the original book of the partnership was then in existence, are strongly persuasive—certainly until the contrary is shown—that the amount decreed by the court is right, or, at least, that it is not to the prejudice of the appellant. The judgment of a court of competent jurisdiction is justly entitled to great weight. It is always presumed to be right until the contrary is shown. An appellate court will not overturn it unless satisfied that it is wrong. It devolves on the party complaining to show error, and to satisfy the appellate court that the judgment or decree complained of is wrong. *Mayor, etc., of Beverly v. Attorney General*, 6 H. L. Cas. 310, 332, 333; *Harman v. City of Lynchburg*, 33 Grat. 37; *Hill v. Woodward*, 78 Va. 765, 771; *Broom, Leg. Max. marg. p. 911*.

The controversy here is mainly over disputed items in the controverted transactions between the parties. It is impracticable to discuss them in detail in an opinion. We have examined the large record and con-

sidered the various errors assigned and numerous questions raised with all the care possible. We have made the examination with the light afforded by the very full oral argument of the able counsel in the case, and had, besides, the benefit of their elaborate briefs. We are unable to say, after full consideration, that the learned judge of the circuit court erred in his disposition of the various exceptions taken to the respective reports of Commissioner Fowler and in the amount finally decreed to be paid by John J. Shipman to William Fletcher.

Nor did the court err in its decree of March 24, 1892, in denying the motion of the complainant to correct the decree of February 27, 1892, by charging the defendant, William Fletcher, with the sum of \$3,042. It was claimed that Commissioner Fowler had failed through an oversight to make such charge against Fletcher in his report, and the motion was based upon a letter to this effect written by the commissioner on March 5, 1892, to the honorable judge of the circuit court at the instance of the counsel for the complainant. It is to be observed that the decree which it was attempted to correct was a final decree, entered in the cause on February 27, 1892, and that the letter was written and the motion made subsequent to the entry of the decree. Section 3451 of the Code, under whose provisions the motion was made, was enacted for the purpose of providing a prompt and inexpensive remedy for the correction of errors by the court that made them. The first part of the statute provides for the correction by such court of any error in a judgment by default, or in a decree on a bill taken for confessed, rendered or entered by it, for which an appellate court might reverse it. It provides for the correction of errors generally. The decree sought to be corrected here upon such motion was not, however, entered upon a bill taken for confessed, but was entered in a suit brought by the party seeking to make the correction and vigorously defended, and it is not, therefore, within the provisions of this part of the statute. By another part of the statute it is provided that "the court in which is rendered a judgment or decree, in a cause wherein there is a declaration or pleading, or in the record of the judgment or decree, any mistake, miscalculation, a misrecital of any name, sum, quantity, or time, when the same is right in any part of the record or proceedings, or when there is any verdict, report of a commissioner, bond, or other writing whereby such judgment or decree may be safely amended, * * * or, in the vacation of the court in which any such judgment or decree is rendered, the judge thereof may, on the motion of any party, amend such judgment or decree according to the truth and justice of the case." It was upon this part of the statute that the complainant relied to sustain his motion. The

errors which the court, or the judge thereof in vacation, is thereby authorized to correct are not all the errors for which an appellate court might reverse a judgment or decree, as is provided in the first part of the statute in regard to a judgment by default or to a decree upon a bill taken for confessed. The particular phraseology of the provisions classifies and limits them. It was not intended to cover errors in the reasoning and conclusion of the court, and to make the judge thereof an appellate tribunal over himself. The errors authorized to be corrected by this particular provision are misprisions of the clerk and what may be termed clerical misprisions of the court. This has been the construction heretofore placed upon the statute. *Compton v. Cilne*, 5 Grat. 137; *Bent v. Patten*, 1 Rand. (Va.) 25; *Com. v. Winstons*, 5 Rand. (Va.) 546; *Richardson's Ex'rs v. Jones*, 12 Grat. 53; *Dillard's Adm'r v. Dillard*, 77 Va. 820, 825; *Powell v. Com.*, 11 Grat. 822; *Goolsby v. St. John*, 25 Grat. 158; *Freem. Judgm.* § 94. The real ground of the motion was, not that there is a mistake in the decree as to a matter which is right in some part of the record or proceedings in the cause, or that there is the report of a commissioner or other writing by which the decree may be safely amended, but that the report itself of the commissioner and the decree based thereon are erroneous in that William Fletcher is not charged with the said sum of \$3,042. The precise question, then, is the propriety or impropriety of the charge. Its determination requires an adjudication by the court. To add to or to expunge from a commissioner's account, to allow or reject an item in it, is a judicial act. Whether the said sum of money should be charged to William Fletcher necessitates the reasoning, deliberation, and judgment of the court. The object of the motion, as is thus seen, was not to correct a clerical error, if indeed error there be, but to obtain the adjudication by the judge of a matter upon which his judgment had not previously been invoked by an exception to the report of the commissioner or otherwise. The subject of the motion was not, therefore, within the class of errors which the statute empowered the court or judge who committed them to correct. The motion was properly denied.

The next inquiry is, can this court, upon the appeal here, decide upon this matter? It is the general rule that the report of a commissioner, so far as it is not excepted to, is taken or admitted to be correct. No exception was taken to the report of Commissioner Fowler in respect to the item in controversy. Whether the said sum of money should be charged to William Fletcher or not is a matter which might be affected by extraneous testimony. If an exception had been filed in the circuit court to the report of the commissioner for omitting to make the charge, it might have been met by testimony, or otherwise shown

that it ought not to be made. It has been uniformly held by this court that objections to a decree for errors in the report of a commissioner not appearing on the face of it cannot avail here, unless founded on exceptions taken to the report in the court below. *Simmons v. Simmons' Adm'r*, 33 Grat. 451; *Bank v. Campbell*, 75 Va. 534; *Peters v. Neville*, 26 Grat. 549; *Coffman v. Sangston*, 21 Grat. 263; *Cole v. Cole*, 28 Grat. 365; *Wimbish v. Rawlins' Ex'r*, 76 Va. 48; *Ashby v. Bell*, 80 Va. 811; *Nickels v. Kane's Adm'r*, 82 Va. 309; *McComb v. Donald's Adm'r*, Id. 903, 5 S. E. 558; *Cralle v. Cralle*, 84 Va. 196, 6 S. E. 12; *Morrison's Ex'r v. Householder's Adm'r*, 79 Va. 627; 2 Rob. Old Prac. 383. In *Peters v. Neville*, and in *Cralle v. Cralle*, supra, it was said that the rule applies both as regards the principles and the evidence upon which the report is founded. The only exception to the rule is where the error is apparent upon the face of the report and may not be affected by extraneous evidence. The question here is not within the exception. This court, for these reasons, cannot, under its long and well-established practice, consider the particular matter in controversy. The decree appealed from is affirmed.

KEITH, P., not sitting.

FLETCHER v. SHIPMAN et al.*

(Supreme Court of Appeals of Virginia. June 13, 1895.)²

Appeal from circuit court of city of Alexandria; James Keith, Judge.

Bill by John J. Shipman and others against William Fletcher for an accounting. From the decree, William Fletcher appeals. Affirmed.

Edmund Burke, A. W. Armstrong, Staples & Munford, and Moore & Son, for appellant. W. Willoughby and John W. Daniel, for appellees.

RIELY, J. The appeal with this case was heard along with the appeal of John J. Shipman in the case of Shipman v. Fletcher, and with the cross appeal of William Fletcher in the same case. 22 S. E. 458. Those appeals have been disposed of in the opinion just delivered in that case. The subject-matter of this suit and of the appeal is the same as that set forth in the petition of the said Fletcher filed in the case of Shipman v. Fletcher on April 25, 1891, raised by his fifty-fifth exception to the original report of Commissioner John S. Fowler and by his fourth exception to the reformed report of the said commissioner made in the said cause. The claim thus presented by William Fletcher in that suit was decided against him by the judge of the circuit court in his decree therein in vacation, and in the aforesaid opinion we have affirmed his decision. The subject-matter of this suit and of the appeal having thus been finally determined in that suit, its further consideration is at an end; and having been determined adversely to the contention of the appellant, the same result must follow here. The decree of the circuit court is, therefore, affirmed.

KEITH, P., not sitting.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

² Rehearing denied.

(44 S. C. 209)

C. AULTMAN & CO. v. SALINAS et al.
(Supreme Court of South Carolina. July 12, 1895.)

TRIAL BY JURY—WAIVER—HEARING ON REMAND.

1. After a party has, in writing, waived a trial by jury in a civil action, he will not be afterwards heard to say that he was denied the right.

2. Where a law case, heard by the court alone, was remanded by the supreme court for the determining of an issue upon which there was evidence at the former hearing, but which was not passed upon by the court, it was not error for the trial court to consider that question alone and deny a trial de novo. McIver, C. J., dissents.

3. In such case appellants cannot complain that the court refused to hear any further testimony on said question, where, after they requested a continuance on the ground that additional testimony would be required, the court announced that further evidence would be received if, upon hearing, it appeared to him that it should come in, but appellants offered no further evidence. McIver, C. J., dissents.

4. The action of the court in considering evidence given on the former trial of the case will not be reviewed on appeal, where it does not appear that appellants either objected or consented thereto. McIver, C. J., dissents.

5. Where the question raised on appeal was not presented to the court, it will not be considered.

6. The appellate court cannot, under the constitution, consider the effect of testimony on the mind of the trial court.

7. The court's finding of fact will not be reviewed on appeal where the case does not contain all the evidence upon which it was based.

8. The computation of the court on the question of damages will not be disturbed on appeal if it is approximately correct.

9. Under the constitution of 1868, an insolvent has the right to convey away his homestead, as it is not subject to execution on creditors' claims.

10. The sale of a homestead by an insolvent prior to leaving the state is not an abandonment, so as to subject it to the claims of the creditors.

Appeal from common pleas circuit court of Abbeville county; Ernest Gary, Judge.

Ejectment by C. Aultman & Co. against W. B. Utsey and others. Judgment for defendants A. J. Salinas & Sons. Plaintiffs appeal. Affirmed.

Graydon & Graydon, for appellants. Frank B. Gary, for respondents.

TOWNSEND, A. J. When the matters involved in a former appeal in this cause were considered, this court discovered that the circuit judge who heard the cause in the court below had failed to pass upon the question of homestead, which was clearly presented in the pleading, and to which issue testimony had been offered; and that, if this claim of homestead was allowed, it would necessarily affect the other question of damages wrought to the plaintiffs by the defendants' withholding possession from them of the house and lot in dispute. Hence this court remanded the cause "to the circuit court for the purpose of hearing and determining the question of homestead, and how far the amount of damages to which the plaintiffs are entitled may be affected thereby. This

will appear by reference to C. Aultman & Co. v. Utsey, 41 S. C. 304, 19 S. E. 617. This branch of the action was called up at the regular June term, 1894, of the court of common pleas for Abbeville county, in this state, while his honor, Judge Ernest Gary, was presiding. The plaintiffs sought a continuance upon the ground that the case would require some testimony. The judgment of the supreme court was handed down on 21st April, 1894, and the hearing of Judge Gary occurred some time in the month of June, 1894. It does not appear from the case that any showing was made before Judge Gary of any facts upon which the delay of plaintiffs' counsel to get ready for a trial might be excused. The presiding circuit judge in effect ordered the trial to go forward; and it was proceeded with. The testimony offered before Judge Izlar at the former hearing was considered. The circuit judge filed his decree on 25th June, 1894, sustaining the claim of defendants to the homestead of F. M. Pope, and also reducing the judgment of plaintiffs for damages to the sum of \$233.34. From this decree the plaintiffs now appeal on 14 grounds, which will now be considered.

The third exception imputes error to the circuit judge in hearing the cause over the objections of the plaintiffs, it being a law case, and the plaintiffs having a right of trial by jury. It is needless to pause very long in dismissing the ground of appeal. Unquestionably the plaintiffs, under our laws, have a right to a trial by jury. They likewise had a right to waive this trial by jury. This last they did in writing, and never asked leave to rescind such agreement, hence this ground of appeal is untenable.

By the thirteenth exception appellants insist that, the supreme court having remanded the case for the purpose of hearing the question of homestead, the plaintiffs had a right to a hearing de novo, and that it was error in his honor to hold otherwise. It seems to us that the appellants did not raise any such question before the circuit judge. So far as the case shows, all that appellants did was to seek a continuance upon the ground that the cause would require some testimony. If they had had the testimony on hand, ready for use, they would not have needed to continue the cause; they would have been ready to go to trial. If, without reasonable excuse, they had neglected to bring such testimony to the court for use at the trial, the fault was theirs, and they cannot now devolve their responsibility upon the circuit judge. However, the appellants contend that they had a right to a trial de novo. Let us see what were the surroundings of these two questions rendered by the supreme court for a new trial when Judge Gary took control of the cause. The pleadings read before Judge Gary and Judge Izlar, respectively, were the same, and in de-

fendants' answer the claim by them to F. M. Pope's homestead was before Judge Izlar, but he failed to pass upon the issue. If he had done so, the supreme court would have acted upon his conclusions. It was because Judge Izlar had failed to pass upon the testimony and the pleadings that claimed homestead that this court sent the cause back to the circuit with directions to try that question. To this extent the judgment of this court was mandatory. Hence, when the cause was brought up before Judge Gary, he instantly recognized the purpose, and said that "the judgment of the supreme court was mandatory upon him to decide the question of homestead in the case as sent back to [by] the supreme court." The attention of this court is called to the additional language of Judge Gary: "But if, upon the further hearing of the case, it appeared to the court that further evidence should be received, the court would permit such evidence to come in." It is evident that the circuit judge felt that the judgment of the supreme court required that the judge who should pass upon the question of homestead should admit at the hearing before him the testimony already taken in the case bearing upon and relating to the question of homestead, and that his ruling so impressed the minds of appellants' counsel; and upon this, no doubt, appellants' counsel base their contention that the circuit judge denied to them the right of a trial de novo. Ordinarily, in a law case, as distinguished from an equity case, when the supreme court orders a new trial, such a trial should proceed as if no other trial had ever been had, subject, of course, to any rulings of the supreme court in the appeal. Judge Gary recognized this. He read the judgment on the appeal and the case, and from these he saw that what the supreme court required was that the circuit judge should pass upon the one issue. All others had been disposed of. Under the circumstances of this particular case, we do not see that the circuit judge erred, especially as he offered to allow additional testimony if, during the process of the trial, its propriety was made manifest. No application was made therefor. Again, it must be remembered that the attorneys for all the parties to the cause had agreed that the circuit judge should hear and determine on the issue without the aid of a jury; thus largely assimilating the hearing before the circuit judge to that of the same officer sitting as a chancellor in an equity cause. Concerning the last, this court, in its recent decision in the case of *Cunningham v. Cauthen* (S. C.) 21 S. E. 804, sustained this same circuit judge, while sitting as a chancellor, when he refused to hold it error in a special master who declined to hear additional testimony as to a matter which, by the judgment of the supreme court, had been recommitted with instructions to apply testimony once offered upon the question recommitted for considera-

tion. As before remarked, it is the proper practice, when a new trial is ordered in a long case that the circuit judge should enforce a new trial de novo; but we think, for the reasons already indicated, that the circumstances of this cause make it an exception to such general rule. This exception is overruled.

The first exception here presented by appellants imputes error to the circuit judge in holding that the judgment of the supreme court was mandatory, and that he had no right to take further testimony. This exception embodies two propositions: First, that the judgment of the supreme court was mandatory; and, second, that the circuit judge, under the supreme court judgment, could not take other testimony. There can be no doubt that the circuit judge properly construed the judgment of this court as mandatory so far as the question of homestead was concerned. It was mandatory to that extent; but appellants are mistaken as to the views expressed by the circuit judge on the second proposition, for he did not hold that he would not admit such testimony. In addition to this, we would call attention to the fact that appellants did not offer any additional testimony. Counsel should recall this language of this court in the case of *Moore v. Railroad Co.*, 38 S. C. 33, 16 S. E. 781. It was there announced: "Now, it is contended, and the case does disclose, that one of the plaintiffs' counsel, as the judge finished his charge, arose, and was in the act of addressing the court, when he was stopped by the judge with the remark: 'I cannot hear any argument, but if you have any request—' At these words counsel said, 'I have nothing more to say, sir.' It seems to us counsel stopped too quickly. He ought to have demanded his right to be heard,—of course, in courteous terms,—and then, if the judge refused to hear him, we would have most thoroughly considered his complaint. We take a decided stand on counsel's right to be heard in any court; of course, subject to the rules of law. We can have no sympathy or toleration for a practical denial of the right of litigants when the request of his counsel to be heard is made to the court (and refused); and in justice to the bench we are satisfied that no such attitude (to the bar) is ever occasioned knowingly. Still we would be understood in all frankness. If counsel had persisted, and then the court declined to make the proposed correction, we should have unhesitatingly upheld the rights and privileges of the bar." Appellants stopped short in the assertion of what they conceived to be their right, if they have additional testimony to offer, by not making an actual tender of such testimony. As the matter now stands, we are considering an abstract proposition of law that has no direct or practical bearing upon the matter at issue. The exception must be overruled. Appellants, by this second exception, complain that the circuit judge erred

in considering evidence given in a former trial of the cause, without the consent of the plaintiff, said evidence having been given orally before Judge Izlar, and being no longer competent. We must be governed by the case. It nowhere appears therein that appellants' counsel made any such objection in the court below. Such being the condition of things, it is not competent for appellants to raise that question before this court for the first time. This exception must be overruled.

The next exception—the fourth—relates to the effect of certain testimony upon the mind of the circuit judge. We cannot, under the constitution, enter upon the consideration of this matter in a law cause. This exception must be overruled.

The fifth exception raises a question that does not appear by the case to have been presented to the circuit judge, nor passed upon by him. It is overruled.

The sixth exception complains that the circuit judge erred in holding that the property in dispute was the property of F. M. Pope at the time he conveyed the same to G. W. Conner. The testimony discloses the fact that Francis M. Pope occupied this house and lot as a family residence at the time he conveyed the same—7th December, 1887—to G. W. Conner. We refer to the testimony of W. B. Utsey. But the case does not purport to contain everything that was before the circuit judge. This exception must be overruled.

The next exception—the seventh—alleges that the circuit judge erred in holding that the amount of damages to which plaintiffs (appellants) were entitled should be reduced by one-third thereof being deducted from the amount adjudged by Judge Izlar as due by defendants to plaintiffs as damages, as the only testimony looking to that result was that of the witness W. B. Utsey, given in a former trial. The circuit judge had more than the testimony of Utsey on the matter here complained of. It appeared from several questions that Mrs. Utsey paid Mrs. Pope, in cash, \$3,250, for the property. The law allows \$1,000 in land as a homestead. This last amount is \$83 less than one-third of the \$3,250 paid by Mrs. Utsey for the property. Mathematical exactness is scarcely ever possible in these matters. Nearness in approximation is about the best that can be hoped for. The circuit judge has striven to reach this result, and we are not prepared to overrule his conclusion. This exception must be overruled.

Appellants' eighth exception imputes error to the circuit judge in holding that the homestead of F. M. Pope was ever conveyed out of said Pope, his deeds therefor having been declared fraudulent only at the instance of his creditors. He himself never questioned said deeds. His creditors could only reach such of his property as was liable to levy and sale under execution against him. His homestead was never liable to such execution

of his creditors if their claims originated after 1868, when the constitution was adopted wherein such homestead was provided for against creditors. Therefore Pope had a perfect right to convey away his homestead so far as his creditors were concerned. This exception must be overruled.

By the ninth exception the appellants raise somewhat the same question presented in the eighth exception, by suggesting that a deed set aside for fraud is as though such deed had never been made, and, while such setting aside of the deed may revest the fraudulent grantor with the title to his homestead, it cannot be made to so aid the fraudulent grantee. A patient consideration of the language used above in disposing of the eighth exception will show that this latter is also untenable. By the deed of Pope he has rendered himself incapable of receiving any advantage from the transaction, for, if we were to hold otherwise, he would be receiving a profit from his own wrong. Let this exception be overruled.

Appellants' twelfth exception alleges that the claim of homestead is *res adjudicata*, not having been set up by Mrs. Utsey in this cause, and A. J. Salinas & Sons, her privies in estate, being bound by her acts in the cause. No such question was presented or passed upon by the circuit judge. It is too late to raise such question for the first time in this court. This exception is overruled.

The eleventh exception raises a question not considered by the circuit judge, and not presented to him. It must, therefore, be overruled.

Appellants' twelfth exception alleges that, if F. M. Pope ever had a homestead, he abandoned it by leaving the state, and it remains for his creditors. Counsel for appellants rely upon the recent case of *Trimmer v. Win-smith*, 41 S. C. 100, 19 S. E. 283, as authority for this proposition. When the two cases are compared, it will be seen how very different they are from each other. In the case at bar, F. M. Pope sold and conveyed his homestead while he was a resident of this state, and long after such sale removed from this state to that of Arkansas. In *Trimmer v. Win-smith* the homestead was for the life of husband and wife. They both were dead, and there was no intervening purchase of the homestead when *Trimmer* enforced his judgment. Besides, there were other facts connected with that case which rendered it very different from the case under consideration. This exception is therefore overruled.

The last exception alleges that the circuit judge erred in holding that the defendants acquired any right under this mortgage upon this house and lot, because Judge Izlar held—in which conclusion this court concurred—that the sale of such house and lot by the sheriff as the property of F. M. Pope cut out all intervening liens, and therefore the mortgage held by the defendants was a cut-off. No such question seems to

have been presented to or considered by the circuit judge. All that this court did adjudge in the last case before it was subject to this right of defendants to have their right as to Pope's homestead considered, otherwise it was a nugatory act to order a new trial of this issue. This exception must be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

POPE, J. I concur, but desire to emphasize the distinctions pointed out by Judge Townsend existing between this and other law cases when a new trial is ordered. Here one single issue in a law case is remanded for trial by the circuit judge, whereas, in other law cases the whole judgment is reversed, and a new trial granted. Of course, in the latter cases, the trial must be *de novo*. I fear this distinction escaped the attention of Chief Justice McIVER.

McIVER, C. J. (dissenting). Not being able to concur in all of the conclusions reached by the Honorable D. A. TOWNSEND, who sat at the hearing of this case in the place of Mr. Justice GARY, disqualified by reason of having been of counsel in the cause, I will state briefly the grounds of my dissent. The first, second, and thirteenth grounds of appeal, in different forms, impute error to the circuit judge in the course pursued by him in the hearing of the cause when sent back by the supreme court. For a proper understanding of the questions presented by these exceptions it is best to state from the record precisely what occurred. It seems that at the hearing of a former appeal in the cause, reported in 19 S. E. 617, as well as in 41 S. C. 304, this court, finding that his honor, Judge Izlar, from whose judgment the previous appeal had been taken, had failed to decide, or even consider, the question of homestead, presented in the pleadings, sent the case back to the circuit court for the purpose of having that question considered and decided; the language of this court, in reference to the question of homestead, being as follows: "It does not appear that this question was considered by the circuit judge, or decided by him. Certainly it is not mentioned in the decision; and therefore it cannot be considered as properly before this court. * * * The case must therefore go back to the circuit court for the purpose of hearing and determining the question of homestead, and how far the amount of damages to which the plaintiffs are entitled may be affected thereby;" and judgment was rendered accordingly. From the case as prepared for the argument of the present appeal it appears that when the cause was called for trial "the plaintiffs' attorneys stated that they were not ready for trial, as the case would require some testimony. After hearing the pleadings and the judgment of the supreme court, the presiding judge, Ernest Gary, said that the judgment of the supreme court was mandatory on him to decide the

question of homestead in the case as sent back to [manifestly a misprint for "by"] the supreme court; but if, upon further hearing of the case, it appeared to the court that further evidence should be received, the court would permit such evidence to come in. No such evidence was offered at the hearing, and the cause was heard upon the evidence in the printed brief. The case then proceeded to trial by reading the complaint and answer, and the extracts from the testimony given on the former trial, which are put in this brief." It is due to the circuit judge that I should add that in his order setting the case for the present appeal, after directing such amendments as would make the statement read as above copied, the following language is used: "In other words, the reason assigned by the plaintiffs' attorneys for a continuance did not appear to me to be sufficient to grant the continuance asked for, and in consequence I ordered the cause to proceed to trial." It seems to me from the foregoing statement, which I have endeavored to make as fully and fairly as possible, that the real question made before the circuit judge when the case was called for trial was not the ordinary motion for a continuance upon the ground of the absence of witnesses, but whether the case should be heard on the testimony previously taken before Judge Izlar, without the privilege to either party to offer any additional testimony they, or either of them, might desire to adduce. This is apparent from the fact that the case does not show that any formal motion for a continuance was made, but simply a statement made by plaintiffs' attorneys that testimony would be required in the cause. In response to this proposition the circuit judge, after hearing the pleadings and the judgment of the supreme court, said that such judgment "was mandatory to him to decide the question of homestead in the case as sent back to [by] the supreme court." That, it seems to me, necessarily implies that the case was not to be heard *de novo*, but upon the record "as sent back." Why the use of the term "mandatory" (for every judgment of the supreme court is mandatory), unless it was to signify, by the use of that term, that the circuit judge construed the judgment of the supreme court as positively directing that the circuit court should hear the question remanded, not *de novo*, but upon the record as sent back. This view is confirmed by the succeeding language: "But if, upon the further hearing of the case, it appeared to the court that further evidence should be received, the court would permit such evidence to come in." This language plainly implied that the ruling was that the case should be heard upon the testimony previously taken, unless it should appear to the court—not unless it should be desired by either party—that further evidence was necessary, in which event such evidence would be received. But, as the case does not show that the circuit judge gave any indication that further evi-

dence appeared to him to be necessary, the attorneys for plaintiffs are not to be regarded as in any default in failing to offer any further evidence. Indeed, after the ruling above stated, if they had attempted to offer further evidence, their condition might have been regarded as at least bordering on contempt in disregarding such ruling.

The next inquiry is whether there was any error in such ruling. The well-settled rule, as I understand it, is that when a judgment of the circuit court is reversed, either in whole or in part, in a law case, and a new trial ordered of the whole case or the part reversed, such new trial must be conducted just as if there had been no previous trial; and hence the testimony as taken down at the former trial cannot be used, except by consent on the new trial, and that the parties are at liberty to introduce any additional competent testimony upon such new trial that they, or either of them, may desire to offer, though testimony which has been taken by commission, and used at the former trial, may be again offered upon the new trial. See 16 Am. & Eng. Enc. Law, p. 676, and the cases there cited; *Walton v. Bostick*, 1 Brev. 162; *Pulaski v. Ward*, 2 Rich. Law, 119; and *Hosford v. Wynn*, 26 S. C. 130, 1 S. E. 497. Now as, in this case, the judgment of Judge Izlar, in so far as the question of homestead was concerned, was reversed, and the case remanded to the circuit court for the purpose of having that question considered and decided, a new trial of that issue was ordered, which, under the rule above stated, should have been conducted just as if there had been no former trial; and hence there was error in practically denying the legal right of the plaintiffs to offer any testimony upon that issue which they might desire to offer, and in considering and deciding that issue upon the testimony previously taken before Judge Izlar; for, in my judgment, the testimony previously taken was not admissible, except by consent, and of such consent I find no evidence in the record. True, it does not appear that any objection was formally interposed by counsel for plaintiffs when it was offered in the form of the notes of testimony taken at the former trial, but, under the ruling made at the outset of the trial, as I understand it, and as counsel for plaintiffs evidently understood it, such an objection would have been not only fruitless, but also in open disregard of such ruling. In the case of *Cunningham v. Cauthen* (S. C.) 21 S. E. 800, which has been cited to show that the circuit judge was justified in declining to hear additional testimony, is not in point. In that case, which was a case in equity, and not a case at law, as this is, the referee had charged the administrator with the premium on gold on the amount of all the notes taken at a sale made by him, simply because the advertisement of the sale stated that such notes should be payable in gold or its equivalent; and this court, in its former decision (41 S. C., at page 304, 19 S. E. 317), held that this was

error, and that the administrator should be charged only where it appeared that the premium had been collected by him, and the case was sent back simply for the correction of this error. The referee, construing the decision of the supreme court to be a direction to reform the account previously stated in accordance with the views of that court, declined to hear further evidence upon the subject; and upon the second appeal the position was taken that the referee had erred in declining to receive further testimony, and this court, in disposing of the second appeal, after stating the question, used the following language, which may be found in 21 S. E., at page 805: "When the plaintiffs applied to the referee to be allowed to introduce a new and additional testimony, the referee declined to hear it, and now this refusal is assailed as erroneous. In cases where new trials are ordered, of course such trials are de novo. But in a cause in equity, where the testimony on all the issues has been fully taken and reported to the court by the very referee to whom the duty is confided of correcting a few among the many of his former conclusions, it does not seem that additional testimony could be admitted without the usual incidents to new testimony, namely, first questions, etc. We might have been more explicit in our former judgment, but, as it is, we think the referee correctly construed our decision. We did not mean thereby to open afresh all these matters." It is manifest that in the case of *Cunningham v. Cauthen* this court based its decision upon the ground that under a proper construction of the former decision of this court it was not intended to open afresh any of the issues in the case, but that the referee should simply reform the account in the single particular indicated. But the present is a very different case. Here the circuit court has failed altogether to decide one of the material issues in the case, and hence a new trial of that issue was rendered absolutely necessary, and was ordered. Upon well-settled doctrine, such new trial should have been de novo, and hence either party had the legal right to offer any testimony, otherwise competent, that might be desired; and such legal right could not be made to depend upon whether "it appeared to the court that further evidence should be received." And furthermore, upon such new trial, the notes of testimony taken before Judge Izlar were not admissible, except by consent, and it does not seem to me that it can properly be considered that there was any such consent on the part of the plaintiffs. It seems to me, therefore, that the judgment appealed from should be reversed, and the case remanded to the circuit court for a new trial, upon which either party may be at liberty to offer any testimony otherwise competent upon the issue which was sent back to be considered and decided by the circuit court.

Under this view of the case it certainly is not necessary, and would scarcely be proper,

for me to consider any of the points raised by the grounds of appeal going to the merits of the case, for, according to my view, such points are not now properly before this court.

(44 S. C. 430)

BENJAMIN v. DRAFTS et al.

(Supreme Court of South Carolina. July 20, 1895.)

FORECLOSURE OF MORTGAGE—ORDER OF SALE—DURESS.

1. In a suit to foreclose a mortgage the only issues raised were between the defendants, the defenses to plaintiff's mortgage having been abandoned. Before the referee who was appointed for that purpose had finished taking testimony on the contention between the defendants, the court made an order directing that plaintiff's mortgage be foreclosed and the property be sold. Plaintiff and the mortgagor stipulated for a postponement of the sale, without objection to the order. *Held*, that the court had jurisdiction to make the order, first, because plaintiff's right of foreclosure was unaffected by the result of the referee's report, and, second, because the legality of the order was recognized by the mortgagor in her stipulation to postpone the sale.

2. The burden of proof being on the maker to show that he executed the notes and mortgage under duress, evidence that the mortgagor, in a prior action, resisted a creditor's effort to have the mortgage set aside for fraud, and did not then allege duress; that the mortgagor asserted that the duress continued until and during that trial, and that she and her adult children were led to commit perjury thereby; that the mortgagor, living with a grown son, had every access to the agencies of law, and that the parties alleged to have exercised the duress were her daughter and her daughter's husband; that no violence was attempted, that the words used were of a dubious character, and that the mortgagees never attempted to enforce their mortgages until they were obliged to by the foreclosure of a prior mortgage; and that there was a fraudulent agreement to deprive the mortgagees of their mortgage lien,—is sufficient to sustain the court's finding that there was no duress in the execution of the mortgage.

Appeal from common pleas circuit court of Lexington county; W. C. Benet, Judge.

Action by Harriet J. Benjamin against Sarah Drafts and others. From the decree therein rendered, Sarah Drafts appeals. Affirmed.

By order of the supreme court the issues raised in the cause were submitted to a referee (J. Brooks Wingard) who reported as follows:

"The above-entitled case comes before me as special referee 'to hear and determine all the issues of law and fact in the above action' under an order of reference passed by the supreme court of date 4th of January, 1889. Under the authority granted by said order of reference, I have on various occasions, to which reference is made in the volume of testimony, held references and taken the testimony in the case,—all of which is herewith respectfully submitted to this court. The volume of testimony herein will disclose the presence of various attorneys engaged in the case, at and during the references, for the purpose of taking testimony and argument. This action was commenced

by the plaintiff, Harriet J. Benjamin, as assignee of Meetze and Muller, partners under the name and style of Meetze & Muller, praying for the foreclosure of a certain mortgage executed by Sarah Drafts to said Meetze & Muller, and dated the 1st day of January, 1886, and for the sum of \$500, payable 12 months after its date, with interest from date at 10 per cent. per annum. The complaint, at paragraph 5, alleges 'that Mrs. Polly C. Meetze, a defendant here, has also a mortgage on said tract of land, of anterior date to the date of the mortgage of this plaintiff; but the said Polly C. Meetze, under her hand and seal, on the said 1st day of January, A.D. 1886, indorsed on the mortgage of the plaintiff, herein sued on, her assent that her mortgage should be a prior lien to hers, to secure the said bond of \$500 and interest thereon; and the plaintiff is informed that William J. Assmann claims some interest in said land.' Each of the defendants, through their respective attorneys, filed separate answers to the complaint herein. The defendant Sarah Drafts, by her answer, admits the execution of plaintiff's mortgage; but, with respect to the Polly C. Meetze note and mortgage, referred to in plaintiff's complaint, this defendant, by her answer, alleges 'that she admits making the mortgage to Polly C. Meetze mentioned in said paragraph, but that the said mortgage was obtained by the said Polly C. Meetze from this defendant by duress and imposition of and upon this defendant by the said Polly C. Meetze and her husband, Walter S. Meetze, in that they threatened, abused, and importuned her, alternately, with force, and with the promise that the execution of the said mortgage would not be injurious to her, but that it would be hereafter destroyed or not enforced; that the reason of such conduct on the part of said Polly C. Meetze and Walter S. Meetze, who are her daughter and son-in-law, was that, some time during the year 1881, the heirs of William Fort, deceased, were about to commence proceedings against the defendant, and the said Walter S. Meetze claimed to be apprehensive that this defendant would be unsuccessful in said proceeding, and that the defendant's children would receive nothing; but the defendant now believes that it was only a pretension, to get possession of this defendant's property for his wife, Polly C. Meetze; that defendant was unwilling to execute such mortgage, or enter into any such transaction, but the said Walter S. Meetze and his wife so abused her and threatened her with bodily harm, by reason whereof, and through fear and apprehension thereof, the defendant executed said mortgage, as also by reason of their promise that said mortgage would not be enforced; that the said Polly C. Meetze and Walter S. Meetze compelled this defendant to execute said instrument for the purpose of defeating the claim of the said William Fort, deceased, of defrauding creditors and at the same time of obtaining and getting into their posses-

sion the property of this defendant; that the said mortgage is without any consideration whatever, and the consideration therein expressed and in said notes was only colorable and pretensive; that, since the execution of said mortgage and notes, this defendant has, until lately, been under the influence and control of the said Polly C. and her husband, and has been forced and compelled to abide by said mortgage; that the defendant has no knowledge of any claims that William J. Assmann has in said bonds, as alleged in said paragraph, and therefore denies the same; but, if said claim arise from or under said mortgage, she alleges that the said Assmann had full notice and knowledge that the said mortgage was without consideration, and intended to defeat and defraud the defendant's creditors.' This defendant, on account of this allegation in her answer, prays that the notes and mortgage executed to Polly C. Meetze be adjudged null and void, and delivered up and canceled. The defendants Polly C. Meetze and William J. Assmann each filed a separate answer to the complaint, admitting the allegations contained therein, and, further answering, allege that the notes and mortgage executed by Sarah Drafts to Polly C. Meetze for \$1,800 in the aggregate were valid, and that said sum of \$1,800, with interest according to the notes, which said mortgage secured, was justly due the said Polly C. Meetze; and that the court of common pleas for Lexington county, in the case of H. Arthur Fort et al. v. Sarah Drafts and Polly C. Meetze, in its decision dated the 27th day of February, A. D. 1884, had solemnly adjudged and decreed 'that the said mortgage of Sarah Drafts to Polly C. Meetze, this defendant, is valid, for valuable consideration, and without taint of fraud, and that the same was held by this defendant as an innocent creditor without notice.'

"The sole issues raised by the answers herein are confined to the defendants; and, briefly stated, it is as to whether duress, imposition, oppression, and undue and improper influence were exercised upon the defendant Sarah Drafts by Polly C. Meetze and her husband, Walter S. Meetze, in compelling the said Sarah Drafts to execute and deliver the said Polly C. Meetze the notes and mortgage to secure the sum mentioned and described in the pleadings herein, and whether or not the said Sarah Drafts was forced and compelled to abide by said notes and mortgage until the time stated in the answers. The defendant Polly C. Meetze and Wm. J. Assmann, by their answer, rely upon a plea of *res adjudicata*, claiming the defendant Sarah Drafts is concluded from attacking the validity of the notes and mortgage given by her to Polly C. Meetze, as having been determined by this court in the case of H. Arthur Fort et al. v. Sarah Drafts and Polly C. Meetze, as above referred to. The record in that case, of Fort et al. v. Sarah Drafts et al., has been introduced in evidence in this

case, and shows that no question of duress, imposition, oppression, or improper and undue influence practiced by Walter S. and Polly C. Meetze upon Sarah Drafts was either raised by the pleadings or passed upon by the court. The plaintiff here alleges fraud and collusion against the defendants Sarah Drafts and Polly C. Meetze in executing the notes and mortgage for the purpose of defeating the plaintiff's claim. The issue now and here is of quite a different character, and to determine which recourse must be had to the testimony herein. I now come to the very important inquiry, was there an exercise of duress, imposition, oppression, improper and undue influence, upon the defendant Sarah Drafts by her codefendant Polly C. Meetze and her husband, Walter S. Meetze, at and during the execution and existence of the notes and mortgage which constitute the subject of this controversy? The settlement of this question will, in my judgment, very much abridge the investigation of this case. The testimony shows that Mrs. Drafts is an elderly widow woman, in feeble health, and, at the time, and prior thereto, of the execution of the notes and mortgage to Polly C. Meetze, had no one with whom she could confer and counsel about business matters, except her daughter Polly C. Meetze and her husband, Walter S. Meetze, who were residing on the premises of the said Sarah Drafts. In questions of the kind now before the court, regard must be had to age, sex, condition, and circumstances, since the degree of fear which would be insufficient to influence a man in the prime of life and of heroic mold might be regarded amply sufficient in respect to a woman or a man in the decline of life. The testimony is ample enough to show that Polly C. Meetze and Walter S. Meetze and Mrs. Sarah Speights, the sister of Mrs. Polly Meetze, were all exceedingly anxious to have the Fort claim defeated; and, to the end that such purpose should prevail and the property be left to their enjoyment, the said Polly C. Meetze and Walter S. Meetze so besought, counseled, urged, importuned, and threatened the said Sarah Drafts as to grievously impose upon her, and thereby exercise a controlling influence over her character and conduct, depriving her of the free and untrammelled exercise of her will. Mrs. Sarah Drafts, in her testimony in this case, is unequivocal in declaring that she was living in constant fear and dread of Walter S. Meetze; that she had been afraid of him ever since he had been in her family; and that she was afraid of her daughter Polly, whom she characterized as being 'not a bit better than he was.' In her testimony here, Mrs. Drafts explains how she was forced by Polly C. Meetze and Walter S. Meetze to testify, before William J. Assmann, Esq., in the case of Fort et al. v. Drafts et al., as to the validity of the Polly C. Meetze notes and mortgage. This is corroborated by several

other witnesses. I scarcely need to state here that at one of the references I was holding in this case the conduct of Walter S. Meetze towards a witness on the stand was such as to impose the conviction upon me that he was entirely capable of exercising duress and imposition and oppression upon any one who might be so unfortunate as to fall within his grasp. I am satisfied that the notes and mortgage were executed on the same date, to wit, the 8th day of September, A. D. 1881, and are without consideration. From a careful consideration of all the testimony in this case I am satisfied that Walter S. Meetze and Polly C. Meetze did obtain, by duress, imposition, and oppression exercised upon her, the execution by Sarah Drafts of the notes and mortgage which constitute the subject-matter of the controversy herein; and, by the same agencies, the said Sarah Drafts was forced to submit to and abide by said notes and mortgage until the opportunity for getting relief was afforded by the institution of this suit. So far as the rights of the plaintiff herein are concerned, I, as referee, am relieved from making any conclusion, since the court has granted the plaintiff the order of foreclosure and sale in satisfaction of said mortgage.

"My conclusions of fact are: (1) That the defendant Polly C. Meetze and her husband, Walter S. Meetze, obtained the notes and mortgage in controversy by the exercise of duress, oppression, imposition, and improper and undue influence upon the said Sarah Drafts, and compelled her to abide by the said notes and mortgage until about the time of the commencement of this action. (2) That said Walter S. Meetze and Polly C. Meetze, by the continued use of duress, oppression, imposition, and improper influence, compelled the defendant Sarah Drafts to testify as to the validity of the notes and mortgage before William J. Assmann, Esq., as referee in the case of Fort et al. v. Sarah Drafts and Polly C. Meetze. (3) That, for some time previous to the execution of said notes and mortgage, and until about the time of the commencement of this action, Mrs. Sarah Drafts was under the influence and control of the said Walter S. and Polly C. Meetze. (4) That said notes and mortgage are without any consideration whatsoever. (5) That the pleadings in the case of H. Arthur Fort et al. v. Sarah Drafts and Polly C. Meetze did not raise an issue of duress, oppression, imposition, or undue influence, and were not passed upon by the judgment pronounced in that case. (6) That the interest claimed by said William J. Assmann in said mortgage was purchased subsequent to the maturity of said notes and mortgage, and the testimony shows that he was not a purchaser for valuable consideration without notice. (7) That the interest claimed by the Carolina National Bank in said mortgage was purchased after its maturity, and subsequent to the filing of the pleadings in this case.

(8) That the defendants Sarah Drafts and Polly C. Meetze are not in *pari delicto*.

"Conclusions of Law: (1) That, as the notes and mortgage from Sarah Drafts to Polly C. Meetze were obtained by duress, oppression, imposition, and undue influence, and as the defendants Sarah Drafts and Polly C. Meetze are not in *pari delicto*, the defendant Sarah Drafts is entitled to have said notes and mortgage surrendered up and canceled, and I so recommend. (2) It having been established that the notes and mortgage of Sarah Drafts to Polly C. Meetze are illegal and void, and are without consideration, Polly C. Meetze is not entitled to a foreclosure of said mortgage, since courts of equity will not aid the enforcement of illegal contracts. (3) That the defendant William J. Assmann, having purchased an interest in said mortgage after its maturity, can occupy no higher position than the original mortgagee. (4) That the interest claimed in the Carolina National Bank was purchased after the filing of the pleadings in this action and must stand or fall only as the mortgage itself is sustained or defeated.

"I have arrived at the foregoing conclusions after a careful consideration of the whole case, together with the argument and authorities submitted thereon. The counsel for Mrs. Polly C. Meetze appeared at the time set for the argument, but declined to argue the case further than to submit a few propositions of law, without any authority to support the same when requested to do so. The propositions are filed with the record of the case June 1, 1894. I recommend that the notes and mortgage given by Sarah Drafts to Polly C. Meetze be delivered up and canceled, and that the costs of this proceeding be paid out of the cash portion of the proceeds of the sale heretofore ordered by his honor, T. B. Fraser, and dated 27th day of February, A. D. 1894."

Upon the submission of said report the trial court rendered the following decree:

"By consent of all the parties to this action the cause was heard by me at my chambers in the city of Columbia. It is an action for the foreclosure of a bond and mortgage executed and delivered by the defendant Sarah Drafts to Messrs. Meetze & Muller on the 1st of January, 1886, and by them assigned to the plaintiff herein. The answer of Sarah Drafts raised certain issues between her and the said plaintiff, which, however, have been eliminated by the decree heretofore filed ordering a foreclosure and sale of the land covered by said mortgage. But important issues were left to be passed upon, which arise between the defendant Sarah Drafts, on the one hand, and her codefendants Polly C. Meetze and William J. Assmann, on the other. The cause was heard by me on exceptions to the report of the referee to whom it had been referred, to hear and determine all the issues of law and fact between the said defendants. In the fifth paragraph of

the complaint it is alleged the defendant Polly C. Meetze has also a mortgage on the tract of land described in the complaint, and that the defendant William J. Assmann claims some interest in said land. The answer of Sarah Drafts admits the execution and delivery of the mortgage, and the two promissory notes secured by it, set forth in the answer of her daughter, Polly C. Meetze; but she impeaches them on the ground that they were obtained from her by Polly C. Meetze and her husband, Walter S. Meetze, by the exercise of duress, imposition, and undue influence. She further alleges that the notes and mortgage in question are pretensive and without consideration, and were made for the purpose of defeating the creditors of the said Sarah Drafts. She also denies knowledge of any claim of William J. Assmann, and avers that, if the said claim arises under her mortgage to Polly C. Meetze, said Assmann had notice that said mortgage was without consideration and designed to defeat the creditors of her, the said Sarah Drafts. The answer of Polly C. Meetze denies the allegations of duress and imposition, and alleges that the notes and mortgage were executed and delivered to her to secure certain moneys lent by her to Sarah Drafts, and sets up an estoppel by record. William J. Assmann, answering, avers that he is the assignee of said mortgage to secure the sum of \$300, and sets up an estoppel by conduct. He denies that he had notice that the mortgage was obtained from Sarah Drafts by wrongful means or intended for an unlawful purpose, and, on the contrary, he avers its validity. The main issue to be determined, therefore, is whether the said notes and mortgage were obtained from Sarah Drafts by the exercise of duress or imposition or undue influence by Polly C. Meetze, aided by her husband, Walter S. Meetze,—whether the will of the said Sarah Drafts was controlled or overpowered, or did Sarah Drafts execute and deliver the said papers in the exercise of her own free will? The referee decided this issue in favor of Sarah Drafts, and held that the notes and mortgage were invalid, null, and void, because of duress, imposition, and undue influence. After reading and weighing the voluminous testimony, and hearing the argument of counsel, I cannot sustain the findings of the referee. The preponderance of the testimony justifies the conclusion that the notes and mortgage were executed and delivered by Sarah Drafts to Polly C. Meetze in the exercise of her own free will, to secure certain loans of money made by the latter to her mother, Sarah Drafts. I am clearly of the opinion that the charges of duress and imposition are groundless. The testimony offered to establish them was flimsy and vague; and, such as it was, it was flatly contradicted by the testimony given at the trial of a previous case, of the same witnesses who testified in this case. And, while the testimony as to the validity

of the notes and mortgage is not so clear or so satisfactory, still it seems to me that the preponderance is on the side of their validity and of the good faith of the parties thereto; and, in the mass of conflicting and contradictory evidence, some of which confesses itself to be false, it seems consistent with a reasonable view of the case to believe in the bona fides of the transaction,—the more especially because of the failure to prove duress and imposition. A short statement of the facts will not be out of place at this point. In the year 1881, the defendant Sarah Drafts and her daughter, Polly C. Meetze, and Polly's husband, Walter S. Meetze, lived on the land described in the complaint and embraced in the said mortgage, the land being the property of Sarah Drafts. Polly and her husband lived about a half a mile from her mother. Walter rented and cultivated a portion of said land. With Sarah Drafts then lived her brother, Jefferson Leaphart, who managed her farm. A short time before the execution of the mortgage to Polly, which bears date 8th of September, 1881, one H. Arthur Fort, administrator of the estate of his brother, William Fort, came to the house of Sarah Drafts, and told her that he had a claim against her for \$2,000, on account of his deceased brother, for professional (legal) services alleged to have been rendered her and her deceased husband. After his departure, Sarah Drafts went to the house of her daughter, Polly, and told her and her husband what Fort had said, she hereby denying that she or her deceased husband owed William Fort's estate anything. She testified that Walter Meetze became very angry, and said he was not going to let the land all go from his children; that he went to Lexington to consult with Henry A. Meetze, Esq., a member of the bar, and, on his return, stated that Mr. Meetze had advised that she should execute to them the notes and mortgage; that Polly and Walter insisted on her giving them 'bogus' notes and mortgage, so as to defeat the Fort claim; that she did not wish to do the wrong, but that she was forced to do it under the pressure of fear, induced by threats of violence; that she went to the house of her daughter when the notes were prepared by this said daughter, and signed by herself; that she (Sarah Drafts) then went to the office of Mr. Meetze, in Lexington, when the mortgage was drawn up, executed, and delivered, and placed in the office of the clerk of court to be put on record.

"Polly C. Meetze testifies that, on the 26th of January, 1874, at the request of her mother, and in order to secure her the comfort which her age required, she lent her mother, Sarah Drafts, the sum of \$700, and took her promissory note for that amount; that, on the 26th day of December, 1880, she again made a loan to her mother, this time for \$1,100, and took her promissory note therefor; that, a short time before the mortgage was executed, her mother came to her house, and re-

counted the conversation Fort had had with her about the \$2,000 claim, and asked advice from herself and her husband as to what she should do, claiming that she owed Fort nothing; that Walter Meetze, her husband, asked her mother to secure the notes she had made to his wife for the money lent, and that her mother readily and willingly agreed to sign any papers necessary to attain that object, and went with Walter to the office of Mr. Meetze, when the mortgage was prepared and executed; that no threats were made, nor force or any unlawful means used, by her or her husband in obtaining this security. The foregoing statement substantially presents the matter in dispute between these codefendants. The testimony of Sarah Drafts, as taken down by the stenographer of the court, contains many glaring inconsistencies, contradictions, and incredible statements. She asserts that she signed the papers because she was afraid that Walter Meetze would put her out of the way, and that he threatened so to do; that her daughter Polly aided her husband in forcing her to sign them; that Mr. Meetze, a lawyer of distinction, learning, and integrity, was a party to the fraud, aiding in the duress; and that William J. Assmann, clerk of the court, was willing, as well as Mr. Meetze, to join with her daughter and her son-in-law in putting her 'out of the way.' Nor did the duress end here, according to the testimony. If she is to be believed, it continued on to and through the trial of the case of Fort v. Drafts, a case brought in 1882 by Fort, as administrator, against herself, to have the said notes and mortgage set aside as fraudulent and intended to defeat her creditors. In her answer in that action she averred that this same mortgage was executed by her to her daughter Polly to secure a debt justly due, and in that case she testified that 'the notes described in the mortgage were for money I got from Mrs. Meetze'; but now she swears that all her former sworn testimony was false, and extorted from her by duress and threats and fear of being 'put out of the way.' This is certainly remarkable; and still more extraordinary is it to find that her brother, Jefferson Leaphart, and another daughter, Sallie Speights, swear in this case that the testimony they swore to in Fort v. Drafts in favor of the validity of the notes and mortgage was false, too, and extorted from them by the duress and threats of Walter Meetze. We are asked to believe that Walter Meetze and Polly exercised their wicked control, not only over the mind of Sarah Drafts, but also over her brother, a Confederate veteran, and her daughter, Sallie, forcing them to swear falsely; and that this overpowering duress was not confined to the execution of the notes and mortgage, but lasted for years, and was exercised at great distances; for it is in evidence Sallie Speights, married, and living in Augusta, came to attend the reference held in Fort v. Drafts,—came from Augusta to Lexington for

that purpose several times; and yet she swears in this case that her sworn testimony given at these several references was false, and extorted from her by duress exercised by Walter S. Meetze. Courts are acquainted with instances of duress and imposition practiced upon one person, and for one purpose; but the duress sought to be established in this case is of an unfamiliar type,—of malignity so vigorous that it not merely forces a woman to sign fraudulent papers and swear on the witness stand that they are good and valid, but it also makes a coward of an old soldier and a perjurer of an honest man; and so far reaching is its influence that it again and again draws a married woman from her husband in a distant city, and compels her to perjure herself; and finally it makes a reputable lawyer and court officer its willing tools and agents. If duress of this sort had really existed, it would not have been difficult to prove it. As it is, the evidence of its existence is so meager and vague as to be hardly worthy of consideration. From the date of the execution of the notes and mortgage to the commencement of this action the conduct and declarations, and the surroundings, of Sarah Drafts, all tend to negative the charge of duress. Although she professes to have been afraid of Walter Meetze, yet we find her going to his house to tell her story immediately after Fort's visit, and to ask Walter's advice. At his house she makes the notes; then she goes with him to Lexington. There she executes the mortgage; and, out of her own purse, she pays Mr. Meetze the \$5 for drawing it. Mr. Meetze, her attorney in the Fort Case, testifies that he had never seen a case where the witnesses seemed to be more friendly than in that case. William J. Assmann, the referee in that case, and the clerk of the court, testifies that Sarah Drafts gave her testimony in that case 'as plainly, calmly, as any lady could, without the slightest fear or evidence of excitement whatever,' and that he saw no evidence of intimidation or duress; that, indeed, Mrs. Sallie Speight showed 'a good deal of temper towards the attorney who cross-examined her.' The charge of duress in forcing these witnesses to testify falsely falls utterly. From the time of the execution of the notes and mortgage to the commencement of this action, a period of more than six years, Sarah Drafts treated them as valid obligations, and at different times she so stated and declared. During all these years she made no attempt to be relieved from the mortgage. But she claims that her long acquiescence can be explained by the duress continuing all this time. Of such continuance of duress there is not the slightest proof, except her own statement that she was afraid of Walter Meetze,—afraid of him always. If, therefore, any duress had been used in obtaining the notes and mortgage in the first instance, this lapse of time and nonaction would be regarded, in equity, as acquies-

cence, and a ratification of the original transaction. Where a party relies upon a defense of duress, he is, in equity, bound to act promptly after actual duress has ceased; and he must not sleep on his rights if he would seek relief. Where there has been long delay in seeking relief, the party pleading duress must introduce clear and conclusive evidence to explain the delay. If there was any testimony on this, it was inconsiderable. The averment that the two notes are pretensive and without consideration is not satisfactorily sustained by the proof. It is hard to understand why Sarah Drafts should have executed notes to her daughter without the consideration, unless the charge be true that they were made for the purpose of defrauding creditors. But this charge is met by the fact that, while the notes were for \$1,800 in all, the value of the property was about \$4,500,—enough to satisfy the Fort claim as well as the others. My view of the evidence compels me to overrule the report of the referee and to sustain the validity of the notes and mortgage delivered to Polly C. Meetze by Sarah Drafts. It is not necessary to dwell at length on the interest of W. J. Assmann. It is sufficient to say that, if the charge of duress had been established, Sarah Drafts would have been estopped by her actions and declarations from denying the validity of the mortgage so far as he is concerned. By an order formerly passed in this cause, the Carolina National Bank of Columbia, S. C., was permitted to prove an interest they had in the mortgage in question, which was assigned to them to secure a promissory note of Polly C. Meetze dated 27th March, 1891, for \$300, bearing interest after maturity at the rate of 8 per cent. per annum. It is ordered, adjudged, and decreed that the report of the referee herein be, and the same is hereby, overruled. It is further ordered, adjudged, and decreed that, after the payment of the costs and expenses of this action and the amount due on the Benjamin mortgage, as aforesaid, as provided for in former decree filed in this case, the clerk of the court shall apply the remainder of the proceeds of the sale of the land covered by this mortgage—First, to the claim of W. J. Assmann; second, to the claim of the Carolina National Bank of Columbia; third, to the notes and mortgage of Sarah Drafts to Polly C. Meetze, to be paid to the latter or her attorney, and to reserve any balance that may remain in his hands until the further order of the court. It is further ordered that in the costs and expenses to be paid shall be included the costs and expenses and disbursements of William H. McFeat, stenographer employed in the cause, after the same shall have been properly ascertained and taxed up by the clerk of the court.”

G. T. Graham, for appellant. Melton & Melton, Meetze & Muller, and C. M. Efrid, for respondents.

McIVER, C. J. This action was commenced on the 20th January, 1888, by the plaintiff to foreclose a mortgage of real estate, executed by the appellant, Sarah Drafts, on the 1st day of January, 1886, to Messrs. Meetze & Muller to secure the payment to them of the sum of \$500, for a fee for professional services rendered by them to the said appellant, which mortgage, it is alleged, was duly assigned to the plaintiff before the commencement of this action. It is also alleged in the complaint that the defendant Polly C. Meetze holds a mortgage, prior in date to that held by the plaintiff, covering the same premises, but that the said Polly C. Meetze has, by her writing indorsed on plaintiff's mortgage, consented to waive her prior lien, in favor of plaintiff, on account of the fact, as recited in said indorsement, that the amount for which the plaintiff's mortgage was given was for services rendered by Messrs. Meetze & Muller “to the within mortgagor in recovering the land within described, and without which recovery my mortgage would have been worthless.” It is also alleged in the complaint that the defendant William J. Assmann has some interest in the mortgage to Polly C. Meetze, which, it appears from the testimony, arose from the fact that said Assmann had advanced about \$300 to Polly C. Meetze, to enable her to take back the mortgage which she had previously assigned to one Ballentine; and, to secure the repayment of the amount so advanced, said Assmann took from Polly C. Meetze an assignment of so much of the mortgage as would be sufficient to secure the repayment of the sum advanced. The answer of the appellant, Sarah Drafts, admits the execution of both of the mortgages above referred to, but she denies the assignment of the first-mentioned mortgage to the plaintiff, and alleges that nothing is due thereon; and, as to the mortgage to the defendant Polly C. Meetze, she sets up, as defense thereto, that said mortgage was without consideration, was given to defeat, delay, and hinder her creditors, and that the same was obtained from her by the said Polly C. Meetze and her husband, Walter S. Meetze, by the exercise of duress, imposition, and undue influence. Polly C. Meetze answered, joining in plaintiff's prayer for foreclosure, and utterly denying all charges made by appellant against her mortgage. William J. Assmann answers pretty much to the same effect, and, in addition thereto, avers that when he took the assignment of so much of the Polly C. Meetze mortgage as would be necessary to secure the repayment of the amount advanced, as above stated, he had no knowledge or notice of any kind of any defect or vice in said mortgage. After the pleadings were made up, the defendant Sarah Drafts applied to his honor Judge Hudson for an order framing certain issues of fact to be tried by a jury. This order was refused, and an order was granted by

Judge Hudson referring all the issues, both of law and fact, to Robert W. Shand, Esq., for trial. From that order the said Sarah Drafts appealed; and, while the case was pending in the supreme court, an order was granted by that court, with the consent of all parties, substituting J. Brooks Wingard, Esq., in place of William Shand, "to hear and determine the issues in said action," and affirming the order appealed from in all other respects. This order, as set out in the case, is without date, but it is said to have been passed on the 4th of January, 1889. At all events, it appears from the case that the first reference, before Mr. Wingard, was commenced on the 20th of August, 1889. Many references were subsequently held, and an immense mass of testimony was taken, and, on the 26th day of July, 1894, the referee submitted his report (a copy of which should be incorporated in the report of this case), in which he substantially finds that the Polly C. Meetze mortgage was obtained by the exercise of duress, oppression, imposition, and improper and undue influence upon the said Sarah Drafts by the said Polly C. Meetze and her husband; "that the defendant William J. Assmann, having purchased an interest in said mortgage after its maturity, can occupy no higher position than the original mortgagee;" and he also finds that the interest claimed by the Carolina National Bank, which, in some way not fully explained, became a party to the action, "was purchased after the filing of the pleadings in this action, and must stand or fall only as the mortgage itself is sustained or defeated." He therefore recommends that the notes and mortgages given by Sarah Drafts to Polly C. Meetze be delivered up and canceled. It is well to note here that the referee, after stating what he regards as the substance of the pleadings, uses these words: "The sole issue raised by the answers herein is confined to the defendants; and, briefly stated, it is as to whether duress, imposition, oppression, and undue and improper influence were exercised upon the defendant Sarah Drafts by Polly C. Meetze and her husband, Walter S. Meetze, in compelling the said Sarah Drafts to execute and deliver [to] the said Polly C. Meetze the notes and mortgage to secure the sum mentioned and described in the pleadings herein." To this report the defendants Polly C. Meetze and William J. Assmann, as well as the Carolina National Bank, filed exceptions, and the case came on for hearing, upon the report and exceptions, before his honor Judge Benet, who rendered his decree (a copy of which should be embraced in the report of this case) overruling the report of the referee, sustaining the notes and mortgage to Polly C. Meetze, and directing that, after the payment of the costs and expenses of this action, and the amount due on the mortgage held by the plaintiff, the balance of the proceeds of the sale of the mortgaged premises

be applied—First, to the payment of the claim of William J. Assmann; second, to the claim of the Carolina National Bank; third, to the notes and mortgage of Sarah Drafts to Polly C. Meetze, and that any balance that may then remain be held subject to the further order of the court. From this decree the defendant Sarah Drafts has given notice of appeal, upon the several exceptions set forth in the record, which need not be repeated here, as, in our view of the case, it turns upon a single question of fact, which will be presently stated. It seems, however, that the referee made his report, the plaintiff applied to his honor, Judge Fraser, for a decree of foreclosure, which was granted on the 27th day of February, 1894, and the mortgaged premises ordered to be sold on the first Monday in November, 1894; but, by an agreement of all parties, the sale was postponed until the first Monday in December, 1894, though, in fact, the property was not offered for sale until the first Monday in January, 1895,—a day or two before the filing of Judge Benet's decree. From this decree of Judge Fraser the defendant Sarah Drafts has also appealed, upon the following grounds: "For that his honor erred in ordering a foreclosure of the plaintiff's mortgage, and directing the clerk of the court of Lexington county to sell the lands and premises mentioned and described in the complaint herein, on the first Monday in November, 1893, or some subsequent sale day thereafter; because all the issues raised by the pleadings in this case were, on the 4th day of January, 1889, referred to J. Brooks Wingard, Esq., special referee, to hear and determine, by an order of the supreme court of South Carolina. At the time of filing of the order of Judge Fraser, to wit, on the 27th day of February, 1894, the taking of the testimony by the referee had not been concluded, and no report had been filed by said referee; nor had any order been passed requiring said referee to file his report therein on or before a certain day; and it is respectfully submitted that his honor Judge Fraser was without jurisdiction in passing said order of foreclosure as to plaintiff's mortgage, and in ordering a sale of the lands and premises aforesaid, at the time aforesaid; and he erred as a matter of law therein."

We purpose first to consider the exception to Judge Fraser's decree; and we might dispose of it very speedily by the simple observation that it is based upon the ground of lack of jurisdiction, which is clearly untenable; for, if a judge has no jurisdiction to pass an order to speed a cause pending in the court of common pleas over which he presides, it would be difficult to conceive what tribunal would have such jurisdiction. The fact that the original order of reference was granted by the supreme court is not sufficient to deprive the circuit court of jurisdiction; for, by the ex-

press terms of the order, the case was necessarily remanded to the circuit court, and thus the supreme court lost its jurisdiction. But we are disposed to take a more liberal view of this exception, and to inquire whether there was any error of law in the decree of Judge Fraser, even if it should be conceded that the reference was still pending when Judge Fraser rendered his decree; for it is manifest, from the whole proceedings in the cause, there was no issue between the defendant Sarah Drafts and the plaintiff as to her right to foreclosure, upon which the referee was called upon to pass, but that the whole issue was between the defendant Sarah Drafts, on the one side, and the defendants Polly C. Meetze and William J. Assmann, on the other, as to the validity of the Polly C. Meetze mortgage. In that issue the plaintiff had no concern whatever; and, in whatever way such issue might be decided, the plaintiff's right to foreclose could not possibly be affected. It must strike every one as manifestly unjust to the plaintiff that she should be postponed in her rights, to await the determination of an issue in which she had no concern. Such a course of proceeding is pointedly rebuked by this court in *Canaday v. Boliver*, 25 S. C. 547; and, as Judge Fraser well says in his decree: "It seems that these matters in dispute [between the defendants] have been for years under reference, and that, while the plaintiff has been using all efforts to have the same concluded, it has not yet been done. The court can perceive no reason why the plaintiff shall any longer be deprived of her order for foreclosure."

But it may be said that the defendant did, by her answer, raise two issues with the plaintiff—first, as to the assignment of the mortgage to her; second, as to whether there was anything due thereon. It is manifest, however, that these issues were abandoned at the very outset of the case, and were never afterwards pressed; and no testimony was adduced before the referee to sustain any such contention on the part of the appellant. This is apparent from the statement made in the case that the appellant claimed (and her claim was allowed) that she had the right to open and reply because the real issue was between the defendants. Accordingly, the referee says in his report that "the sole issue raised by the answers herein is confined to the defendants,"—that is, whether the Polly C. Meetze mortgage was obtained by duress, etc.; and to that issue alone was the testimony before the referee confined. It is clear, therefore, that Judge Fraser was fully justified in saying: "The contention in the whole case is between the defendants. There is no pretense of any objection to the validity of the claim of the plaintiff,—in fact, all of the defendants except Mrs. Drafts join in the prayer for the foreclosure of the plaintiff's mortgage, while Mrs. Drafts admits its

validity." In addition to this, it appears in the case that on the 3d of November, 1894, the attorney for appellant agreed, in writing, with the attorneys for the other parties, to a postponement of the sale, as ordered by Judge Fraser, until the first Monday in December, 1894, without any protest or exception to such order of sale, which seems to imply a recognition of the legality of the order. But, again, it is at least doubtful whether the reference was legally pending when Judge Fraser made his decree, for it appears in the case that on the 5th day of May, 1893, the attorney for appellant was served with a notice, in writing, that the reference must be closed on the 25th of May, 1893. Now, the Code, in section 293, provides that: "The referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted; and in default thereof, and before the report is delivered, either party may serve a notice upon the opposite party that he elects to end the reference; and thereupon the action shall proceed as though no reference had been ordered." The amendment to this clause by the act of 1893 (21 St. at Large, 399), even if it applies to this case, does not affect the view above presented; for by that amendment provision is made for an extension of the time "by mutual consent in writing," and no such consent appears in this case. In any view of the matter, we are unable to discover any error in the decree of Judge Fraser, and hence the exception thereto must be overruled.

We come next to the exceptions to Judge Benet's decree which, in our judgment, raise the single question whether the appellant has shown that the notes and mortgage held by Polly C. Meetze against Sarah Drafts were obtained by duress, imposition, or undue influence. This is a question of fact, pure and simple; and, under the well-settled rule, it is incumbent upon the appellant to show that the conclusion reached by the circuit judge is without any testimony to sustain it, or is manifestly against the weight of the evidence. It is true that the referee and the circuit judge differ in the view which they have taken of this question of fact; but the only effect of that is to induce this court to scrutinize the testimony more closely than it would otherwise be deemed necessary to do, and to judge for itself who has reached the correct conclusion,—remembering, however, as was held in *Maner v. Wilson*, 16 S. C. 469, that where the referee and the circuit judge differ as to their conclusions on a question of fact, in a chancery case upon which there is a conflict of testimony, the latter must be regarded as *prima facie* right. This is based upon the theory that the circuit judge, from his position and experience in dealing with such matters, is better qualified to sift conflicting testimony than any referee could be. We have therefore exam-

ined the voluminous testimony in this case with great care, and at an expenditure of much time, which, perhaps, might have been more profitably, otherwise, employed; and we must unhesitatingly say that we are entirely satisfied that the circuit judge was right in the conclusion which he has reached. While it is not usual, and would scarcely be profitable, to enter into any elaborate examination of the testimony to vindicate the correctness of the judge's conclusion, we do propose to indicate some of the more striking points in the case which have attracted our attention. There is one circumstance, at the outset, which seems to have escaped the attention of the referee, or, at least, to which he gives no prominence; and that is that the burden of proof rests on the appellant to show that the notes and mortgage held by Polly C. Meetze were obtained by duress, imposition, and undue influence. The execution of these papers having been admitted, they are, of course, to be considered as valid until they are shown by one who assails them to be invalid. This is especially so in this case, when the undisputed testimony shows that these same notes and mortgage were once before assailed in the case of *Fort v. Drafts* and Polly C. Meetze upon the ground that the notes were without consideration, and they, as well as the mortgage, were given to delay, hinder, and defeat the creditors of the appellant, Sarah Drafts, in which case these papers were, by the solemn judgment of the court, determined to be good and valid,—which judgment was based upon the testimony of the same witnesses who are now mainly relied upon to show that they were obtained by duress. It is true that in the former case, instituted by Fort, no charge of duress was made, and no testimony to that effect seems to have been introduced; yet, if it be true, as the appellant now claims, that these notes and mortgage were obtained from the appellant by duress, exercised by Polly C. Meetze and her husband towards the appellant, Sarah Drafts, that was then certainly known to her, and to her main witnesses,—Mrs. Speights and her brother Jefferson Leaphart,—and would have furnished ample ground for the overthrow of said notes and mortgage. While, therefore, for this as well as other reasons, needless to be mentioned, the question now presented may not, possibly, be regarded as *res adjudicata* by the judgment rendered in the former case instituted by Fort, yet the facts developed in the former case reflect much light upon the inquiry now presented. The counsel for the appellant, feeling the force of this, to avoid its effect has undertaken to show, not only that the notes executed by Sarah Drafts to Polly C. Meetze, as well as the mortgage to secure the payment of the same, were originally obtained by duress, but that such duress was continued through a period of several years, to such an extent as to force, not only Mrs. Drafts, but her daughter, Mrs. Speights,

and her brother, Jefferson Leaphart, to swear falsely, in the Fort Case, as to the validity of said notes and mortgage. This story is of such an inherently incredible character that it would require much more testimony, and of a much different character, than that which has been adduced in this case, to command the confidence of right-minded, disinterested persons. Here is an old lady, living within six miles of the capital of the state, and about the same distance from the county seat of the county in which she resided, and thus having easy access to the officers and agencies of the law, designed for the protection of the weak and helpless against the assaults of the lawless, asking the court to believe that she was compelled by a single individual and his wife,—her own daughter,—not only to execute a fraudulent and sham mortgage, but also to commit perjury in a case brought by one of her creditors to set aside such mortgage. Not only that, but such was the terror which this single individual and his wife excited, not only in her breast, but in that of her brother, a gallant Confederate soldier, living with her, and her other daughter, Mrs. Speights, living in Augusta, Ga., as to compel them all to join with her in deliberately committing perjury,—the daughter, Mrs. Speights, voluntarily leaving her home in the city of Augusta, where she certainly was beyond the reach of danger, on more than one occasion, and returning to Lexington, where she would be in easy reach of this alleged desperado; and for what purpose? To commit perjury. But what was the nature of the duress claimed to have been exercised towards appellant and her main witnesses, over this long period of years? There is not the slightest evidence that either Walter S. Meetze or his wife ever offered or attempted any act of violence towards Mrs. Drafts or any of her witnesses. Nothing but mere words,—and they, too, of a most dubious character. Again, there is no evidence that either Polly C. Meetze or her husband, during the long period since 1881, when the mortgage was executed, ever indicated, either by word or deed, any intention, or even desire, to enforce the mortgage against Mrs. Drafts, until the commencement of the present suit, when Polly C. Meetze was made a party defendant, and was thus compelled to set up her mortgage or abandon her claim altogether. And, as one of the counsel for respondents very pertinently says, but for the institution of the present action, for all that appears, Polly C. Meetze would never to this day have pressed her mortgage against her mother. On the contrary, as the testimony shows, whenever there was any danger of her mother being disturbed in the possession of the mortgaged premises, not only Polly C. Meetze, but her husband also, always displayed not only a willingness, but an anxiety, that Mrs. Drafts should be secured in the possession of a home.

There is another important and pregnant

circumstance in this case to which due attention has not been given, and that is that the appellant has wholly failed to give, or even suggest, any reason whatever why the terrorism (which she claims continued from the time of the execution of the mortgage to Polly C. Meetze, not only up to the time of the trial of the Fort Case, and was so great as to compel her and her principal witnesses to testify falsely in that case, but up to the time of the commencement of the present case) should have then suddenly ceased. There is no doubt that Walter S. Meetze, who seems to have been the source of terror which appellant now relies upon to overthrow the Polly C. Meetze mortgage, was still alive, and in possession of all his faculties, mental, moral, and physical, and he was present, certainly at one, and probably at all, the references held in the present case; and there is no evidence tending to show that he had lost any of his alleged ferocity, or had become more lamb-like and amiable. Why, then, this extraordinary change in the testimony of the appellant and her main witnesses? If she and they were so overpowered by the fear of Walter S. Meetze, at the time of the trial of the Fort Case, as to induce them then to testify falsely, and if this fear continued up to the time of the trial of the present case (as is evidenced by the fact that no subsequent attack was made upon the Polly C. Meetze mortgage until after the present action was instituted, and, on the contrary, its validity was distinctly recognized by Mrs. Drafts when she signed, as a witness, the writing by which Polly C. Meetze waived the priority of the lien of her mortgage in favor of the plaintiff's mortgage), the inquiry naturally forces itself upon the mind, what was the reason for this unmistakable change in the testimony? While the appellant has failed to suggest any answer to this very natural inquiry, we think it may possibly be found in a circumstance to which we will advert. It appears from the testimony in the case that, the day before appellant's answer was filed in this case, there was a secret conclave held in the office of appellant's counsel, at which it was arranged that Mrs. Drafts should confess a judgment for a large amount to Fort, on a debt that she has always denied owing, and that the mortgaged premises should be sold under this judgment, and bid off by Fort, who was then to divide the same between the lawyers, Fort, and Mrs. Speights,—the same person who was so ready to leave the safety of her home in the city of Augusta and come to Lexington for the purpose, as she now says, of testifying falsely in the former case of Fort. This arrangement was reduced to the form of a written agreement, which was claimed to have been lost; but its contents were extracted from W. G. Speights (the husband of Mrs. Speights above referred to) and J. C. Fort on their cross-examination. It is impossible to read the testimony of these

two witnesses without being impressed with the conviction that such was the arrangement between them. In pursuance thereof, it appears that the land was sold and bid off by Fort for a nominal sum, and that he is now in possession thereof, claiming it as his own. In order to perfect this scheme, concocted between W. G. Speights, acting for his wife, and Fort, it was necessary to overthrow the Polly C. Meetze mortgage, as that was a senior lien on the land, and this may possibly account for the extraordinary change in the testimony of the most material witnesses in the present case. Without further investigation of the testimony in the case, all of which has been most carefully examined, it is sufficient for us to say that we are satisfied that Judge Benet has correctly solved the material question in the case, and that we concur in the conclusion which he has reached. The judgment of this court is that the judgment of Judge Fraser, as well as that of Judge Benet, be affirmed, and that the case be remanded to the circuit court for such further proceedings as may be deemed necessary.

(44 S. C. 386)

QUICK et al. v. CAMPBELL et al.

(Supreme Court of South Carolina. July 11, 1895.)

DEATH OF PARTY—SUBSTITUTION OF REPRESENTATIVE—PLEA OF PLENE ADMINISTRAVIT—DISCHARGE OF ADMINISTRATOR—PERSONS BOUND.

1. Under Code, § 142, providing that an action on a cause of action which survives shall not abate by the death of a party, but that, on motion within a year from such death, the court may allow the action to be continued by or against his representative or successor in interest, an action pending against an administrator for an accounting may, on the death of defendant after trial, and before judgment, be continued by a substitution of his representative, and judgment rendered against the substituted defendant without a second trial.

2. Rev. St. 1893, § 2322, providing that no action shall be commenced against the representative of a decedent, on debts due the estate, until 12 months after probate of the will or grant of administration, does not apply to an action begun against the decedent in his lifetime, and continued by a substitution of his legal representative.

3. An exception involving a question of fact cannot be considered when the evidence is not contained in the record.

4. In an action against an administrator, a decree for plaintiff cannot be made subject to the plea of plene administravit, when such plea has not been interposed.

5. A discharge granted the administrator of a surety on an administrator's bond, under Code, § 41, which allows a judge of probate to grant a discharge to an administrator, but provides that it shall not affect any distributee, legatee, cestui que trust, ward, or lunatic who has not been made a party to the application for discharge, will, after the lapse of six years, be binding upon the heirs of the estate for the protection of which the bond was given, and upon a cosurety thereon.

Appeal from common pleas circuit court of Chesterfield county; J. I. Norton, Judge.

Action by Eveline Quick and others against Allen Campbell and others. From the judg-

ment rendered, part of plaintiffs and part of defendants appeal. Affirmed.

The decree of the lower court was as follows:

"Daniel Ruthven died intestate 17th April, 1868, in said county and state. The defendant C. G. Ruthven administered on his personal estate, and gave Alexander Douglass and D. L. Campbell as sureties on his administration bond, dated 21st of May, 1868. Alexander Douglass died —, and the defendant James W. Ousley fully administered his personal estate, and was discharged from his office by the probate court in —, 1882, and nothing appears to show the invalidity of the discharge. It follows that James W. Ousley is not administrator of said estate, and is not a proper party to this action, and said estate is not represented in this action, and cannot be affected by any judgment herein. D. L. Campbell, the other surety, died the 20th October, 1893, pending this action, and after he had been made a party thereto, and the reference held. Allen Campbell has administered upon his estate, has been properly made a party to this action, and is bound as administrator by all the proceedings in the cause had in the lifetime of D. L. Campbell, and by which the deceased was bound, and by all proceedings since this defendant became a party. C. G. Ruthven has not fully administered the personal estate of Daniel Ruthven, deceased. The exception is well taken that the sureties on the administration bond were not liable for rents of lands received by the administrator (\$20) in 1869, but the administrator is personally liable. So the exceptions correctly state the general rule that the administrator is not liable for the sale bill, but only for the moneys which were, or ought to have been, collected. In this case it seems that the rule is practically the same. He is charged with certain notes because he did not exercise proper diligence to collect them, and credited with others because proper diligence failed to secure their payment. The note of Mary C. Ruthven which the administrator holds bears compound interest, and the crediting of it on her share at a late date is favorable to the administrator. The exception that Alexander C. Ruthven was not bound by the decree for partition by the probate court is sustained. It does not appear that he was made a party, and that will not be presumed in that court, especially as it had, de jure, no jurisdiction over the subject-matter. John W. Ruthven, Cornelius G. Ruthven, C. R. Sumner, John N. Sumner, Isabella Campbell, Allen Campbell, Josiah Winburn, John Winburn, and James W. Ousley except because there is no evidence that the heirs of Alexander Ruthven, Catharine Gandy, and Robert Ruthven are correctly set forth in the complaint. It is not denied that Alexander C. Ruthven, Catharine Gandy, and Robert Ruthven are deceased, nor that they were children and heirs and distributees of Daniel Ruthven, deceased, but it is essential to the protection

of defendant John W. Ruthven that their heirs should be parties to this action. It is therefore ordered that it be referred to W. J. Hanna, Esq., to ascertain and report who are the heirs, respectively, of Alexander C. Ruthven, Catharine Gandy, and Robert Ruthven, deceased, and that their several shares as heirs of Daniel Ruthven, deceased, be retained until the coming in of said report. The exception that Mary Alice Quick was a bastard is overruled. Upon consideration of the testimony, I am not convinced that, having been born in wedlock, her prima facie status of legitimacy has been overthrown by a preponderance of evidence. The exception that several causes of action were improperly joined in this suit, is overruled. Such objections, if valid in this case, appear upon the face of the complaint, and could only have been taken by demurrer. It was not so taken. If it had been, it could not have been sustained. There was but one main cause of action,—the partition and settlement of the estate of Daniel Ruthven, deceased, both real and personal. All of the other matters are merely incidental. The object is not to set aside the judgment of the probate court for partition, but to treat it as a nullity as to plaintiffs, which it was; but its existence was a necessary averment, because it affects rights of the defendant. The alleged action for the partition of real estate of Mary C. Ruthven is merely an incident necessary to the determination of the parties among whom the estate of Daniel Ruthven is now to be partitioned. All other exceptions to the referee's report are overruled, and the report, as modified by the foregoing rulings, confirmed. It is further ordered and adjudged that the lands described in the complaint be sold as recommended, and that the proceeds of sale be distributed as recommended, except that one-eleventh of two-thirds of the net proceeds of sale be paid to the heirs of Alexander Ruthven, deceased, from the part adjudged to be paid to John W. Ruthven; the administrator's account, as against him, be confirmed, and also as against the estate of his surety, D. L. Campbell, now deceased, except that \$20 received by administrator for rent of land for 1868 be deducted, with interest from 1st January, 1869, with the same rests made; that the referee take further proof as to the heirs of Alexander Ruthven, Catharine Gandy, and Robert Ruthven, and report who are the heirs of said deceased persons; also as to what persons and personal representatives are entitled, and in what proportion, to receive the personal estate of Daniel Ruthven, deceased, which the administrator and the administrator of D. L. Campbell (out of the estate of his intestate) are hereby required to pay to the clerk of this court."

W. F. Stevenson, for plaintiffs appellants and for respondents. E. J. Kennedy, for defendants appellants.

GARY, J. For a proper understanding of the questions raised by the exceptions here-

la, it will be necessary to state only the following facts: This action was commenced on the — day of February, 1892, for the partition of the lands of Daniel Ruthven, who died intestate on the 17th of April, 1866; also for an accounting by the defendant O. G. Ruthven, who administered on his personal estate, and gave Alexander Douglass and D. L. Campbell as sureties on his administration bond, dated 21st of May, 1866. Alexander Douglass died years ago, and the defendant James W. Ousley fully administered his personal estate, and was discharged from his office by the probate court in 1882, and nothing appears to show the invalidity of the discharge. D. L. Campbell, the other surety, died on the 20th of October, 1893. On the 16th of February, 1893, his honor, Judge Ernest Gary, made an order referring all issues of law and fact to W. J. Hanna, Esq., as special referee. The special referee held references on the 25th of April and the 7th and 25th days of August, 1893, when the reference was closed, and arguments made by the attorneys. At the February term of the court, 1894, his honor, Judge Aldrich, made the following order: "It appearing that D. L. Campbell has died since the institution of this action, and that it is now in the hands of a referee, on motion of W. F. Stevenson, plaintiffs' attorney, it is ordered that the administrator of said D. L. Campbell be substituted on the record in his stead, by amendment, and that the case proceed in the usual way before the referee." Plaintiffs amended their complaint as follows: "(1) That they adopt all the allegations of their former amended complaint in this case on file in this cause, and make the same a part of this complaint, and draw reference thereto as often as may be necessary. (2) That, in addition to the allegations therein contained, they allege that, since the institution of this action, D. L. Campbell has departed this life, testate, and the defendant Allen Campbell has proved the will of D. L. Campbell, and qualified as his executor, and has been made a party to this action by the service of a summons pursuant to the order of this court." The defendant Allen Campbell, after adopting the defenses set up in the answer of D. L. Campbell, his testator, alleged, as further defense: "(1) That Duncan L. Campbell, his testator, departed this life on the 20th day of October, A. D. 1893. (2) That this defendant, on the 16th day of February, 1894, filed in the court of probate for Chesterfield county the last will and testament of his testator, Duncan L. Campbell, deceased, and on said day had the same probated, and duly qualified thereon as executor of said estate. (3) That the plaintiff has no right or authority to commence an action against him, as executor of the estate of Duncan L. Campbell, for the recovery of their claim against the estate of his testator, until after the lapse of twelve months from the 16th day of February, 1894." Without further testimony, or any further order of ref-

erence, the referee filed on the 22d of August, 1894, his report. The defendant Allen Campbell filed exceptions to said report. The case came on to be heard at the September term of the court, 1894, before his honor, Judge Norton, whose decree will be incorporated in the report of the case.

We first consider the exceptions of Allen Campbell. Exceptions 1, 5, and 6 will be considered together, and are as follows: (1) "Because his honor erred in rendering against him any judgment whatever, when he had never had any hearing before the referee." (5) "Because his honor erred in rendering judgment against this defendant, when there had neither been an order of reference as to his rights, nor a hearing as to him before the referee." (6) "Because his honor erred in rendering judgment against him without allowing him the right or privilege of a trial." The defendant Allen Campbell was simply substituted upon the record in the place of his testator, and does not, therefore, occupy the position of one who has been made a party defendant, claiming independent rights, as in the case of *Ex parte Maurice*, 24 S. C. 178. Section 142 of the Code provides: "No action shall abate by the death * * * of a party * * * if the cause of action survive or continue. In case of death * * * of a party the court, on motion at any time within one year thereafter, * * * may allow the action to be continued by or against his representative or successor in interest." The latest judicial utterance of this court in construing this section is found in the case of *Dunham v. Carson* (S. C.) 20 S. E. 197, the rubric of which is as follows: Where, on the death of a defendant in an action to foreclose a mortgage on land, her devisees are, by order, made parties defendant, it is error to provide in the order that they may answer the complaint generally, as the only question they can raise by answer is whether they are the heirs or devisees of the deceased. See, also, *Lyles v. Haskell*, 35 S. C. 391, 14 S. E. 829. These exceptions are therefore overruled.

The second exception is as follows: "(2) Because this defendant was not liable to an action as executor for the debts of his testator until after the expiration of twelve months from the probate of his testator's will, and his honor erred in holding otherwise." Section 2322, Rev. St. 1893, provides that "no action shall be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate until twelve months after the probate of will or grant of administration." The section just quoted has no application to a case like this. It was intended to apply to cases where the original action was commenced against the executor or administrator, and not when the representative is substituted on the record in the place of his testator or intestate. This exception is overruled.

The third exception is as follows: "(3) Because his honor erred in sustaining the ref-

eree's finding that plaintiffs are entitled to a decree against this defendant for \$647.07, when there was no evidence to show any assets of his testator had gone into his hands, and when the defendant had never been given the opportunity of showing how much he had received." This exception only involves a question of fact. The testimony is not set forth in the case, and there is nothing before us to show that there was error on the part of the circuit judge. This exception is also overruled.

The fourth exception is as follows: "(4) Because his honor erred in sustaining the finding of the referee that plaintiffs were entitled to a decree against this defendant not subject to the plea of plene administravit." In addition to what has just been said in regard to the third exception, it does not appear that the plea of plene administravit was interposed either by D. L. Campbell or Allen Campbell, his representative. This exception is overruled.

We come now to a consideration of the exceptions filed by the plaintiffs and Preston Quick, administrator, which are as follows: "(1) Because the court erred in holding that a discharge by the judge of probate, and the lapse of six years thereafter, before action brought on an obligation of the intestate, terminates the office of administrator, and there is no longer any administrator, and James W. Ousley could not be sued, under these circumstances, upon an obligation of his intestate. (2) Because the court erred in holding that the estate of Alexander Douglass was not represented in this cause, and that James W. Ousley was not a proper party to this cause. (3) Because the court erred in holding that a judgment could not be entered in the case against James W. Ousley, as administrator of Alexander Douglass, subject to the plea of plene administravit. (4) Because the court erred in dismissing the complaint as against James W. Ousley, as administrator of Alexander Douglass." These exceptions all depend upon whether these parties are bound by the order of the probate court discharging the defendant James W. Ousley as administrator of the estate of Alexander Douglass, deceased. Section 41 of the Code provides that: "It shall not be lawful for any judge of probate in this state to grant a final discharge to any executor, administrator, trustee, guardian, or committee, unless such executor, administrator, trustee, guardian, or committee, shall have finally accounted for the estate in his hands, and have given notice in a newspaper in the county (if there be no newspaper published in the county, then in some newspaper having the greatest circulation therein) for the space of at least one month, that on a day certain application will be made to the said judge of probate for a final discharge: provided, that in Charleston and Richland counties the publication shall be tri-weekly. No such discharge shall affect any distributee, legatee,

cestui que trust, ward or lunatic, who has not been made a party to such application, either by personal service of the notice, or by publication in the mode provided for absent defendants." The special referee, in his report, says, "It is admitted that he (James W. Ousley) made a final accounting, and was discharged by the judge of probate, more than six years before the commencement of this action." There was no exception to this part of the special referee's report. His honor, Judge Norton, in his decree, found that "the defendant James W. Ousley fully administered his [Alexander Douglass'] personal estate, and was discharged from his office by the probate court in 1882, and nothing appears to show the invalidity of the discharge." The said discharge was binding upon all except those mentioned in the proviso to said section, to wit, "any distributee, legatee, cestui que trust, ward or lunatic, who has not been made a party to such application either by personal service of the notice, or by publication in the mode provided for absent defendants." The appellants filing these exceptions do not occupy any of the positions mentioned in the said proviso, and are therefore bound by the said discharge. There is another reason why these exceptions should be overruled: As has been said, none of the testimony is set forth in the case. The correctness of the circuit judge's conclusions in regard to the matter of discharge of the administrator depends upon questions of fact. When the testimony is not set out in the case, upon which the circuit judge based his decree, this court must presume that the circuit judge had before him such facts as were sufficient to sustain his conclusions. These exceptions are therefore overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 397)

HAMMETT et al. v. BROWN.

SAME v. CHAFFIN.

(Supreme Court of South Carolina. July 10, 1895.)

NOTES—MATURITY—INSTRUCTIONS.

1. Instruments reciting, respectively, "This is to show that I have received of my father, as so much interest in his estate, a tract of land, * * * for which I account to the estate for \$3,530, for which I promise to pay H. [the father], during his lifetime, seven per cent. per annum interest, to begin the first day of December, * * * which is value received," and "this is to show that my father has advanced me \$500 in cash, as so much advanced on his estate, for which I have to pay interest annually from * * *, it being for cash, which is value received,"—are notes.

2. The causes of action on said instruments matured at the death of the father.

3. The money on said instruments was, after the death of the father, due his estate.

4. Error cannot be predicated of failure to charge where there was no request therefor.

Appeal from common pleas circuit court of Spartanburg county; T. B. Fraser, Judge.

Actions by Elizabeth Hammett, executrix, and W. W. Dearybuby, executor, of C. B. Hammett, deceased, against Agnes Brown and Sarah A. Chaffin. Judgment for plaintiffs. Defendants appeal in both cases. Affirmed. The complaint, answer, charge to the jury, and exceptions in the case against Brown were as follows:

Complaint.

"I. For the first cause of action: (1) That on May 28, 1885, defendant executed the following obligation: '\$3,530. This is to show that I have received from my father, as so much interest in his estate, a tract of land containing three hundred and fifty-three acres, known as the "Gores Meeting-House Tract," for which I account to the estate for three thousand five hundred and thirty dollars, for which I promise to pay C. B. Hammett, during his lifetime, seven per cent. per annum interest, to begin the 1st day of next December, then the interest to be paid the 1st day of each December thereafter, which is value received this May 28, 1885. [Signed] Agnes Brown. Test: J. F. Sloan.' (2) That the said C. B. Hammett, father of defendant, died in said county and state on October 20, 1887, leaving of force his will, whereof he appointed the plaintiffs executrix and executor, respectively; that they thereafter duly qualified as such executors in the office of the probate court in said county, and entered upon the discharge of the duties of the office. (3) That the said will of C. B. Hammett, directed the executors to collect the aforesaid obligation, should it be necessary to do so in order to pay the debts of the estate; and that such necessity exists. (4) That no part of said obligation has been paid, and that there is now due thereon the said sum of \$3,530, with interest from December 1, 1885.

"II. For a second cause of action: (1) That on May 28, 1885, defendant executed the following obligation: 'This is to show that my father has advanced me five hundred dollars in cash, as so much advanced on his estate, for which I have to pay interest annually from the 3d day of May, 1884, it being for cash, which is value received this 28th day of May, 1885. [Signed] Agnes Brown. Test: J. F. Sloan.' That her father was C. B. Hammett. (2) That the said C. B. Hammett, the father of defendant, died in said county and state on October 20, 1887, leaving of force his will, whereof he appointed the plaintiffs executrix and executor respectively; that they thereafter duly qualified as such executors in the office of the probate court in said county, and entered upon the discharge of the duties of the office. (3) That the said will of C. B. Hammett directs the executors to collect the aforesaid obligation, should it be necessary to do so in order to pay the debts of the estate; and that such necessity exists. (4) That no part of said obligation has been paid, and

that there is now due thereon the sum of \$500, with interest from the 3d day of May, 1884.

"Wherefore, plaintiffs demand judgment for the amounts alleged above to be due on said causes, and for costs."

Answer.

"The defendant by this, her amended answer, answering the complaint herein: (1) Admits all the allegations of the complaint, except so much of the allegation contained in the paragraph numbered 4 of the first cause of action as alleges that the sum of \$3,530, with interest from December 1, 1885, is now due upon said cause of action; and so much of the allegation contained in the paragraph numbered 4 of the second cause of action as alleges that the sum of \$500, with interest from May 3, 1884, is now due upon said cause of action; and also so much of the allegation contained in the paragraph numbered 3 of the second cause of action as alleges that said will directs the executors to collect said obligation, if necessary to do so to pay debts of the estate, which allegation she denies. (2) For a second defense to the first cause of action, the defendant alleges that the cause of action stated in the complaint did not accrue within six years before the commencement of this action. (3) For a third defense to the first cause of action, the defendant alleges that at the date of the same she was a married woman, having a separate property, the same consisting of a parcel of land, containing 353 acres, in Spartanburg county, which said lands said C. B. Hammett in his lifetime conveyed to her by deed with full covenants of warranty; that said cause of action or agreement was not made as to her separate property, and the defendant received and took no property under said will of C. B. Hammett. (4) For a second defense to the second alleged cause of action, the defendant alleges that the cause of action stated in the complaint did not accrue within six years before the commencement of this action. (5) For a third defense to the second alleged cause of action, the defendant alleges that at the date of same she was a married woman, having a separate property, consisting of a parcel of land on Pacolet river, in Spartanburg county, which said land said C. B. Hammett in his lifetime conveyed to her by his deed with full covenants of warranty; that said agreement or cause of action was not made as to her separate property, and the defendant took and received no property under said will of C. B. Hammett. Wherefore the defendant prays judgment against the plaintiffs that the complaint be dismissed, and for costs."

Charge to the Jury.

"This is a case very similar to the one on the other side of the court. It is an action upon certain papers given this gentleman, who is now dead, in his lifetime. The su-

preme court say it is a note. The inclination in my mind was that it was a matter to be settled elsewhere, but the decision of the supreme court settles the case for me and you. That promised to pay so much. That promise to pay matured when he died, and is payable to his estate; so she is due to the estate that amount of money, with interest from his death, at 7 per cent., until now. As to being a married woman, while a married woman can make contracts as to her separate estate, if she borrowed money or bought property, that was her separate act. It was as to her separate estate that the note was given."

Exceptions.

"(1) In holding and charging that the causes of action sued on were notes. (2) In holding and charging that the causes of action matured at the death of testator. (3) In holding and charging that the causes of action were payable to the estate of the testator. (4) In holding and charging that the defendant was due the estate the principal amount sued for, with interest from the death of the testator. (5) In not charging that the first cause of action became due, if at all, at its date. (6) In not charging that the second cause of action became due, if at all, at its date. (7) In not charging that the first cause of action was not a note. (8) In not charging that the second cause of action was not a note. (9) In not charging that the first cause of action was not an agreement for the payment of money, and never became due and payable. (10) In not charging that the second cause of action was not an agreement for the payment of money, and never became due and payable. (11) In not charging that the plea of the statute of limitations was a bar to the action as to the first cause of action. (12) In not charging that the plea of the statute of limitations was a bar to the action as to the second cause of action."

S. T. McCravey, for appellants. Stanyarne Wilson, for respondents.

GARY, J. This action came on for trial before his honor, T. B. Fraser, presiding judge, and a jury, at the October, 1894, term of the court of common pleas for Spartanburg county. The complaint, answer, charge to the jury, and exceptions will be incorporated in the report of the case. Plaintiffs offered no testimony, and closed, and the defendant did likewise. The jury rendered a verdict for the amount of the notes, with interest from the 20th of October, 1887,—the date of the death of the testator,—and judgment was entered thereon. Before proceeding to consider the exceptions, we desire to state that the arguments of counsel in this case are very meager, and not a single authority is cited, except the case of Hammett v. Hammett, 38 S. C. 50, 16 S. E. 293, 839.

Appellants' first exception complains of error on the part of the presiding judge in hold-

ing and charging that the causes of action sued on were notes. This was substantially the decision rendered by this court in the case of Hammett v. Hammett, supra. This exception is therefore overruled.

The second exception complains of error on the part of the presiding judge in holding and charging that the causes of action matured at the death of testator. The instruments of writing show that the presiding judge was correct in so charging, and this exception is also overruled.

The third exception complains of error on the part of the presiding judge in holding and charging that the causes of action were payable to the estate of the testator. We do not see how it can even admit of question that the money was due to the estate of the testator in the absence of a contrary showing. This exception is also overruled.

The fourth exception complains of error on the part of the presiding judge in holding and charging that the defendant was due the estate the principal amount sued for, with interest from the death of the testator. We agree with the circuit judge in his construction of the instruments of writing. This exception is also overruled.

The other exceptions all complain of error on the part of the presiding judge in failing to charge the jury as therein set forth, although there were no requests to charge. It has been so often decided by this court that this is not reversible error that we do not deem it necessary to cite authority on this point. It is the judgment of this court that the judgment of the circuit court be affirmed.

The case of Hammett v. Chaffin was heard with the foregoing case, and, as they both turn upon the same question, the same judgment is rendered.

SHUGART'S ADM'X v. NORFOLK & W. R. CO.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

INJURY TO EMPLOYEE—UNUSUAL DUTIES.

Deceased was a fireman in employ of the defendant railroad company. The engineer acted as conductor, and at times uncoupled cars, and sometimes requested the deceased to do so. The deceased also uncoupled cars of his own motion, but on the occasion when the accident occurred the engineer, who alone testified for the plaintiff on this point, did not recollect whether the deceased was requested so to do, or not. It was claimed that by reason of the insufficient number of persons in charge of the train the deceased was killed while uncoupling cars. Held that, as it had not been shown that he was ordered to perform that unusual duty, the company was not responsible.

Error to circuit court, Washington county; Kelly, Judge.

Action by Isabella Shugart, administratrix, against the Norfolk & Western Railroad Com-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

pany. Judgment for defendant. Plaintiff brings error. Affirmed.

Daniel Trigg and C. F. Trigg, for plaintiff in error. Fulkerson, Page & Hurt, for defendant in error.

BUCHANAN, J. The plaintiff in error brought an action of trespass on the case in the circuit court for Washington county against the defendant, to recover damages for negligently running its cars over her intestate, so that he died by reason of the injuries done him.

Upon a trial of the cause the defendant demurred to the evidence, and the court sustained the demurrer, and gave judgment for the defendant. To that judgment a writ of error was awarded by this court.

The plaintiff bases her right to recover upon the ground that the train upon which her intestate was fireman did not have upon it a sufficient number of servants to do the work required of them; that the engine was defective; that the conductor was absent from his place of duty, at a hotel some 200 or 300 yards away, and that the engineer, who, it is claimed, was in charge of the train in the conductor's absence, ordered the fireman to uncouple cars, so as to expedite the shifting of cars in which the train was then engaged; and that while engaged in uncoupling cars—a work more dangerous, and not within the scope of his employment as fireman—he received the injuries from which he died.

It is unnecessary to decide whether or not the defendant company failed in its duty to exercise reasonable care in selecting and retaining a sufficient number of competent servants, or in providing and keeping safe and suitable machinery for the work in which the plaintiff's intestate was engaged, unless the evidence shows that the plaintiff's intestate was ordered to leave his place of duty as fireman, and to engage in the other and more dangerous work of uncoupling cars.

The plaintiff's only witness upon this point was the engineer, who proves that he had uncoupled cars himself; that he had sometimes requested the plaintiff's intestate to do so; that the said intestate had sometimes done so of his own motion, but that on the occasion when the accident occurred he does not recollect whether he made any such request or not. The burden of proof was upon the plaintiff to prove that her intestate was engaged in uncoupling the cars by order of his superior. Having failed to show this, there could be no recovery in this case, whatever the facts may have been as to the other grounds of negligence relied on, for the injury could not have happened to him if he had continued to perform his duties as fireman, and not gone to a place of danger not within the scope of his employment.

The circuit court did not err in sustaining the demurrer to the evidence, and its judgment must be affirmed.

(91 Va. 664)

HUGHES v. PATTERSON'S EX'R.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

CLAIMS AGAINST DECEDENT'S ESTATE.

A daughter held her father's bond, dated in 1874, and upon which there were certain credits. Prior to her death, in 1879, she requested him to keep her children for the debt. This he did until his death, in 1891. The bond was found among his private papers. *Held*, that the estate should be allowed a fair compensation for maintaining the children during the above period, less the value of their services, and charged with the remainder, if any.

Appeal from circuit court, Washington county; Kelly, Judge.

Hughes, administrator of Harriet Palmer, appeals from a decree in favor of the executor of S. C. Patterson. Reversed.

Daniel Trigg and A. L. Robinson, for appellant. Selden Longley, for appellee.

BUCHANAN, J. This is an appeal from a decree of the circuit court for Washington county rendered in a suit brought by creditors of S. C. Patterson, deceased, for the settlement of his estate, and to enforce the payment of its debts. A commissioner was appointed to take an account of the assets of the said estate, its liabilities, and their priorities. Among the debts which were asserted before the commissioner taking the account was a bond for \$817.12, executed by the decedent, Patterson, to his daughter Harriet Palmer for the balance due from him as her guardian. The bond was dated the 20th of October, 1874, and was subject to two credits indorsed upon it,—one as of June 6, 1876, for \$150; the other, for \$50, as of October 8, 1878. It appears that Mrs. Palmer had been divorced from her husband, Thomas Palmer, prior to the execution of the bond, and had been living with her father since her divorce, up to the time of her death, which occurred in December, 1879. Immediately prior to her death she requested her father to take her two children, and keep them, for what he owed her. This he agreed to do. Pursuant to this request of his daughter, the father kept her children at his home, and clothed and fed them, up to the time of his death, which occurred in June, 1891. The bond in question was found after the father's death in a drawer which he kept locked, and which contained his private papers. It was taken from the drawer by a grandson of the decedent, who afterwards became the husband of the daughter of Mrs. Palmer, and without the knowledge of the decedent's widow, who was one of his personal representatives, and had possession of his papers. The bond was laid before the commissioner by the administrator of Mrs. Harriet Palmer, deceased. The commissioner was of opinion that the bond was not a valid debt against the decedent's estate, and reported against it. His

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

report was excepted to upon this point, but the court overruled the exception and confirmed his report, and from that decree this appeal was taken by the administrator of Harriet Palmer, deceased.

The circuit court based its decree upon the ground that there was an express agreement between the decedent and his daughter that he, in consideration of his indebtedness to her, should keep and raise her infant children, and that he had fully executed this engagement, as to the granddaughter, and that his estate was still discharging the duty towards the grandson, who was at the time of the decedent's death 12 years of age.

The evidence in the cause does not show with such definiteness and certainty what the agreement between the decedent and his daughter was as would enable a court, if it were otherwise a proper case for specific performance, to specifically execute it. Nor does the evidence show that the decedent performed the duties imposed by it upon him, giving it the most liberal construction in his favor.

Although the agreement is not so proved, yet there is no doubt that there was an agreement between the parties which induced the decedent to take and keep his grandchildren at his house, and to feed and clothe them, and to take possession of his daughter's property as his own. Under the facts of the case, the services rendered by the decedent for his daughter's children could not be considered as having been rendered voluntarily, or because of the relationship which existed between the parties. It would be unjust, we think, to the grandchildren, to deprive them of the whole of their mother's estate by reason of the agreement referred to and the acts done under it; and it would be equally unjust to refuse compensation to the decedent's estate for the services rendered and money expended by him upon the faith of such agreement. In *King v. Thompson*, 9 Pet. 204, the agreement between the parties was so uncertain that it could not be specifically enforced, but the evidence in the cause showed that the purchaser of the property under the indefinite agreement took possession of the property under such agreement, acted under it, and expended a large sum of money upon the property on the faith of the contract. In that case, although the contract could not be enforced, the supreme court was of opinion, and so decreed, that the party expending the money upon the property upon the faith of the contract was entitled to have the property sold, and the money he had expended upon it repaid to him out of the proceeds of its sale.

This seems to be a proper case for the application of the same principle, in order to do justice between the parties. We think the decedent's estate is entitled to reasonable compensation for the services rendered and money expended by him for his grandchildren after the death of their mother, and up to

the time of his death, and that the bond, or money due from him, which it evidenced, should be charged with its payment, and that the balance thereof, if any, should be paid, according to its priority, out of the decedent's estate. Instead, therefore, of confirming the commissioner's report, rejecting appellant's debt, the circuit court ought to have recommended the report upon that point, with direction to its commissioner to give notice to the parties, and ascertain what would be a reasonable compensation to the decedent's estate for the services rendered and money expended by him in keeping and caring for his daughter's children from the time of her death until his death, taking into consideration the value of their services to him during that period, to credit that sum upon the bond in question, and report the balance thereof, if any, as a debt against the decedent's estate, according to its priority.

The decree complained of must be reversed, and the cause remanded to the circuit court, to be proceeded in there according to law and justice, and in conformity with the opinion of this court.

(91 Va. 593)

PRESTON v. SALEM IMP. CO.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

RIGHT TO JURY—JUDGMENT ON MOTION.

Under Code 1887, § 3211, providing for a judgment on 15 days' notice in an action by a person entitled to recover money, defendant is not entitled to a jury trial, on failure or refusal to plead.

Error to circuit court, Washington county; Kelly, Judge.

Action by the Salem Improvement Company against R. A. Preston. Judgment for plaintiff. Defendant brings error. Affirmed.

Daniel Trigg, for plaintiff in error. J. J. Stuart, for defendant in error.

HARRISON, J. This case does not involve the amount required by statute to entitle the plaintiff to a hearing by this court. It is, however, contended that there is a constitutional question involved which brings the case within the jurisdiction of this court.

The question presented is, can a defendant, in a motion under section 3211, Code Va. 1887, claim a trial by a jury, as of right, without tendering an issue?

When the case was called in the court below, the defendant declined to plead, or tender any issue of fact claiming the right, as this was a summary proceeding, to go to trial, without any formal pleadings, and to produce orally in the progress of the trial any defenses he might have. The court declined to allow a jury to be sworn until and

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

unless some issue of fact was joined. The parties thereupon submitted the matters of law and fact arising in the case to the determination and judgment of the court, but without waiving the defendant's exception to the ruling of the court.

The contention is that this is a summary proceeding provided by statute, and that it was not necessary, under section 3211, to plead, or make up an issue of fact for the jury, but that the defendant was entitled to a trial by a jury without an issue, and that it was a denial of his constitutional rights not to accord him a jury, without his tendering an issue.

The object of section 3211 of the Code was to afford a more speedy remedy for the enforcement of contracts, but it was not contemplated that all the rules of pleading were to be abrogated thereby. Section 3213 of the Code expressly provides that "on a motion where an issue of fact is joined, and either party desire it, or where in the opinion of the court, it is proper, a jury shall be impaneled, unless the case be one in which the recovery is limited to an amount not greater than twenty dollars, exclusive of interest."

The general rules applying to all actions will not sustain a judgment given upon a verdict, rendered as upon the trial of an issue, where no issue has been joined. No verdict can be rendered, or judgment entered thereon, in any case, unless issue shall have first been joined on the pleadings. 1 Bart. L. Prac. 476; 4 Minor, Inst. pt. 1, p. 851. It would be error in the circuit court to enter up a judgment on the verdict of a jury in any case where no issue had been joined, or no plea filed by the defendant. Any such judgment would, for that reason only, be reversed. The cases are numerous, in this and other states, where verdicts and judgment have been set aside by the appellate court merely because the verdict was rendered when no issue had been joined. *Stevens v. Tallafarro*, 1 Wash. (Va.) 155; *McMillion v. Dobbins*, 9 Leigh. 422; *Rowans v. Givens*, 10 Grat. 250; *Ruffner v. Hill*, 21 W. Va. 152.

The better practice in proceedings by motion would be to make up the issue to be tried by the jury by filing such formal plea as would be suitable had the action been by declaration, according to the form at common law. Inasmuch, however, as the object of this proceeding by motion under section 3211 was to give suitors a plain and summary proceeding for the recovery of judgments, and it is but in accordance with the spirit of this flexible proceeding by motion to permit the defendant to make his defense by such informal pleas or statement in writing as will state his defense and make up the issue to be tried, this latter practice is permissible, except in all cases where the statute requires the plea to be verified by affidavit. In such cases that re-

quirement of the statute must always be complied with.

In the case at bar, the defendant was deprived of no constitutional right in being required to make up an issue of fact before the jury was impaneled. He could have secured this privilege by filing the formal but simple plea of *nihil debet*, or by filing a statement in writing of the grounds of his defense sufficiently explicit to make up the issue.

For the foregoing reasons, the court is of opinion that there is no error in the judgment complained of, and it is affirmed.

(91 Va. 652)

LYNCHBURG NAT. BANK v. SCOTT et al.¹
(Supreme Court of Appeals of Virginia. July 11, 1895.)

USURY AS A DEFENSE—BONA FIDE HOLDER.

Code 1887, § 2818, provides that contracts calling for usurious interest "shall be deemed to be for an illegal consideration as to the excess beyond the principal amount so loaned or forborne." *Held*, that usury could not be pleaded under this statute against one who acquired a negotiable note in the usual course of business, for a valuable consideration, before maturity, without notice of the usury, and who charged no usurious interest.

Error to circuit court, Washington county; Kelly, Judge.

Action by the Lynchburg National Bank against Scott Bros. and others. Judgment for defendants. Plaintiff brings error. Reversed.

Honaker & Hutton and White & Penn, for plaintiff in error. Daniel Trigg, for defendants in error.

HARRISON, J. This was a suit at law instituted in the circuit court of Washington county, in December, 1893, by the Lynchburg National Bank against Scott Bros., upon a negotiable note for \$1,000, bearing date June 3, 1893, executed by Scott Bros., and payable four months after date to S. L. Scott, at the Bank of Abingdon, Va., indorsed by S. L. Scott and the Bank of Abingdon, and discounted by the Lynchburg National Bank. The note sued on is the last of a series of renewals of a similar note discounted by the Bank of Abingdon, December 17, 1888, at a usurious rate of interest, the usurious interest paid said bank aggregating the sum of \$506.38. The plaintiff bank discounted the note sued on before maturity, in the due course of business, at 6 per cent. interest, without notice of any fact connected with its history, or of any illegality which affected it in the hands of antecedent parties. Before the maturity of the note sued on, the Bank of Abingdon made a general deed of assignment for the benefit of all of its creditors. Among the defenses set up by the defendants Scott Bros. was that

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

of usury, and all questions of law and fact were, by agreement, submitted to the court, which gave judgment for the plaintiff for the sum of \$1,002.25, the principal of said note, and charges of protest, subject to a credit of \$506.38, with interest on the balance from the date of said judgment. Objections to the rulings of the circuit court adverse to the plaintiff being regularly saved by bills of exceptions, application was made to this court for a writ of error, which was granted.

In the petition the plaintiff assigns four grounds of error, all raising questions of far more than ordinary interest. In the view, however, taken of the case by this court, it becomes unnecessary to consider but one; and that is, can the defendants Scott Bros., in this action, avail themselves of the defense of usury against the plaintiff bank, a bona fide holder of the note sued on, for value, and without notice of any taint of usury, and received in the due course of business, before maturity, and at a legal rate of discount?

The statute of Virginia (Code, § 2818) provides as follows: "All contracts and assurances, made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is allowed by the preceding section, shall be deemed to be for an illegal consideration, as to the excess beyond the principal amount so loaned or forborne." This section of the Code is in the words of the act, as passed March 24, 1874, and has been the law in Virginia since that date. By the terms of the statute which was in force in this state prior to April 1, 1893, all contracts and assurances for the loan or forbearance of money founded upon a usurious consideration were declared to be void.

The question to be considered is the effect, as to negotiable instruments, of this change in the statute, declaring that such contracts shall be deemed to be for an illegal consideration, instead of void, as formerly.

These are not meaningless words, and it cannot be doubted that the legislature had some wise purpose in adopting the one rather than the other.

The purchaser or holder of a negotiable instrument, who has taken it bona fide, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor, and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity, as between the antecedent parties. 1 Daniel, Neg. Inst. p. 576, § 769.

I believe the foregoing strong statement of the favor with which negotiable instruments are regarded by the law is universally accepted as sound. So far as I have been able to examine the authorities, there is but one exception to the rule just laid down, and that is when the statute renders such instruments void. The law extends this peculiar protec-

tion to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. The same author says: "When the statute merely declares, expressly or by implication, that the consideration shall be deemed illegal, the bill or note founded upon such consideration shall be valid in the hands of the bona fide holder without notice, but the burden of proof will be upon the plaintiff, when the illegal consideration appears, to show that he is a bona fide holder without notice." In sections 807 and 808 the same author says: "In many localities negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations,—that is, void between the parties, but valid in the hands of a bona fide holder; * * * and that when the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving bona fide ownership for value. * * * And in all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover."

Story, Prom. Notes (3d Ed.) § 192, says: "The same doctrine will certainly apply to all cases of a bona fide holder for value, without notice, before it becomes due, where the original note, or the indorsement thereof, is founded on an illegal consideration; and this upon the same general ground of public policy, without any distinction between a case of illegality founded on moral crime or turpitude, which is *malum in se*, and a case founded on the positive prohibition of a statute, which is *malum prohibitum*; for in each case the innocent holder is, or may be otherwise, exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is where the statute creating the prohibition has at the same time, either expressly or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice or not."

In note 4 to Kent's Commentaries (11th Ed., vol. 3, p. 100) it is said: "If a note is not declared void by statute, mere illegality in its consideration will not affect the rights of a bona fide holder for value;" citing *Norris v. Langley*, 19 N. H. 423; *Converse v. Foster*, 32 Vt. 820; *Johnson v. Meeker*, 1 Wis. 436.

The principles in the foregoing text-books are sustained by the following adjudicated cases: *Glenn v. Bank*, 70 N. C. 191; *Paton v. Colt*, 5 Mich. 505; *Hay v. Ayling*, 16 Adol. & E. (N. S.) side page 423; *Vallett v. Parker*, 6 Wend. 615; *Oates v. Bank*, 100 U. S. 239, 249, 250; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687.

In the case of *Converse v. Foster*, 32 Vt.

828, cited in note 4 to Kent's Commentaries, supra, Judge Poland says: "The English statute against usury and gaming not only imposes a penalty for such illegal acts, but expressly declares that all notes, bills, bonds, and other securities given for such legal consideration shall be utterly void. All the cases that have been cited, and all that can be cited, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between the statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff, or such other party between him and the defendant, took the bill or note bona fide, and gave a valuable consideration for it. But, unless it has been so expressly declared by the legislature, illegality of consideration would be no defense for an action at the suit of a bona fide holder for value, without notice of the illegality."

"If the statute declares a security void," says Judge Rodman in the case of Glenn v. Bank, 70 N. C. 191, "then it is void in whosever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal by common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of any one claiming through him.

"The case of Hay v. Ayling, above cited, is a notable illustration of the difference.

"Gaming securities were declared void by 9 Anne, c. 14, § 1, and it was held that they were void in the hands of a bona fide, innocent indorsee. The act of 5 & 6 Wm. IV. c. 41, § 1, modified the act of Anne, and declared they should be illegal. The court held that after that act they could be recovered on by an innocent holder."

Mr. Justice Story, in the case of Fleckner v. Bank, 8 Wheat. 338, in delivering the unanimous opinion of the court, says: "The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and without such an enactment the contract would be valid, at least in respect to persons who are strangers to the usury."

In Vallett v. Parker, 6 Wend. 615, Chief Justice Savage said: "Wherever the statute declares notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for the failure of, or the illegality of, the consideration, they are void in the hands of the original parties, or those who are chargeable with or have had notice of the consideration."

In Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, Mitchell, J., says: "The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in

all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill, or note, void. * * * But, unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable;" citing a number of authorities.

This court, in Branch v. Commissioners, 80 Va. 427, says that a note in the hands of the maker, before delivery, is not property, nor the subject of ownership as such; that it must be issued or delivered by the maker before any one can become the bona fide holder of it. This view is not in conflict with the position taken here, where the question being considered is the difference between contracts declared by the statute to be void, and those declared to be for an illegal consideration, and where the note sued on was issued and delivered by the maker. Nor are the authorities quoted to sustain the conclusion here reached in conflict with the view expressed in 80 Va. 427.

If the word "illegal" were construed to mean "void," as contended for by the learned counsel for the appellees, the change in the statute would be meaningless. A glance at the history of the statute makes it clear that the legislature had an object in its change. The revisers of the Code of 1849 recommended that what is now section 2818 should be adopted by the legislature. The legislature, however, refused to adopt the report of the revisers, and the law still declared all usurious contracts void, until the law was modified, and declared they should be void only as to the interest in excess of 6 per cent. per annum, but the legislature of 1874 declared that it should be deemed to be for an illegal consideration as to the excess beyond the principal sum loaned or forborne. Commercial paper has ever been regarded with favor by the law, and, in view of its growing importance and its universal convenience in the affairs of men, it is not strange that the lawmaker, in the interest of a wise public policy, should desire to exempt such paper, in the hands of a bona fide holder for value, and without notice, from the hazard and uncertainty to which it was subjected by the law under a statute which declared the usurious contract void. But, whatever may have been the motive of the legislature in making this change, it is the duty of the court to enforce the law as it is made. And it is perfectly clear, upon reason and authority, that, no matter how illegal the consideration may be, a negotiable note in the hands of a bona fide holder, for value, without notice, will be held valid and enforceable.

If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of

him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void.

The agreed statement of facts in this case shows that the plaintiff in error discounted the note sued on before maturity, and in the due course of business, at 6 per cent. interest; that the plaintiff in error had no notice or knowledge when it discounted the note that it was a renewal of any other note, or that it had ever theretofore been discounted by the Bank of Abingdon, or that any one had at any time received from the defendants in error usurious interest thereon.

The statute (section 2818) declaring that all usurious contracts shall be deemed to be for an illegal consideration as to the interest, instead of void, as formerly, it follows from what has been said that the defendants in error could not avail themselves of the defense of usury, to defeat the plaintiff bank of its recovery of the note sued on, or any part thereof.

The judgment of the circuit court being in conflict with this opinion, it must be reversed and set aside, and this court will enter such judgment as the said circuit court ought to have entered.

GRANT v. SUTTON.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

RIGHT TO DOWER.

Where real estate is purchased by and deeded to a wife, and is successfully attacked by her husband's creditors as being in fraud of their rights, he having paid the purchase money, the husband has no seisin, actual or constructive, therein, out of which the wife can be endowed under Code 1887, § 2267.

Appeal from circuit court, Washington county; Kelly, Judge.

Affirmed.

Dan'l Trigg, Geo. W. Ward, Jr., and F. T. Barr, for appellant. Fulkerson, Page & Hurt, for appellee.

KEITH, P. The case before us is the sequel to the case of Grant v. Sutton, reported in 90 Va. 773, 19 S. E. 784. When the mandate of this court was returned to the circuit court of Washington county, Martha J. Grant made a motion in the case, which, by consent of the parties, was treated as a petition, asking the court for the appointment of commissioners to assign dower to her out of the real estate mentioned in the bill. This motion the court rejected, and Mrs. Grant has by her appeal brought the correctness of this decision before us for consideration.

It appears, by reference to the record on the former appeal, that the real estate which is the subject of this contention was pur-

chased by Mrs. Martha J. Grant on the 14th day of March, 1882, from F. S. Finley and R. M. Page, and she was immediately placed in possession of it; and that on the 18th day of October, 1884, her vendors conveyed to her the land so purchased. A bill was filed by a creditor of her husband alleging that her husband, H. M. Grant, was indebted to him in a large amount, with interest thereon from the 19th day of January, 1881, and that since said debts were contracted the said H. M. Grant had given to his wife valuable real estate in the town of Abingdon, or that he had given her the money wherewith to pay for the same. This bill Mrs. Grant answered, denying its allegations, and upon the issues thus made proof was taken; and the circuit court rendered a decree establishing the right of Sutton to subject the real estate mentioned in the bill to the payment of the debts due to him. Upon an appeal from this decree it was affirmed. We have, then, the case of a purchase of real estate made by the wife, and a deed for the same to her from her vendors, successfully attacked by her husband's creditors, claiming that he had, in fraud of their rights, paid a part of the purchase money; but it nowhere appears that H. M. Grant was at any time, or that any one to his use was at any time, during the coverture, seised of the real estate in the bill mentioned, or of any part thereof. See Code Va. § 2267. And without seisin in the husband during the coverture, either actual or constructive,—that is to say, without seisin in law or seisin in fact in the husband,—there can be no right to dower in the wife. We are, therefore, of opinion that the circuit court did not err in refusing to assign dower to the appellant, and the decree complained of should be affirmed.

(91 Va. 601)

NORFOLK & W. R. CO. v. HARMAN et al.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

CARRIERS—LIABILITY FOR LOSS OF LIVE STOCK—NEGLIGENCE—CONTRACT—DAMAGES.

1. Where lambs for shipment, before being loaded, drank salt water that the carrier negligently allowed to flow into its stock yard, without the knowledge of the owner, the carrier is liable for the death of the lambs resulting therefrom, though the death did not occur until they were in the possession of a connecting carrier.

2. The contract under which lambs were shipped provided that the company should not be liable for injury to the stock until they were "loaded into the car, and the car door fastened by the conductor." *Held*, that this did not exempt the carrier from injury caused by its negligence in allowing the lambs to drink salt water before they got on the cars.

3. The evidence showed that 147 lambs died because of defendants' negligence; that they averaged 77 pounds each, and were worth from 7½ to 8 cents per pound at the point of destination. *Held*, that a verdict for \$742, with interest from date of injury, was justified.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Error to circuit court, Smyth county; Kelly, Judge.

Action by Harman & Crockett against the Norfolk & Western Railroad Company. Plaintiffs had judgment, and defendant brings error. Affirmed.

Bolling & Stanley, for plaintiff in error. Jas. L. White and B. F. Buchanan, for defendants in error.

RIELY, J. The defendants in error, on June 13, 1891, delivered to the Norfolk & Western Railroad Company two lots of lambs to be transported to Jersey City, in the state of New Jersey. One lot was received by the railroad company at its station at Saltville, Va., and the other lot at Pounding Mill, in Tazewell county, Va. A large number of the lambs having died on the route, the owners charged that their death was caused by the negligence of the railroad company, and brought suit to recover damages for the loss sustained. The railroad company having undertaken to furnish a stock pen at Saltville for the purpose of enabling shippers of live stock to load the same upon its cars, its negligence, upon which the plaintiffs' right of action was founded, consisted, it was alleged in the declaration, in not furnishing a suitable stock pen, and maintaining it in a good and safe condition, but permitting salt water or brine, which was poisonous and dangerous to stock, when drunk by them, to be in the pen, whereby the lambs had access to and drank of it, and sickened and died.

When a railroad company holds itself out as a carrier of live stock, the law imposes upon it the duty to provide suitable and safe facilities, such as yards or pens, both at the place of shipment and the place of destination, for receiving and discharging the live stock offered to it for shipment over its road. *Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 23 Am. & Eng. Enc. Law, 902. It appears from the certificate of the evidence that the railroad company did provide at its station at Saltville, from which one of the lots of lambs was shipped, a stock pen and a force pen, to enable shippers of live stock to load the stock on their cars. In the stock pen was a culvert, which was made to convey the water from a fresh-water spring, and about one-third of the culvert, at each end, was broken in and uncovered. There was a tank of salt water on the hillside, above the pen, from which the salt water escaped, and flowed into the pen and into the culvert. Many of the lambs, when put into the pen to be loaded, although the loading was done as rapidly as possible, drank of the salt water, in spite of the efforts of the men engaged in loading them to prevent it. It is shown by the evidence that Harman & Crockett had bought the lambs from persons in the surrounding country, who delivered the lambs at the railroad station for shipment, and that

Harman & Crockett knew nothing of there being salt water in the pen until they learned the fact after the disaster that had happened to their stock. But it was known by the railroad company's agent at its station at Saltville. The lambs, which were shipped from Saltville, left there on the cars about 5 o'clock in the afternoon, and arrived at Lynchburgh at 11 o'clock the next morning. Mr. Crockett, one of the owners, met them at Lynchburgh, and had them unloaded for the purpose of feeding and watering them. He fed them some hay, but, finding them very thirsty and feverish, he turned the water off, and they got very little, if any, at that point. They arrived in Baltimore the next day, when they were found to be still so very thirsty that they could hardly be gotten away from the water, and were in bad condition, and looking as if sick. When they arrived at Baltimore, the two lots were unloaded, and turned into the feeding pens together, and became intermingled. At Baltimore they commenced to die, and by the time they arrived at Jersey City, the next day, 85 had died on the route. 61 more died the following night, and others were sick, which very materially affected the sale of those that had survived. It appears from the certificate of the evidence, as testified to by men of large experience in the live-stock business, that it is dangerous to animals to give salt to them, and then let them have free access to water; that the salt creates an intense thirst, which causes the animals—especially lambs—to drink immoderately of the water, the effect of which is to produce sickness, from which they are liable to die. It being proved that the stock pen at its station at Saltville was the means provided by the railroad company to enable shippers to load their live stock on its cars, and that it permitted salt water to be in the pen, accessible to the lambs, the company had not performed its legal duty to furnish and maintain suitable and safe facilities to shippers for receiving their stock for shipment. It was therefore guilty of negligence, and liable to the plaintiffs for such loss as was caused by its negligence. It appearing from the evidence that salt water is dangerous to live stock, when drunk by them; that it was in the stock pen at Saltville, into which the lambs had to be driven for the purpose of loading them on the cars; that the lambs, while being loaded, drank of it; that they were in good condition when put into the cars; and that they soon thereafter became very thirsty and feverish, and affected like stock that had been made sick by drinking water after being salted,—the jury were clearly justified in finding that this was the cause of their death.

It was urged by the plaintiff in error that it assumed no other liability than the safe carriage and delivery of the stock to its connecting line at Lynchburgh, that it did this, and that its liability then ceased. This de-

fense cannot avail, for the evidence shows that the injury was done at Saltville, the shipping point, and in the pen it had provided to enable shippers to load their stock in its cars.

It was also urged that under the printed contract of shipment the railroad company was not responsible for any injury to the stock until they were "loaded into the car, and the car door fastened or secured by the conductor." It failed, as we have seen, to furnish and maintain suitable facilities for receiving the live stock, of which it held itself out as a public carrier. Such failure was negligence, and a common carrier cannot contract for exemption from liability for injury or loss caused by its own neglect. Code Va. § 1296; Railroad Co. v. Sayers, 26 Grat. 328. See, also, Clarke v. Railroad Co., 67 Am. Dec. 205, and the valuable note thereto.

It was further claimed that even if it was negligence in the railroad company to permit salt water to be in the pen which it had provided to enable shippers of live stock to load their stock in its cars, and the only means which it had furnished for that purpose, yet that the plaintiffs were guilty of contributory negligence, in allowing the lambs to get to the water while being loaded, and they cannot recover. The evidence satisfactorily establishes the negligence of the railroad company, and that the loss sustained by the plaintiffs was due to such negligence. Contributory negligence, to defeat a recovery, must be satisfactorily and affirmatively shown. Unless it appear from the plaintiffs' evidence, it devolves on the defendant to prove it. Contributory negligence on the part of the plaintiffs nowhere appears. There is no evidence whatever that they knew of the existence of salt water in the loading pen, and it is not even pretended that they had any actual knowledge of it, but it is claimed that the men who brought the lambs to the station became aware of it. This is true, and the evidence shows also that they used every effort to keep the lambs from drinking the water. The fact that they learned of the presence of the salt water in the pen does not fix contributory negligence upon the plaintiffs. The men who delivered the lambs at the station, and put them in the cars, were not the employés of the plaintiff. They were the persons from whom Harman & Crockett had bought the stock to be delivered to the railroad for shipment. In making the delivery, they were in no sense the agents of the plaintiffs. They were simply fulfilling their part of the contract of sale. Therefore, their knowledge was not the knowledge of the plaintiffs, and could not be imputed to them. The doctrine of constructive notice by agency does not apply. The defense of contributory negligence is not sustained.

On the trial the jury found a verdict in favor of the plaintiffs for \$742, with interest thereon from June 17, 1891. The defendant company moved the court to set aside the

verdict, but the court refused to do so, and gave judgment thereon. It was proved that the lambs would average about 77 pounds each, and that they were worth in the New York market—the place where they were to be sold—from 7½ to 8 cents per pound. One hundred and forty-seven died before they could be gotten to market. It is an easy calculation to show that, exclusive of any compensation for those that were sold as "sick lambs," the amount of the verdict of the jury was rather below than above the actual damages sustained by the defendants in error. And the evidence was ample to sustain the charge of the plaintiffs in the suit that the loss that they had sustained was due to the negligence of the railroad company. The court rightly overruled the motion for a new trial. There is no error in the judgment appealed from, and the same must be affirmed.

BUCHANAN, J., having been of counsel, did not sit.

KING et al. v. LEVY.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—BILL OF SALE—FAILURE TO RECORD.

1. In the absence of a fraudulent intent, it is not fraudulent per se as to creditors, in one who has assumed an indebtedness of a firm in consideration of a sale of specified merchandise, to allow such merchandise to remain in said firm's possession to be disposed of in the usual course of trade.

2. Where one of two trustees in a deed of assignment for the benefit of creditors has actual knowledge of a previous bill of sale conveying a part of the assets called for in his deed, the failure to record said bill does not prejudice the creditors.

3. An assignee for creditors with notice of a prior bill of sale of the property assigned secures no greater rights to the property than his assignor possessed.

Error to circuit court of city of Roanoke; Dupuy, Judge.

Action of detinue by Bettie G. Levy against A. E. King and H. M. Daniel. Plaintiff had judgment, and defendants bring error. Affirmed.

Smith & King, for plaintiffs in error. Penn & Cocke, for defendant in error.

HARRISON, J. The controversy in this suit grows out of the following paper executed January 16, 1894, by the Yager Shoe Company:

"Whereas, the Yager Shoe Company, a corporation chartered under the laws of the state of Virginia, did make and execute two certain negotiable notes, payable at the Commercial National Bank of Roanoke,—the first

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

for the sum of \$2,000, at four months, bearing date April 1st, 1893, and indorsed by James A. Yager, J. B. Levy, W. M. Yager, and Bettie G. Levy; the second for the sum of \$1,000, at ——— months, and bearing date the ——— day of ———, 1893, and also indorsed by James A. Yager, J. B. Levy, Wm. M. Yager, and Bettie G. Levy. And whereas, certain payments have since been made on the said notes, reducing the amount to \$2,500, which said notes have from time to time been renewed. And whereas, the said Bettie G. Levy has this day agreed with the said Yager Shoe Company to assume and pay off the balance due on the said notes: The said Yager Shoe Company, for and in consideration of the said Bettie G. Levy assuming to pay off and discharge the balance due on the two said notes, amounting to the sum of twenty-five hundred dollars, agrees to and does this day hereby sell and deliver to the said Bettie G. Levy the following goods of the said Yager Shoe Company, which are to be in full of the payment of the two aforesaid notes."

A long list of the articles sold, with prices attached, aggregating \$2,501.20, is made part of the foregoing bill of sale.

It appears from the evidence that Mrs. Levy allowed the goods mentioned in this bill of sale to remain in the possession of her vendor until the 22d day of May, 1894, on which last-named day the Yager Shoe Company made an assignment of all its stock of goods to secure its creditors ratably. The stock of goods thus assigned consisted of what remained unsold of the stock covered by the bill of sale to Mrs. Levy, she having allowed her vendor to continue to sell the goods in the ordinary course of business. After the execution by the company of this deed of assignment, Mrs. Levy instituted this action of detinue to recover from A. E. King and H. M. Daniel, the trustees named in said deed, the goods mentioned in the bill of sale. The defendants filed their plea of non detinet, and, neither party requiring a jury, the whole question of law and fact was submitted to the court for its determination. On the 12th day of February, 1895, the court gave judgment for the plaintiff, and thereupon the defendants, A. E. King and H. M. Daniel, obtained a writ of error to this court.

The chief contention of counsel for plaintiffs in error is that, this being an absolute bill of sale, and Mrs. Levy having allowed the goods to remain in the possession of the vendor, this was fraud per se as to creditors. This view cannot be maintained under the authorities. The mere circumstance of possession of chattels amounts to no more than that it is prima facie evidence of property in the possessor until a title, not fraudulent, is shown to be in some other than the one in possession.

It is not contended in the petition for writ of error or in argument that there was any fraud in the transaction, except such

legal fraud as was to be presumed from the circumstance that the goods were left in the possession of the vendor.

H. M. Daniel, one of the plaintiffs in error, who was the notary who took the acknowledgment of the vendor to the bill of sale, testifies that, so far as he knew, the transaction was a bona fide one.

The sale to Mrs. Levy being a bona fide one, she has a title which is good against the plaintiffs in error, because, as trustees under the deed of assignment, they took with full and complete notice of the sale to her. As already stated, H. M. Daniel, one of the trustees, took the acknowledgment of the vendor to the bill of sale, and he testifies that the bill of sale was left in his possession with the understanding that he should place it on record when directed to do so by Mrs. Levy. The failure, therefore, to record the bill of sale, could not possibly prejudice the plaintiffs in error, for they knew all about it from the time the sale was made to Mrs. Levy until the deed of assignment was executed.

Mrs. Levy being the indorser on the notes referred to in the bill of sale, and having assumed their payment, in consideration of the conveyance to her of the stock of goods, she thereby became the principal debtor as to said notes, and could at any time thereafter have recovered the goods from the Yager Shoe Company; and, the property not having been conveyed to her in fraud of creditors, the assignees have no greater interest in or better title to it than their assignor had.

It is further insisted by the plaintiffs in error that this bill of sale was merely intended as a mortgage. There are but two witnesses introduced. H. M. Daniel, on behalf of the defendants, says that the consideration for the bill of sale was the indorsement by Mrs. Levy of certain notes for the Yager Shoe Company. This statement, taken in connection with the plain, unambiguous terms of the bill of sale itself, is not sufficient to justify this contention. The terms of the written paper show a complete and absolute sale and delivery for a valuable consideration.

The only other evidence on the subject is that of James A. Yager, a witness for defendants, who says that the bill of sale was executed by the Yager Shoe Company for the purpose of securing Mrs. Levy from any loss on account of certain notes which she had indorsed for the company. What weight was given to this statement by the court below is not known.

The case is before us, under the statute, as on a demurrer to evidence, and, viewing the case from this standpoint, we think the evidence justified the court in holding that the title to the stock mentioned in the bill of sale passed to the plaintiff, as between the parties, and therefore, as against the subsequent assignees of the Yager Shoe Company, Mrs. Levy had the right to recover the goods

in the action brought by her for that purpose.

For the foregoing reasons, the court is of opinion that there is no error in the judgment complained of, and it is affirmed.

(91 Va. 676)

WARD'S ADM'RS v. CORNETT et al.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

DISCOVERY—EFFECT OF ANSWER—USURY.

1. Where a bill states that complainants have no means of proving its allegations except by discovery from defendants, and calls for discovery, allegations in the answer responsive to the bill are to be taken as evidence for defendants.

2. A bond is not void for usury where it provides for usurious interest only after maturity.

Appeal from circuit court, Grayson county; Kelly, Judge.

Action by F. R. Cornett and others against the administrators of B. E. Ward. Plaintiffs had judgment, and defendants appeal. Affirmed.

Walker & Caldwell, for appellants. Robert Crockett and Thos. H. Cornett, for appellees.

RIMLY, J. The only question presented by the appeal is whether the bond executed by B. E. Ward to E. Mallissee Cornett on July 1, 1878, for \$1,275, is usurious or not. It reads as follows: "\$1,275.00. July 1, 1878. On or before the first day of October, 1880, I promise to pay E. Mallissee Cornett or order one thousand two hundred and seventy-five dollars, lawful money, without plea or offset, for value received, rate of interest agreed to be eight per cent. per annum after first day of October, 1880, until paid; and I hereby waive the benefit of my homestead exemption as to the payment of this debt. Witness my hand and seal. B. E. Ward. [Seal.]" On October 28, 1878, B. E. Ward conveyed 200 acres of his land by deed of trust to secure the above bond. It was provided in the deed of trust that, if he failed to pay the bond by the 1st of October, 1880, then the trustee, upon the direction of the obligee in the bond, should sell the land to pay the debt. It was further secured by a second deed of trust, along with another bond for \$975, to F. R. Cornett, bearing date May 15, 1880, and payable one day after date, on 800 acres of land, which included the 200 acres conveyed in the first deed. The second deed bore date October 25, 1880. The trustee, after the death of B. E. Ward, was proceeding, at the request of the beneficiary, to sell the land to pay said bonds, when the administrators of the decedent and his heirs at law filed a bill to enjoin the sale. In their bill they charged that the debts secured by the deeds of trust were usurious, and called upon F. R. Cornett and E. Mallissee Cornett to discover,

upon oath, the rate of interest called for in the bonds, and the rate of interest agreed to be paid by B. E. Ward, whether specified on the face of the bonds or agreed verbally to be paid for the moneys lent to him; in what manner the amount specified in each bond was made up; and whether any device, either directly or indirectly, was resorted to by which interest in excess of the legal rate was charged or agreed to be paid for the loan or forbearance of the money specified in the said bonds. They were also called upon to state what payments, if any, had been made on the bonds, or either of them.

There is nothing in the record or in the answers to the bill to indicate usury in the bond of \$975, or in another bond for \$1,000, secured by deed of trust on land of B. E. Ward, and referred to in the record, and they may be dismissed from further consideration. The answer of F. R. Cornett and E. Mallissee Cornett was specific and positive as to the bond for \$1,275, and was based upon personal knowledge. They stated, in substance, that the consideration of the bond was \$1,125, cash lent to B. E. Ward on July 1, 1878, of which amount the sum of \$250 belonged to E. Mallissee Cornett, to whom the bond was made payable, and the residue to F. R. Cornett, to whom she assigned it for value on January 1, 1880. They further answered that B. E. Ward thought at first that he could repay the loan promptly at the end of two years, but, to suit his convenience, and to enable him to sell his cattle in the fall of 1880, he asked that three months longer might be given to him for that purpose, so that, with the proceeds of the sale of his cattle then to be made, he would more surely be able to pay the money; that the interest on \$1,125 at 6 per cent. per annum for two years and three months, to wit, from July 1, 1878, to October 1, 1880, was then calculated, and found to be \$151.87, which, added to \$1,125, made \$1,276.87; but, to make the bond for even money, the sum of \$1.87 was dropped, and the bond drawn for \$1,275; that the rate of interest agreed to be paid was 6 per cent. per annum only; and that, it being understood and agreed that the bond should be paid at maturity, it was further agreed, by way of penalty only, in order to secure its prompt payment at maturity, that after maturity it should bear 8 per cent. It was denied in the answer that any payments had been made, except \$35.15, paid on a tax ticket on November 29, 1883, and credited on December 13, 1883, on the bond for \$975, and the sum of \$1,000, paid December 5, 1889, and credited on the bond for \$1,275. The bond itself, the deeds of trust made to secure it, and which have been already referred to, and the answer of F. R. Cornett and E. Mallissee Cornett, constitute the entire evidence bearing on the controversy.

It was stated by the complainants, in the bill, that they had no means of proving the alleged usury except by a discovery from the defendants, and by calling for the discovery

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

they made it evidence upon the matter in issue. The answer wholly denies the usury. It was directly responsive to the special interrogations of the bill, and the whole of it is to be taken as evidence for the defendants. *Morrison's Ex'rs v. Grubb*, 23 Grat. 342; *Fant v. Miller*, 17 Grat. 187; *Corbin v. Mills*, 19 Grat. 438, 466; *Shurtz v. Johnson*, 28 Grat. 657; *Bell v. Moon*, 79 Va. 341; *Thompson v. Clark*, 81 Va. 422; 4 Minor, Inst. pt. 2, p. 1191; *Story, Eq. Jur.* § 1528; and 3 Greenl. Ev. § 280.

It was claimed by counsel for the appellants that the bond on its face disclosed the usury; and they therefore argued that, upon the principle that parol evidence cannot be received to vary a written contract, no averment to contradict the bond could be received or considered; and, furthermore, that all the statements of the answer in regard to the land, after its production, constituted new and affirmative matter, and could not operate as evidence without being proved as any other fact. Whether the rule of evidence thus invoked is applicable to a contract of this kind (*Browne, Parol Ev.* § 36; *Thompson v. Clark*, 81 Va. 422; *Campbell v. Shields*, 6 Leigh, 517; 3 Pars. Cont. 110; *Beete v. Bidgood*, 7 Barn. & C. 453; 17 Walt's Act. & Def. p. 611, § 5; *Whart. Ev.* § 1044; and *Tyler, Usury*, 108, 109) need not be decided, for it is to be observed that the bond on its face does not bear interest for two years and three months from its date. It is only after it matures that any interest is provided for. The answer, then, in disclosing the facts of the transaction in its inception, and stating the consideration of the bond, and that only legal interest entered into it, in nowise contradicts the terms of the bond. And all the statements of the answer respecting the loan and execution of the bond being directly responsive to the interrogations of the bill, they are to be treated as evidence in the cause. And, being so treated, under the rule of law, in the absence of other evidence to overcome the answer, which is the case here, the charge of usury is wholly refuted. The deed of trust by which the bond was originally secured authorizes an immediate sale of the land, if the debt is not paid when it falls due. It is evidence that prompt payment of the debt at maturity was contemplated by the parties. This fact, taken in connection with the unusual and peculiar character of the bond in not stipulating for any interest until it fell due at a fixed period in the future of considerable duration, and in providing for a greater than legal rate of interest after its maturity, shows that this illegal rate of interest was affixed as a penalty to insure the prompt payment of the debt, and is not usury. And this bond is to be so construed and treated. A debt, to be usurious, must be so in the beginning. It cannot be made so by subsequent events. A usurious agreement is one to pay originally a greater rate

of interest than the law allows: If the obligor had paid the debt when the bond became due, he would not have incurred, even under the literal terms of the bond, any liability to pay the illegal interest stipulated for after its maturity. Where the debtor, by a punctual payment of the debt, may thus relieve himself and avoid the payment of the illegal interest stipulated for, it is not usury. 2 Minor, Inst. (4th Ed.) 438; *Pollard v. Baylors*, 6 Munf. 433; *Graves v. Graves*, 1 Wash. (Va.) 1; *Lloyd v. Scott*, 4 Pet. 205; *Lawrence v. Cowles*, 13 Ill. 577-579; *Gower v. Carter*, 66 Am. Dec. 71; *Tyler, Usury*, 96, 213-215, 217; *Pars. Cont.* 117, and note S.

It was further argued that in the deed of trust of October 25, 1880, which was made to secure the debt of \$975, and also to secure further the debt of \$1,275, an extension of time from October 1, 1880, to December 1, 1886, was given, and the debt in question, including the illegal interest stipulated for after its maturity, provided for. But the provisions of the deed do not sustain this view. The 8 per cent. interest provided for in the bond being a penalty, the bond, if not paid at maturity, would only bear legal interest until paid; and this, we have no doubt, is the purport of the deed of trust.

It was provided as to both debts that the grantor should "remain in quiet and peaceable possession of the land until the 1st day of December, 1886, after which time, if default be made in the payment of the debt of \$975, with interest thereon as aforesaid, and also of the other debt herein further secured, with interest from the 1st day of October, 1880, thereon," the trustee, if requested, should sell the land. The proper interpretation of this language, as it does not specify any rate of interest, must be that both bonds are to bear only legal interest. In the last clause of the deed, where it is directed how the proceeds of sale, in the event of a sale shall be applied, the language is that after paying the debt of \$975, "with legal interest thereon, as aforesaid," the balance, if any, is to be applied to the payment of the "principal and interest on the other debt, herein further secured as aforesaid." The insertion of the word "legal" with respect to the interest to be paid on the one debt, and its omission as to the interest to be paid on the other debt, was relied on in argument as proof of a discrimination in the rate of interest on the two debts, and of an intention to provide for 8 per cent. interest on the debt for \$1,275. We do not think that this is a legitimate construction of the language used. The insertion of the word "legal" in the one case, and its omission in the other, was not intended to make any distinction in the rate of interest to be paid, and does not have such effect. Only legal interest in the case of each debt was provided for. Where interest is stipulated for, and no particular rate is reserved, it must be construed to mean legal interest only. A court would not

be justified in inserting in a writing by construction an illegal rate of interest, such as 8 per cent. in this case, where no particular rate of interest was stipulated for, but only interest generally, where its effect would be to make a debt usurious, and thereby invalidate it. This could not be done except in a case of irresistible implication. Evidence such as the above falls far short of the degree of proof required to establish usury. Usury is a quasi penal offense, and must be strictly proved. The evidence must establish it beyond a reasonable doubt. *Brockenbrough's Ex'rs v. Spindle's Adm'r*, 17 Grat. 21; 7 Walt, Act. & Def. 637; and *Bart. Law Prac.* 549. The evidence relied on in this case to prove usury, exclusive of the answer, fails to do so; and, when the answer is considered as evidence for the defendants, which we are bound to do, the charge of usury is completely refuted. The decree of the circuit court must be affirmed.

BUCHANAN, J., did not sit.

(91 Va. 668)

NORFOLK & W. R. CO. v. BROWN.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

INJURY TO RAILROAD BRAKEMAN—NEGLIGENCE—PROXIMATE CAUSE—PRESUMPTIONS BY SILENCE—FELLOW SERVANTS.

1. The use of cars of unequal height and mismatched couplings is not such negligence on the part of a railroad company as will render it liable for an injury to a brakeman resulting therefrom.

2. Where the direct cause of an injury to a brakeman while uncoupling cars was the negligent moving of the train by a fellow servant, for which the company is not liable, recovery for the injury cannot be had on the ground that the coupling was defective.

3. In an action against a railroad company for injury to a brakeman while uncoupling cars alleged to have resulted from the negligence of the yard foreman in ordering the engine to back a second time, where there was no direct proof that the foreman gave such an order, and the engineer and fireman both denied that the engine backed a second time, the failure to put the foreman on the stand to deny giving such a second order does not raise the presumption that he gave it.

4. An engineer and brakeman on the same train are fellow servants.

Error to circuit court of city of Roanoke; Dupuy, Judge.

Action for personal injuries by Hugh Brown against the Norfolk & Western Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

Watts, Robertson & Robertson, for plaintiff in error. Smith & King, Marshall McCormick, and J. Thompson Brown, for defendant in error.

BUCHANAN, J. This is a writ of error to a judgment of the circuit court of the city

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

of Roanoke in favor of Hugh Brown against the Norfolk & Western Railroad Company for the sum of \$10,000.

It appears from the record that the plaintiff, who was about 19 years of age, was employed by the defendant company on the 15th of September, 1891, as a brakeman in the yards of the defendant company at Roanoke city. The crew of hands with which he was working was engaged chiefly in coupling and uncoupling cars, and in shifting them for the purpose of making up trains. On the 15th of October, one month after he commenced work, while engaged in uncoupling cars, his arm was so injured that it had to be amputated above the elbow. It further appears that he was under the control of the yard master (who, it was admitted in argument, was the vice principal of the defendant company), and that on the day he was injured, while engaged in his usual employment, he went up the yard upon the engine, with the yard master, engineer, and fireman, to shift some cars to make up a freight train. When the engine reached a point opposite the cars which were to be shifted, the yard master ordered him to get off the engine, go over to the train, and cut loose two of the cars that were to be shifted; that the cars in a train in the yard were generally kept "taut" or tight, to prevent the coupling pins from being stolen. In order that the plaintiff might be able to cut the cars loose, as directed, it was necessary for the couplings to be slacked by backing the train. Before going between the cars, the plaintiff gave the signal to the yard master, who was some eight cars nearer the engineer, to back the train. The yard master repeated the signal, and the cars were basked, but not far enough to loosen the coupling pins. The plaintiff then went between the cars, attempted to take out one coupling pin, but was unable to do so, and turned to take out the other. While attempting to get out this pin, and when it was about one-third of the way out, the train came back, caught his arm between the dead blocks or bumpers, and while his arm was so fastened the cars moved back about a car length, when the train slacked up, and his arm was released. The record shows, further, that the cars which the plaintiff was attempting to uncouple when injured were of different heights, and the coupling was what is known as a "mismatched coupling," and that the difficulty in pulling out the coupling pin was caused by the rear car pressing down the link with which the cars were coupled, and causing it to hang against the coupling pin; that the cars which made up the train came from various roads, with various kinds of drawheads, coupling, etc.; that the plaintiff had never seen a mismatched coupling before that one, and that he only noticed that this one was mismatched a few seconds before the accident happened. It further appeared that if the coupling had not been mismatched there would have been no difficulty in un-

coupling them; that the plaintiff, prior to his employment with the defendant company, had worked one month in the machine shops at Roanoke, and four months as a brakeman on a mixed train on the Warrenton Branch of the Richmond & Danville Railroad; and that the plaintiff's engagement with the defendant company was with the knowledge and consent of his parents.

The plaintiff bases his right to recover upon two grounds:

First, that the defendant company was negligent in requiring him to uncouple cars of unequal height, with mismatched couplings, without informing him of the increased danger which he would incur in the performance of that duty.

Second, that the yard master, who had entire control of the railroad yard, and who was admitted to be the vice principal of the defendant company, ordered the train to be moved back the second time, when the plaintiff was injured, without warning to or signal from him, while he was between the cars, endeavoring to uncouple them.

The first ground of negligence relied on involves the question whether the use of cars of unequal height and mismatched couplings is *per se* negligence in the company, for which it must answer in damages to its employes if injury results to them therefrom in the performance of their duties.

It is well settled that the master, whether a natural or an artificial person, although he is not to be held as guarantying the absolute safety or perfection of his machinery, appliances, or other apparatus provided for the use of his servants, must observe all the care which the exigencies of the situation reasonably require in furnishing instrumentalities adequately safe. *McKin. Fel. Serv.* § 24; *Wood, Mast. & Serv.* § 329.

There was no defect in either of the cars which the plaintiff was uncoupling when injured. They were of different heights, and for that cause their couplings were mismatched; but the difference in the height of the cars was not so great that the bumpers on the cars missed each other when drawn together for the purpose of coupling or uncoupling, but the bumpers of one struck the bumpers of the other, and prevented the cars from coming any nearer than if the cars had been of the same height.

The record shows that thousands of cars are carried over the defendant's road, from all parts of the country, to and from its yards at Roanoke.

To hold that a railroad company was negligent in supplying safe and suitable machinery to its servants unless every car in a train was of the same height would, in our opinion, be requiring an extraordinary degree of care on its part. The effect of such a requirement would be to compel such company to have all its own cars changed to or made the same height, or to have only cars of the same height placed in the same train. It would

also be required to have the railroad companies whose cars pass over its line to make their cars of the same height, or put only those of the same height in the same train, or to transfer all freight at its terminal points to other cars, or cease to do business with connecting lines. Such a rule would be impracticable, as well as expensive and burdensome to the railroad company, and would require the company to exercise not reasonable, but extraordinary, care, in supplying and maintaining suitable machinery and instrumentalities to its servants in the performance of the work required of them; and that, too, when the defect complained of was obvious and patent, and could be seen as easily by them as by the master.

But even if it was negligence, as we do not think it was, in the defendant company, under the facts in this case, to have cars in the same train of unequal height, with mismatched couplings, we do not think that such defect was the proximate cause of the plaintiff's injury. The mismatched couplings furnished an occasion for uncoupling the cars in a slower way than if they had not been mismatched, but there was no risk of any injury from such delay while the cars were standing still. It was the negligence in driving back the train, and not the mismatched couplings, which was the direct, proximate cause of the injury. The failure to have the cars of equal height and the driving back of the train were distinct and independent, and had no connection with each other; the failure to have cars of equal height being the remote cause, while the act of negligence in driving the train back was the proximate cause, within the meaning of the cases.

Mr. Cooley states the doctrine as follows: "If an injury has resulted from a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury follows as a direct and immediate consequence, the law will refer the damages to the last or proximate cause, and refuse to trace it to that which is remote." *Cooley, Torts*, p. 73; *Pease v. Railroad Co. (Wis.)* 20 N. W. 908.

Having reached the conclusion that the proximate cause of the plaintiff's injury was the grossly negligent act of driving the train back a second time, while the plaintiff was between the cars uncoupling them, the question arises, was that act the act of the master or the act of the fellow servant? And upon the answer to this question depends the right of the plaintiff to recover, in this view of the case.

The record shows that the engineer and fireman were on the engine when the injury to the plaintiff was done. It shows, and it is admitted, that, if the train was backed a second time, it must have been done by one of them; but the plaintiff insists that, while it is true that the engineer or fireman did so move the train, they were ordered to do so by the yard master, the vice principal. If

the yard master ordered the train to be moved back a second time, the defendant company is clearly responsible for the injury done. It appears that the yard master was in the yard, that he ordered the plaintiff to uncouple the cars where he was injured, and that he repeated the signal of the plaintiff to move the train back the first time, and before the plaintiff went between the cars; but there is no evidence whatever that he afterwards gave any signal or directed the train to be moved back until after the plaintiff was injured. It is claimed by the plaintiff's counsel that the failure of the defendant company to call the yard master as a witness, and its failure to prove by the engineer, fireman, and brakeman, who were called as witnesses, that the yard master did not order the train to be backed a second time, together with the fact that he was in the yard, and ordered the uncoupling to be done, and repeated the signal for the train to be moved back the first time, are sufficient grounds upon which to base a presumption that he did order the train to be moved back the second time. The burden rested upon the plaintiff to show that his injury resulted from the defendant's wrongful act. That fact must have been proved before he was entitled to recover. It is not necessary that negligence shall be proved by direct evidence. It can be proved by circumstantial evidence, as any other fact, but the circumstances relied on wholly fail to prove the fact in question. The engineer, fireman, and brakeman, called as witnesses, denied that the train was moved back a second time at all. The fact that the defendant did not prove by the engineer, fireman, or brakeman, when on the stand, that the yard master had not ordered the train moved back the second time, when they denied that it had been so moved, and the fact that the defendant did not call the yard master to prove that he did not order the train back a second time, when there was no evidence whatever that he had done so, are not circumstances which prove or even tend to prove that he had ordered the train to back a second time. There was no proof whatever that the yard master ordered the train to be so moved, and in the absence of such proof it was not incumbent upon the defendant company to prove that no such order had been given.

The evidence in this case, considering it as on a demurrer to the evidence, does not show that the defendant company failed to exercise ordinary care in supplying and maintaining suitable machinery and instrumentalities for the performance of the work required of the plaintiff. But, if such machinery and instrumentalities had been defective, the evidence shows that the proximate cause of the injury done was the negligent act of a fellow servant. In this view of the case, it becomes unnecessary to consider the question of whether or not the plaintiff was guilty of contributory negligence in pla-

cing his arm between the dead blocks or bumpers of the cars when uncoupling them, and having it between them when it was crushed by the backing of the train.

The judgment of the trial court must be reversed, the verdict set aside, and a new trial awarded, to be had in accordance with this opinion.

RAKES et al. v. RUSTIN LAND, MINING & MANUFACTURING CO.

(Supreme Court of Appeals of Virginia. July 28, 1895.)

INJUNCTION—RESTRAINING TRESPASS AND WASTE.

1. A tenant cannot dispute his landlord's title.

2. One making a fair prima facie showing in support of his title to land may obtain an injunction to restrain the commission of waste or of trespass if the injury would be irreparable.

3. One may obtain an injunction against trespass or waste without showing that he could not obtain adequate compensation in damages in a suit at law.

Appeal from circuit court, Carroll county; Bolen, Judge.

Suit by the Rustin Land, Mining & Manufacturing Company against Jackson Rakes and others. Decree for complainant, and defendants appeal. Affirmed.

Robert Crockett, for appellants. Fulton & Fulton, for appellee.

RIELY, J. The question here is as to the right of the appellee to the injunction that was awarded it against the appellants to restrain them from cutting or removing the wood or timber upon a certain parcel of land of 109 acres, described in the bill, and which was afterwards at the hearing made perpetual.

It appears from the record that the appellee claims title to a large body of land under a grant from the commonwealth to Thomas Rustin, bearing date December 11, 1795, and that the appellants claim through one John Porter, who obtained a grant from the commonwealth for the said 109 acres on January 10, 1856. The claimants under the Rustin grant claimed that this parcel of land was within their grant and survey. They brought a suit in ejectment against John Porter, and the declaration was served on him on February 10, 1859. Subsequently, on March 1, 1859, an agreement in writing, under seal, was entered into and duly executed by John Porter and a certain David G. Shepherd, styled "trustee," the agent and manager of the owners under the Rustin grant, by which the respective rights to the said parcel of land were compromised and adjusted, and the suit dismissed. By that agreement John Porter acknowledged the title of the claimants under the Rustin grant to the land, and became their

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

tenant. By its provisions he was authorized to fence, cultivate, or use any of the land until the timber should be taken off, and they reserved the right to cut and use the timber in any way they might see proper. Porter agreed that, when they had gotten all the timber from the land that they might wish, he would buy the land from them, and give as much for it as any other person; and they agreed to give to him the refusal of the land so soon as they should get the timber off, or so much of it as they might wish to use. The effect of this agreement was to make an adjustment and settlement by compromise of the respective rights of the parties to the land, and to invest the Rustin claimants with an indisputable title to it, so far as John Porter was concerned. He was thereby estopped from contesting or disputing thereafter their title to it. He also, by becoming their tenant, was, for this further reason, that a tenant cannot dispute his landlord's title, estopped from denying the right of the Rustin claimants to the land. He was thus doubly prevented in law from questioning their title.

The Rustin claimants having, then, so far as John Porter and all who claim through and under him were concerned, an incontestable title to the land, were they entitled to the injunction? It was alleged in the bill that the chief value of the land consists in the timber upon it; that, if stripped of this, it is of little value; and that the appellants, who were defendants in the court below, were engaged in committing irreparable trespass, waste, and injury to the land by cutting the timber and hauling it off and selling it. The averments of the bill in these respects are sustained by the testimony taken in the cause. It was shown that the value of the land consists in its minerals and timber; and that the timber is indispensable to the development of the minerals, and that the loss of it would be an irreparable injury. It was further shown that the defendants were cutting and taking away timber from the land, and claimed the right to do so under their purchase from John Porter. The jurisdiction of a court of equity to restrain by injunction the commission of waste or trespass, where the applicant for the injunction has the title to the land, and the injury would be irreparable, is well settled. High, Inj. §§ 460, 464; Pom. Eq. Jur. §§ 1347, 1356, 1357; Manchester Cotton Mills v. Town of Manchester, 25 Grat. 825; Sanderlin v. Baxter, 76 Va. 299; Switzer v. McCulloch, Id. 777; and Jerome v. Ross, 7 Johns. Ch. 315. In the case of Manchester Cotton Mills v. Town of Manchester, supra, it was said by Judge Staples, in delivering the opinion of the court, that it was not essential that the applicant for the injunction should establish a clear title, but only that he should show a fair prima facie case in support of his title. 25 Grat. 831. Here the complainant showed, not merely a fair prima facie case in sup-

port of its title as against John Porter, through whom the defendants claimed, but that against him, and all who claim under him, it had a clear and incontestable title, or, what amounts to the same thing, a title which he and they were estopped from contesting. Emerick v. Tavener, 9 Grat. 220, and 3 Minor, Inst. pt. 1, pp. 236-238. It was argued by the counsel for the appellants that the written agreement referred to was obtained from John Porter by fraud, and that the defendants were therefore not estopped from relying on such title as he possessed prior to the execution of the agreement. It was not claimed that there was any evidence of fraud outside of the paper itself, except the mere fact that the complainant had not removed the timber so that Porter could buy the land. The agreement stipulated for no period within which the timber would or should be removed, and the failure to use or remove it was not fraudulent. But it was further argued that the agreement itself was the perpetration of a fraud upon John Porter, inasmuch as it was entered into under the service on him of a declaration in ejectment. The declaration was served on February 10, 1859, and the agreement was entered into on March 1, 1859. It would be going very far indeed to say that the compromise and settlement by rival claimants of their respective rights to the subject-matter of a pending suit constitutes fraud. Equity is ever ready to avoid the fruits of duress or fraud, but neither is disclosed by the record. It is the policy of the law to uphold the free and voluntary settlement by compromise of adverse or conflicting rights, not to seize upon it as evidence of duress or fraud. The practice may be said to be one of almost daily occurrence, and is unquestioned. Nor is it necessary, in order to obtain an injunction to restrain the commission of trespass or waste, that the plaintiff should aver or prove that he could not obtain adequate compensation in damages in a suit at law. This is not necessary to entitle him to relief in equity; but, whenever the substantive value of the estate in the character in which it is enjoyed is imperiled, that is sufficient to invoke the jurisdiction of a court of equity. Kerr, Inj. 199; Manchester Cotton Mills v. Town of Manchester, 25 Grat. 825, 828; and Anderson v. Harvey's Heirs, 10 Grat. 386, 398. For 30 years the relations of the claimants under the Rustin grant and John Porter to each other and to the land in controversy remained as established by the agreement of March 1, 1859. They used it as their convenience and necessity required the use of the timber. He lived upon adjacent land, and acquiesced in such use of it by them. It was after this long period of repose and acquiescence in the provisions of the said agreement by John Porter that the appellants, with the knowledge of such agreement, and for the paltry sum of \$10,

and of \$100 more if successful in the suit over the land, bought it, and caused this litigation with the appellee. Their purchase has not the appearance of the good faith in which equity delights.

There is no error in the decree complained of, and the same must be affirmed.

(32 Va. 13)

FRY v. STOWERS.¹

(Supreme Court of Appeals of Virginia. July 25, 1895.)

BOUNDARY LINES — DECLARATIONS OF DECEASED PERSONS—ADMISSIBILITY—ESTOPPEL TO CLAIM TITLE—ADMISSIONS BY SILENCE.

1. Declarations of a deceased person as to a corner tree or boundary are admissible if he had peculiar means of knowledge.

2. Declarations of a deceased person as to boundary lines are not rendered admissible by the fact that he was the son-in-law of the former owner and carried the chain when, such owner had some lines run, it not appearing that they were the lines in question.

3. The owner of land is not estopped to claim title thereto by the fact that he kept silence while his title was disparaged in his presence, the disparaging remarks not being addressed to him.

Error to circuit court, Bland county; Dupuy, Judge.

Action by William Stowers against S. V. Fry. Judgment for plaintiff, and defendant brings error. Reversed.

Fulton & Fulton, for plaintiff in error. I. H. Larew and M. Williams, for defendant in error.

BUCHANAN, J. It became important, during the trial of this case, which is an action of ejectment, for the plaintiff in the court below, the defendant in error here, to establish the southeastern corner and the southern line of the grant under which he claimed. To do this, the plaintiff himself was allowed to prove, over the objections of the defendant, the declarations of one Josiah Thompson as to where the corner and line in question were located. The action of the court in admitting such evidence is made the ground of the first assignment of error.

The law is well settled in this state that evidence is admissible to prove the declaration of a deceased person as to the identity of a particular corner tree or boundary, provided such person has peculiar means of knowing the fact in question; as for instance, the surveyor, or chain carrier who was engaged upon the original survey, or the owner of the tract or an adjoining tract calling for the same boundaries; and so of tenants, processioneers, and others, whose duty or interest would lead them to diligent inquiry and accurate information of the fact,—always, however, excluding those dec-

larations which are liable to the suspicion of bias from interest. *Harriman v. Brown*, 8 Leigh, 697; *Clements v. Kyles*, 13 Grat., at pages 477, 478.

Josiah Thompson, whose declarations were allowed to be proved in this case, was the son-in-law of James Deavor, whose lands joined or lapped upon the lands claimed by the plaintiff. Thompson had no interest in the lands of Deavor, and claimed no interest in his estate, as he and his wife had been provided for before Deavor's death, and their lands were located several miles distant. The plaintiff testified that Thompson told him that he had once carried the chain when Deavor, his father-in-law, was having the lines of some of his surveys run, "which one he did not say, and could not say, as Deavor had so many"; that Thompson did not claim to have ever carried a chain around the Robinett grant or tract. Thompson was neither the surveyor nor a chain carrier at the making of the original survey of the land whose corners and boundaries were in controversy; nor was he the owner of that tract or any adjoining tract calling for the same boundaries. Neither does it appear that he had ever been a tenant upon, or engaged as a processioneer of, the land, nor was his situation in reference to it such as to make it his duty or his interest to make diligent inquiry and to obtain accurate information as to the corners or boundary lines as to which his declarations were made. The most that can be said is that he was the son-in-law of an adjacent landowner, and that he had been a chain carrier upon some other survey.

His declarations are clearly not within any of the exceptions made in our decisions in favor of the admissibility of hearsay evidence; and we entirely agree with Judge Lee when he says, in *Clements v. Kyles*, 13 Grat., at page 478, "that, from the perishable character of the landmarks in this country, evidence of hearsay as to particular facts may, under proper restrictions, be received upon a question of ancient boundary. Yet such evidence should be carefully watched, because from its very character it may, in many or most cases, be utterly impossible to meet or disprove it. There must always be some peril in departure from the broad general rules of evidence, and it should not be carried further than required by the absolute necessities of the case. I think the rule is laid down sufficiently broad in *Harriman v. Brown*, and I am not disposed to extend it in the least beyond the very terms in which it is there expressed."

The court erred in the admission of the declarations of Thompson, and for that error its judgment will have to be reversed.

It is also assigned as error that the court allowed the declarations of one Wilkinson, under whom the defendant claims, to be given in evidence. At the time Wilkinson made the declaration in question he was the owner of

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the land, and any admission he may have made while such owner which tended to show that his boundaries were located as the plaintiff claims they are was admissible evidence. *Reusons v. Lawson*, 21 S. E. 347, 91 Va. —. The fact that he did not live upon the land, or that he perhaps had never seen it, did not affect the admissibility of the evidence. It was proper for these facts, together with all the circumstances connected with his admission, to go to the jury, and it was for them to give it such weight as they deemed proper under all the circumstances of the case.

The next assignment of error is raised by bill of exceptions No. 3, which is as follows:

"Be it remembered on the trial of this cause the plaintiff, to further maintain the issue in this cause, after introducing the evidence as is set out in bill of exceptions No. 4, to be read herewith, down to the evidence of James Stowers, then introduced said James Stowers, to prove declarations of Solomon Waddle, who was a son-in-law of James Deavor, under whom defendant claims. To the introduction of this testimony the defendant objected, but court overruled the objection; and thereupon the witness testified that he was at a barn-raising at Michael Waddle's, after the Deavor partition; that he saw Joseph Holston, a surveyor, and George Deavor come in in the evening. Deavor had Holston to run his land to see if he could get water. It was the land in controversy. Solomon Waddle was present, and asked if he had found water. He said 'No.' Then Solomon said: 'I knew you wouldn't; for your patent don't take you there.' Solomon Waddle, George Deavor, and Joseph Holston are all dead. Holston was there several days surveying. To the ruling of the court in permitting the witness to thus testify the defendant excepted."

The declarations of Waddle were admissible, it is contended by the plaintiff's counsel, upon two grounds: First, that he was the son-in-law of James Deavor, under whom the defendant claims, and that it was recently after the partition of Deavor's lands among his heirs, and that he was present when such partition was made, and therefore his situation towards the land was such that it rendered his declarations admissible. That they were not admissible on that ground is shown by this opinion in disposing of the first assignment of error.

The other ground upon which it is claimed that they were admissible is that they were made in the presence of George Deavor, the then owner of the land claimed by the defendant, and that if they were not true he ought to have denied them; and, as he did not do so, he is presumed to have admitted their correctness.

The bill of exceptions does not show clearly whether the question of Solomon Waddle was directed to George Deavor or to the surveyor, Holston, nor whether the answer made was

the answer of Deavor or the answer of Holston. If there was a conversation between Waddle and Deavor as to the boundary of the land in question, in which Deavor disparaged his own title, that conversation was clearly admissible; but if the conversation was between Waddle and the surveyor, in Deavor's presence merely, and the remarks of Waddle were not addressed to Deavor, his silence could not be considered as an admission of the truth of Waddle's declaration, because, if not addressed to him, it cannot be said to have called for a reply.

Mr. Greenleaf says, in discussing this subject: "But, in regard to admissions inferred from acquiescence in the verbal statements of others, the maxim '*qui tacet consentire videtur*' is to be applied with careful discrimination." "Nothing," it is said, "can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all unless the evidence is of direct declarations of that kind which naturally calls for contradiction, — some assertion made to the party with respect to his right which by his silence he acquiesces in. A distinction has accordingly been taken between declarations made between a party interested and a stranger; and it has been held that, while what one party declares to the other, without contradiction, is admissible evidence, what is said by a third party may not be so. It may be impertinent, and best rebuked by silence; but, if it receives a reply the reply is evidence." 1 Greenl. Ev. § 199.

In *Larry v. Sherburne*, 2 Allen, 34 et seq., Chief Justice Shaw says: "It is true that there are cases where a party may be affected in his rights by proof of a silent acquiescence in the verbal statements of others. But such evidence is always to be received and applied with great caution, especially where it appears, as in this case, that the statements are made, not by a party to the controversy, but by a stranger. There are many cases where the intervention of a third person may properly be deemed unnecessary, and his statements be regarded as immaterial and impertinent. To them no reply need be made; and no inference can be drawn from the fact that they are received in silence."

Upon the next trial, if it appears that the declarations in question were made in a conversation between Waddle and George Deavor, they should be admitted in evidence; but, if it appear that Waddle was a mere stranger, having no interest in the matter, and that his conversation was with Holston and not with Deavor, but merely in his presence, then the court should not admit his declarations in evidence.

Objection is made both to the form of the verdict and to the fact that it embraced land which the plaintiff admitted, and the record shows, was the property of the defendant. As the case must be sent back for a new trial, it is unnecessary to decide these ques-

tions, as they are not likely to arise on the next trial.

We are of opinion that the judgment complained of should be reversed, the verdict set aside, and a new trial awarded.

TATE'S EX'R v. HULL et al.¹

(Supreme Court of Appeals of Virginia. July 25, 1895.)

BANKRUPTCY PROCEEDINGS — BINDING EFFECT OF DECREE—SUBSEQUENT SUIT IN STATE COURT.

A judgment creditor, who proves his debt by bankruptcy proceedings, and takes an active part in these proceedings, cannot afterwards go into a state court to subject property sold by the assignee in bankruptcy on any ground of error which might have been corrected in the bankrupt court, or by appeal from the order or decree of that court.

Appeal from circuit court, Wythe county; Williams, Judge.

Bill by Henry B. Hull and another against M. B. Tate's executor. Decree for complainants, and defendant appeals. Affirmed.

Daniel Trigg, for appellant. A. A. Campbell, J. J. Stuart, and White & Penn, for appellees.

KEITH, P. A bill was filed in the circuit court of Wythe county by Henry B. Hull and William A. Stuart, afterwards removed to Wythe county, in which they state they are the owners of the mineral rights in a certain tract of land in Rye Valley, Wythe county, Va., commonly known as the "Rock Ore Bank Tract"; that one-half interest in this land was purchased by R. K. Williams from Moses Peirce, and on the death of Williams descended to his heirs, by whom it was conveyed to the plaintiffs. The other half of the said tract of land was owned by George Peirce, the brother of Moses Peirce, and was purchased by G. F. Barton in the chancery suit of Barton v. Peirce's Heirs, lately pending in the circuit court of Wythe county. Barton afterwards sold the land thus purchased to R. K. Williams, and bound himself to make a good and sufficient deed for the same. It thus appears that R. K. Williams had both the legal and equitable title to one-half of the Rock Ore Bank Tract, derived by deed from Moses Peirce, and was the equitable owner of the other half, derived through the Bartons from George Peirce. It is alleged that Williams and those holding under him have had continuous and uninterrupted possession of the Rock Ore Bank Tract of land from January 21, 1857, to the present time. At February rules, 1871, M. B. Tate filed his bill in chancery against G. F. Barton and others in the circuit court of Wythe county. The object of the bill was to en-

force the lien of a judgment in the name of the Northwestern Bank of Virginia against G. F. Barton, Conrad Farris, and William Porter for the sum of \$418, with interest and costs. The bill averred that Barton owned several tracts of land in Wythe county, on which the judgment was a lien. Among other tracts described, and the only one in which the parties to this suit are concerned, is the Rock Ore Bank Tract. At the April term, 1872, of the court, George E. Penn was directed to take an account of the debts and their priorities. His report was filed on the 14th of August, 1872. At the September term following, the court confirmed the said report, and Derric was appointed a commissioner to sell the lands of G. F. Barton, mentioned in the bill. On the 27th of August, 1872, G. F. Barton filed his petition in the district court of the United States, asking to be adjudged a bankrupt, and upon his petition such proceedings were had that he was adjudged a bankrupt, and subsequently obtained his discharge. With his petition to the bankrupt court, Barton filed schedules of his real estate, and a list of his creditors. M. B. Tate, the plaintiff here, who represented the greater part of the indebtedness against G. F. Barton, appeared before the commissioner in pursuance to notice, proved his debts against the bankrupt, amounting to \$3,246.14, and Daniel Trigg was chosen assignee of the bankrupt, which position was duly accepted by him. The debts proven in the bankrupt court were the same as those proven in the cause of M. B. Tate v. Barton, above referred to, pending in the circuit court of Wythe county. The debt of the Northwestern Bank was not reported either by Commissioner Penn in the state court or before the commissioner in the proceedings in bankruptcy; but subsequently, at the instance of the administrator of Conrad Farris, who was one of the sureties in the debt due the Northwestern Bank, Tate was compelled to prove his judgment, and it was paid out of the proceeds of the sale of the tract of land containing 127 acres, upon which it constituted a lien. On the 13th of December, 1872, the district court of the United States issued a restraining order prohibiting Commissioner Derric from making sale of the lands of Barton under the decree of the circuit court of Wythe county. A copy of this order of injunction is filed as a part of the bill in this case.

Barton, by his schedule filed in the bankrupt court, surrendered various tracts of land, and among them he recites the tract which is now in dispute in this case, described as the "Rock Ore Bank Tract"; and upon the schedule is indorsed, "This tract is in the possession of the heirs of Rufus K. Williams." As soon as it became known to the heirs of Williams that Barton had surrendered the lands in which they were interested, they filed their petition in the district

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

court of the United States, and thereupon such proceedings were had that Daniel Trigg, the assignee, was ordered to make a conveyance of the land embraced in the petition to the heirs of B. K. Williams. This deed was duly executed by the assignee, acknowledged, and admitted to record, and is filed as an exhibit with the bill. It will thus be seen that the legal title to George Peirce's interest became united by the deed of Daniel Trigg, assignee, as aforesaid, with the equitable title in the heirs of R. K. Williams. It further appears from the bill that the plaintiffs purchased this half also from the heirs of R. K. Williams. All this while the original suit of M. B. Tate v. G. F. Barton and others remained upon the docket of the circuit court of Wythe county, and on the 24th of April, 1878, more than three years after the recordation of the deed from Daniel Trigg, assignee of G. F. Barton, to the heirs of R. K. Williams, an order was entered in the cause, reviving it against Daniel Trigg, assignee as aforesaid. By an order of the 30th of September, 1878, James H. Gilmore was substituted as commissioner in the place of Derric, and directed to sell the land in the bill mentioned. The sale was made, and M. B. Tate, the plaintiff, was reported, at the April term, 1879, as the purchaser of the one-half interest of George Peirce in the Rock Ore Bank Tract for the sum of \$10. Subsequently, James H. Gollihorn, who had been substituted as commissioner, was directed to execute to M. B. Tate a deed for the land purchased by him at the sale made by J. H. Gilmore, and confirmed as above set forth. The bill of Hull and Stuart, after setting out in much detail the facts, a mere synopsis of which has been here given, charges that the deed made by Commissioner Gollihorn constitutes a cloud upon their title, so far as it relates to the Rock Ore Bank Tract, and prays that it be set aside and annulled, and that M. B. Tate be perpetually enjoined and restrained from any further proceedings in the suit of M. B. Tate v. G. F. Barton and others, in the circuit court of Wythe county, so that their title to the Rock Ore Bank Tract may be established and quieted, and for other and further relief. To this bill Tate filed his answer, which denies that the complainants are the owners of the mineral rights in the Rock Ore Bank Tract. He alleges that the title bond from Barton to Williams was never recorded, and therefore denies that R. K. Williams was ever the owner of the said tract, except subject to liens of creditors of G. F. Barton upon judgments obtained before the recordation of the said title bond, or the deed afterwards obtained by the heirs of R. K. Williams under the proceedings in bankruptcy, heretofore described. Respondent also denies that R. K. Williams, and those holding under him, have held continuous and uninterrupted possession of said land from the 21st of January, 1857, to the present time. He sets forth the proceedings

in the suit of Tate v. Barton, the record in which he prays may be made a part of his answer, and avers that Williams and his heirs were in fact pendente lite purchasers with full knowledge of the litigation in the case of Tate v. Barton, in which the land in controversy was sold; and, having knowledge of those proceedings, it was their duty to assert their rights in that case, if they had any. He denies that the proceedings in the bankruptcy case can have any effect upon his rights, and claims that the proof of the debt in bankruptcy does not discharge any lien attached to the debt. There are many other averments in the answer, which need not be more specifically adverted to. Suffice it to say that upon the issues made in the pleadings such proofs were submitted and such proceedings had that on the 12th day of May, 1893, the judge of the circuit court of Wythe county entered a decree granting the plaintiffs all the relief asked for, and from that decree Tate's executors obtained an appeal to this court.

We are of opinion that the decree of the circuit court is plainly right. The district court, by its decree of the 13th of December, 1872, acquired jurisdiction over the parties to this litigation and the subject-matter of this controversy. It has been held by this court "that a creditor by judgment, who proves his debt in bankruptcy proceedings, and takes an active part in these proceedings, cannot afterwards go into a state court to subject property sold by the assignee of the bankrupt on any ground of error which might have been corrected in the bankrupt court, or by appeal from the order or decree of that court." *Spilman v. Johnson*, 27 Grat. 33. It seems to be clear that the district court of the United States, having obtained jurisdiction over the estate surrendered by Barton, had ample power to administer it, and that the parties are bound by the proceedings in that court. M. B. Tate was a party to those proceedings, proved his debt, and participated in the selection of the assignee. Ordinarily he had two courses open to him. He could have stayed out of the district court, and relied upon the lien of his judgment and his right to enforce it in the state court, but having, in this case, been requested to prove it in the bankrupt court, he is bound by the action of that court. The district court, with all the liens reported to it which were reported in the state court, and, in addition thereto, the lien of appellant's judgment, just referred to, directed its assignee to convey this land to the heirs of R. K. Williams, and by force of that decree and the deed made by the assignee in pursuance thereof, the grantees therein held the land thereby conveyed discharged from all liens reported in the proceedings in bankruptcy, it not appearing upon the face of that deed that it was conveyed subject to those liens. When Tate afterwards went into the state court, and became a purchaser at the sale made in pursuance

of the decree rendered therein, he acquired no right in derogation of the title already vested in the heirs of R. K. Williams by virtue of the deed thus obtained by them from Daniel Trigg, assignee of Barton. We do not think it is necessary to consider other questions of interest presented in the record, but are of opinion, for reasons already stated, that there is no error in the decree complained of, and that the same should be affirmed.

(91 Va. 608)

GOODELL'S EX'RS v. GIBBONS.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

CONTINUANCE—JURY—COMPETENCY OF WITNESS—LIMITATION OF ACTION—BURDEN OF PROOF.

1. Denying a continuance for the absence of a witness who is expected to be present at the next term, is proper where the deposition of such witness has already been taken in anticipation of her removal from the state.

2. The granting of a special jury is correctly refused where the application is made only after the denial of a motion for a continuance, and the case is tried by a competent jury.

3. In an action against an executor for the price of lumber sold to decedent, plaintiffs' agent, who sold and delivered the lumber, is competent to testify for plaintiff as to the transaction.

4. The burden of proof is on him who pleads the statute of limitation, so that when one sues, in August, 1889, for lumber delivered in 1884, and does not allege in what month it was delivered, so as to show the action within the five years limitation, and defendant fails to show it was delivered prior to August, a verdict for the plaintiff is proper.

Error to circuit court, Smyth county; Kelly, Judge.

Action by C. M. Gibbons against the executors of one Goodell. Plaintiff had judgment, and defendants bring error. Affirmed.

James L. White and B. F. Buchanan, for plaintiffs in error. A. M. Dickenson, A. G. Pendleton, and Wm. C. Pendleton, for defendant in error.

KEITH, P. This was an action of trespass on the case in assumpsit brought by C. M. Gibbons, for the benefit of Mary E. Kloeber, plaintiff, against the executors of Goodell, to recover \$469.18, for the price of a certain bill of lumber sold to the defendants' testator in his lifetime. The plaintiffs in error, who were the defendants in the court below, in this petition to this court set out several grounds of error, which will be briefly noticed.

First. That the defendant moved the court to continue the case until a succeeding term, on account of the absence of a Miss Boothe, who had testified at a former trial, but who had removed from the commonwealth, the defendants stating that they believed that her presence could be secured if the continuance should be granted. It appears that her depo-

sition had been taken in anticipation of her removal from the state, and the court refused to continue the case on account of her absence. Motions for continuance are addressed to the discretion of the court, and its judgment will not be reviewed unless it plainly appears that that discretion was improperly exercised. From the facts stated in the bill of exceptions we do not see that the circuit court committed any error in this respect.

The next error assigned is to the refusal of the court to allow a special jury at the instance of the plaintiffs in error. It seems that this request was not made until the motion for a continuance had been overruled, which suggests the idea that it was intended as a substitute for that motion. However that may be, this, too, is a matter addressed to the discretion of the circuit court, and, while there may be circumstances under which a refusal to grant it would constitute reversible error, none such appear in this record. The regular jury was sworn upon its *voir dire*, and a jury free from all exception was secured.

Another error assigned is to the ruling of the court in permitting G. S. Smith, who, as agent for the plaintiff, sold and delivered the lumber to the testator of the plaintiff in error, to testify as a witness on behalf of the defendant in error. Our statute, found in sections 3346 and 3348 of the Code, was never designed to impose any disqualification upon the competency of witnesses to testify which did not theretofore exist. It was intended to remove incompetency in certain cases, and not to create it in any case. See *Reynolds' Ex'r v. Callaway's Ex'r*, 31 Grat. 436. Under the circumstances of this case, G. S. Smith would have been a competent witness at common law, and the circuit court, therefore, did not err in overruling this objection.

The fourth and last assignment of error presents a question of more difficulty and interest than those which we have considered. The suit was brought to the first Monday in August, 1889, and the account filed with the declaration bears date in 1884, without designating the day or the month of that year. From the account it appears that, in the year 1884, about 18,000 feet, or rather more than one-half, of the lumber sued for, was sold and delivered to the testator of the defendants. The pleas were nonassumpsit and nonassumpsit in five years. The account was proved, but the proof is silent as to the exact date of the delivery of the lumber in the year 1884. The jury found a verdict for the defendant in error for the whole amount of her demand, and the plaintiffs in error moved for a new trial upon the ground that there was no proof that the cause of action arose as to the 18,000 feet of lumber within five years next preceding the institution of the suit. This brings us to the consideration of a proposition which, it is believed, has not been decided in this court:

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Upon whom does the burden of proof rest upon the plea of the statute of limitations? In *Wilkinson v. Holloway*, 7 Leigh, at page 288, Judge Carr, referring to the statute of limitations, says: "It behooves the pleader of the statute to make out a case to which it clearly applies." This was, perhaps, an obiter dictum; but a dictum from a source so distinguished is entitled to great consideration at our hands. In *Lewis v. Mason's Adm'r*, 84 Va. 731, 10 S. E. 529, Judge Fauntleroy re-enforces this expression of opinion by adopting it in that case, where also it may be said not to have been necessary to the decision of the controversy there considered. It is, however, embodied in the syllabus of the reporter; and it is cited with approval by Barton in his *Law Practice* (volume 1, p. 93). 4 Minor, Inst. (Ed. 1878) pt. 1, p. 652, in enumerating pleas which confess and avoid the plaintiff's case, gives, by way of illustration, payment; set-off; special plea in the nature of a plea of set-off; statute of limitations; release; accord and satisfaction; gaming; usury; infancy; coverture of a female at the time of the contract. And in discussing the plea of statute of limitations, at page 667, the author says that the plea of statute of limitations is one of the few defenses which cannot be given in evidence under the general issue of *nil debet* and *nonassumpsit*. It must always be pleaded specially by the defendant; and, at the foot of the same page, he says: "This plea being by way of confession and avoidance, it, of course, admits the cause of action stated in the declaration to have been originally valid,"—citing *Brockenbrough v. Hackley*, 6 Call, 51. *Starkey on Evidence* and *Greenleaf on Evidence* state the law to be that the burden of proof is upon the plaintiff to show both a cause of action and the suing out of process within the period mentioned in the statute. *Greenl. Ev.* § 431. In the note to that section, however, it is stated that "probably the better rule is to regard the statute as a defense which must be set up by plea, and that the burden of proof is on the defendant to establish this plea." This he may, of course, do by using the allegations of the complaint as admissions of the plaintiff; and the burden of the evidence will then be shifted, to show some exception." For the law as stated in this note, many decisions from courts of the highest respectability are cited. In 13 Am. & Eng. Enc. Law, p. 771, it is said there is a great conflict of authority upon this point, and many decisions are given in support of both views of the subject. It is believed that in this state the practice has been almost uniformly to hold the burden of proof as resting upon the party relying upon the statute. If the burden be upon the plaintiff to show both a cause of action and the time when it accrued, it is difficult to perceive why the defense of the statute of limitations could not be made under the general issue of *nil*

debet or of *nonassumpsit*. If it be a plea by way of confession and avoidance, and if it be necessary that it should be pleaded specially by him who relies upon it, then the conclusion, as stated by Judge Carr, would seem to follow, necessarily, "that it behooves the pleader of the statute to make out a case to which it clearly applies." See *Wilkinson v. Holloway*, 7 Leigh, 288. We think, therefore, that the court did not err in refusing, upon this ground, to set aside the verdict of the jury. Upon the whole case, we are of opinion that there was no error committed by the circuit court; that the proof was sufficient to warrant the verdict of the jury; that the instructions given were right and proper; and that the judgment of the circuit court must be affirmed.

(91 Va. 661)

NORFOLK & W. R. CO. v. JOHNSON.¹
(Supreme Court of Appeals of Virginia. July 11, 1895.)

KILLING STOCK—FAILURE TO FENCE.

Where a railroad runs through inclosed land, and fails to fence its track, as required by Code 1887, § 1258, the proprietor of the land may recover for the loss of his stock, although the company was guilty of no negligence in running its trains, as section 1261 renders the company liable irrespective of other negligence than failing to fence as required.

Error to circuit court, Washington county; Kelly, Judge.

The Norfolk & Western Railroad Company brings error to a judgment in favor of John H. Johnson. Affirmed.

Fulkerson, Page & Hurt, for plaintiff in error. Daniel Trigg, for defendant in error.

HARRISON, J. This action was brought to recover damages for the careless and negligent killing of a valuable colt, the property of the plaintiff, by the defendant company.

The evidence certified shows that the colt mentioned in the declaration was the property of the plaintiff, and that it was killed by being struck by the locomotive of a train upon the road of the defendant company; that at the place where the animal was struck and killed the road of the defendant passes through the inclosed lands of the plaintiff; that the roadbed of the defendant company was not fenced at this point; that there was at said point no cut or embankment with sides sufficiently steep to prevent the passage of stock; and that the place is not in an incorporated town or city, or in an unincorporated town. The proof also shows that the animal in question was a very fine thoroughbred mare, fully worth \$500, the sum for which the jury rendered a verdict. The evidence further shows that the animal was not killed by the negligence of the defendant company in the management and running of its train.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

The only question presented for consideration in this case is raised by the following instruction offered by the plaintiff in error and refused by the court:

"The court instructs the jury that if they believe from the evidence that the colt in question was killed by an unavoidable accident, and that the defendant could not, by the exercise of ordinary care in running the train in question, have avoided the accident, then the jury should find for the defendant."

This instruction ignores entirely the negligence of the company in having disregarded the express mandate of the law that it should cause to be erected along its line and on both sides of its roadbed, through all inclosed lands or lots, lawful fences, and assumes that, notwithstanding its default in this regard, the plaintiff is not entitled to recover if the company has been guilty of no negligence in the mere running of its train. The instruction was properly refused. Section 1261 of the Code, which provides that "in any action or suit against a railroad company for an injury to any property, on any part of its track not enclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employees, agents, or servants," must be interpreted in the light of other sections in chapter 52 of the Code of 1887, from which it is taken. As we have already seen, section 1258 is an express requirement of the law that the railroad company shall fence its roadbed on both sides with a lawful fence. There are certain exceptions to this positive mandate set forth in the chapter referred to. They do not, however, affect this case.

The recent case of McGavock's Adm'r v. Norfolk & W. R. Co., 90 Va. 507, 18 S. E. 909, was a much stronger case in favor of the railroad company than the one at bar. This court has in that case interpreted the law here called in question, and has construed it adversely to the plaintiff in error; holding that the failure of the company to erect a lawful fence, as required by the statute, makes it amenable to the law, and liable to respond in damages for the injury to or killing of stock.

The case at bar is controlled by McGavock's Adm'r v. Norfolk & W. R. Co., just referred to, and the judgment of the circuit court must therefore be affirmed.

(91 Va. 684)

McKINNEY v. PEERS, Clerk.
(Supreme Court of Appeals of Virginia. July 11, 1895.)

CANVASSING ELECTION—POWERS OF COUNTY BOARD.

1. When the result of an election has been ascertained from the returns, and has been sign-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

ed by the commissioners, attested by the clerk, and annexed to an abstract of the votes cast, the duties of the board cease, and they cannot reconvene and reconsider the vote.

2. Under Code 1887, §§ 133-137, the board of commissioners must ascertain the result of an election from the face of the returns where they are in due form, and, if not in due form, summon the judges and clerks of election to amend the returns, and from the amended returns to ascertain the result.

3. The canvassing board has no power to throw out a precinct for irregularities of any sort.

Original action in mandamus by D. W. McKinney against George T. Peers, clerk of Appomattox county court, requiring the latter to issue to the former a certificate of election as justice of the peace. Judgment for plaintiff.

J. Singleton Diggs, for petitioner. John W. Daniel, Blackford, Horsley & Blackford, and H. D. Flood, for respondent.

PER CURIAM. The court is of opinion that it is the duty of the commissioners of election, under section 133 of the Code, to meet at the clerk's office of the county or corporation in which they are appointed, on the second day (Sunday excepted) after any election held therein, and proceed to open the several returns which shall have been made at that office, and from the returns to ascertain the persons who have received the greatest number of votes for the several offices to be filled at the said election. The result so ascertained, is to be reduced to writing, and signed by the commissioners present, or a majority of them, and attested by the clerk of the county, who is ex officio clerk of the board of commissioners of election, and shall be annexed to an abstract of the votes cast at such election. No other duties are imposed upon the board of commissioners of election by section 133. Section 134 provides how irregularities in returns may be corrected; section 135 declares that the person having the highest number of votes for any office shall be deemed to have been elected to such office, and shall receive the certificate of election; section 136 provides how the clerk shall make out abstracts of the votes cast for each officer chosen, when the commissioners have performed the duties imposed upon them by the sections referred to; and, finally, section 137 directs that the clerk shall make out, in pursuance of the determination of the commissioners, a certificate of election for each of the persons having the highest number of votes for county, corporation, or district office, and deliver the same to the person elected, upon his making application therefor.

In the case before us, it appears from the petition of McKinney, and the answer filed by Peers, the clerk, that the commissioners of election met as directed by section 133; that from the face of the returns the petitioner had received, as candidate for the office of justice of the peace in the Southside magis-

terial district of Appomattox county, 247 votes, being the greatest vote cast for any one for that office at that election. It appears that this result was ascertained in the mode prescribed by law; that it was reduced to writing, and signed by all of the commissioners present, to wit, O'Brien, Owen, Agee, and Worley, present and acting; that it was attested by the clerk, and annexed to the abstract of votes cast at the election, as required by section 136. All these things were done in the place, at the time, and in the manner prescribed by law. The commissioners then left the clerk's office, and presently thereafter returned and undertook to reconsider their action. They reconvened and adjourned over until the following Monday, upon which day they again assembled, and threw out the vote cast at Spout Spring precinct, and ascertained that J. T. Lee, J. R. Hill, and T. W. Smith, who had received, respectively, 121, 111, and 127 votes, were duly elected and entitled to the certificates of election in the room and stead of William A. Durham, D. W. McKinney, and C. W. Blockston, who had received respectively 193 votes, 247 votes, and 210 votes, as ascertained at the session of the board held upon the preceding Saturday; and then proceeded to issue certificates of election to the persons thus ascertained to have received the highest number of votes cast.

We are of opinion that, upon the facts, the law is plainly with the petitioner.

1. When the result of the election had been ascertained from the returns, and had been signed by the commissioners, and attested by the clerk, and had been annexed to the abstract of votes cast, the duties of the board ceased and determined.

2. That the duties of the board, under the law, are to ascertain the result from the face of the returns, where the returns are in due form, and to cause any irregularities in the making out and authentication of the returns to be corrected by those upon whom the law imposes that duty; and to this end they are required to summon the judges and clerks of election of the particular precinct at which the supposed irregularity occurred to appear at the courthouse upon a day named, not more than five days from the date of the summons, for the purpose of amending the returns, and upon the returns as amended they are required to complete a canvass of votes provided for in section 133.

3. That the board is clothed by law with no other function or duty, and the attempt to throw out a precinct was a plain usurpation of authority upon its part. The certificate should have been awarded to the petitioner, leaving the opposing candidate to contest the election before the courts in the mode prescribed by law.

For these reasons, we think the writ of mandamus should issue as prayed for, commanding George T. Peers, clerk as aforesaid, to issue to the petitioner a certificate of his

election as justice of the peace for the Southside magisterial district of Appomattox county.

(91 Va. 813)

NICHOLAS v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

CRIMINAL LAW — AFFIRMANCE OF CONVICTION — FIXING DAY FOR EXECUTION — WITHDRAWAL OF COURT'S JURISDICTION — EFFECT.

The petitioner was convicted of murder in the first degree, and sentenced by the circuit court of Henrico county to be hanged. This judgment was affirmed by the supreme court, but the day originally fixed for the execution had passed, and the legislature in the meantime had divested said circuit court of original jurisdiction in criminal cases. *Held*, that the circuit court nevertheless could appoint another day for the execution, in order to carry out the judgment rendered while it had jurisdiction.

Error to circuit court, Henrico county.

One Nicholas was convicted of murder, and the day for his execution was fixed, and he petitions for a writ of error. Writ denied.

D. C. Richardson and Smith & Moncure, for plaintiff in error. R. Taylor Scott, Atty. Gen., C. R. Sands, and Geo. D. Carter, for the Commonwealth.

PER CURIAM. The sole ground of the petition for a writ of error in this case relates to the right of the circuit court of Henrico county to fix another day for the execution of the judgment of death pronounced against the petitioner on December 21, 1893.

The petitioner was indicted in the county court of the said county for murder, and upon his election, agreeably to the statute then in force, was tried in the said circuit court. Upon his trial, he was found by the jury guilty of murder of the first degree. The court pronounced the judgment of death on the verdict, according to law, and fixed a day for the execution of the judgment by the sheriff. A writ of error was thereupon obtained by the petitioner from this court, which, after hearing and duly considering the arguments of counsel, and finding no error in the said judgment, on March 21, 1895, affirmed it. 21 S. E. 364. The day originally fixed by the circuit court for this execution had then passed, and the legislature in the meantime, on February 12, 1894, had so amended the statute under which he was tried in the circuit court as to divest it of all original jurisdiction to try criminal cases. The circuit court, after the affirmance of its judgment by this court, caused the petitioner to be again brought before it, and thereupon appointed another day for the execution by the sheriff of the judgment of death originally pronounced against the petitioner. The judgment against him was pronounced prior to the repeal of the statute, and while the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

circuit court was in the exercise of its lawful jurisdiction. The judgment still stands against him in full force and effect. Its validity and effect has never been impaired for a moment since it was pronounced. It can now be in nowise reversed or annulled. It only remains to be executed. Though a court which rendered a judgment may be afterwards shorn of its jurisdiction to try in the future like cases in which the particular judgment was entered, there nevertheless remains in the court, from its very nature, the inherent right, in both civil and criminal cases, to cause to be executed such judgments as were rendered by it while clothed with the jurisdiction to do so. The circuit court of Henrico county could not disturb the judgment in the case of the petitioner. It could not add to or take from it one iota. It is forever final. The court did not attempt to pronounce a further judgment, but only to fix a day when the judgment already existing should be executed. This was not a judicial act, and involved the exercise of no judicial power. It was merely a ministerial duty. There would be a strange lack of vitality in a court if it could not cause to be enforced by execution a valid and live judgment which it had rendered, although it had been since divested of the jurisdiction to render judgment in like cases. The petitioner, by virtue of a valid and final judgment rendered according to the laws of the state, is under the condemnation of death, which sentence it is within the power of the court that rendered it to do whatever is necessary for its execution. A somewhat similar case arose in the state of South Carolina. The accused was convicted of an offense, and the sentence of death pronounced against him. The day of his execution was fixed by the court, but the governor pardoned him upon condition, among other things, that he leave the state, never to return. He was discharged from prison, but neglected to leave the state. He was subsequently arrested for this violation of his pardon, and brought before the court in order that it might appoint another day for the execution of the original judgment against him, the day originally appointed for his execution having then passed by. In the meantime the legislature had repealed the penalty of death, and substituted a milder punishment for the offense of which he had been convicted. The like argument was used in that case as is urged in the petition before us, that, the statute having been repealed, the court was powerless to act in the matter. The circuit court refused to fix another day for the execution of the prisoner, and ordered his discharge, but, on appeal to the court of appeals of that state, it held that the circuit court had the power to fix another time when the judgment should be executed, and reversed the action of the circuit court. *State v. Addington*, 2 Bailey, 516. See, also, *State v. Kitchens*, 2 Hill (S.

C.) 276; and the opinion of Chief Justice Marshall in *Yeaton v. U. S.*, 5 Cranch, 281. The writ of error must be denied.

PETTYJOHN et al. v. BURSON et al.¹
(Supreme Court of Appeals of Virginia. July 18, 1895.)

BILL IN EQUITY—AMENDMENT.

A complainant is not at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment, with new parties plaintiff and defendant.

Appeal from corporation court of city of Bristol; Rhea, Judge.

Bill by one Pettyjohn and others against Z. L. Burson and others. Decree for defendants, and complainants appeal. Affirmed.

Hamilton & Sutherland, for appellants. John E. Burson and Fulkerson, Page & Hurt, for appellees.

KEITH, P. Pettyjohn, Holley, Barnes, and Dunn filed a bill in the corporation court of the city of Bristol, alleging that they sued for themselves and others, partners doing business under the firm name of the Bristol Joint-Stock Tobacco Warehouse Company, who shall come in and contribute to the cost of this suit. It appears that the parties named as plaintiffs, acting as a committee for the partnership, purchased of Z. L. Burson, also a member of the firm, a lot of ground in the city of Bristol, on the 15th day of June, 1877, for the sum of \$1,200, made certain payments thereon, and, being unable to complete the purchase, Burson brought a suit in chancery against an incorporated company known as the Planters' Tobacco Warehouse Company of Bristol, in 1881, in which such proceedings were had that a special commissioner was appointed, who reconveyed the lot in question to Burson. The bill alleges that this suit was instituted without the knowledge of the plaintiff; that the property belonged to the partnership above named, and not to the incorporated company; and that neither the partnership nor the individual members had any notice or knowledge of the suit; and that the proceedings therein constitute a fraud upon their rights, and are, as to them, null and void. They pray for a specific performance of the contract of sale, and an account of rents, and for general relief. To this bill there was a demurrer, which demurrer was sustained, with leave to the plaintiffs to file an amended bill. An amended bill was filed, which makes new parties plaintiff and defendant. It alleges new matter, prays for a settlement of partnership accounts, and altogether makes a wholly new case. To

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

this bill as amended defendant Burson demurred, and the court sustained the demurrer, and dismissed the bill. The appellants at another day asked leave to amend their amended bill, but, it appearing that the leave to amend was not asked for the purpose of bringing in new parties, but to allege new matter, it was ordered and decreed that the motion be overruled. The cause was then stricken from the docket, and the plaintiffs in the court below appealed.

They assign as errors the refusal of the court to allow petitioners again to amend their bill, and the dismissal of bill upon demurrer. The first bill was wholly insufficient in law to entitle the parties named as plaintiffs to the relief asked for, and the court was clearly right in sustaining the demurrer, nor is this action of the court alleged to be erroneous. Upon the coming in of the amended bill, defendants demurred, because (as we have seen in the statement of facts) the effort in that bill was under cover of an amendment to institute an entirely new suit,—a suit with new parties plaintiff and defendant, a new suit as to its recital of fact, and as to the relief sought. Presumably the court below sustained the demurrer upon this ground, and the cases cited by counsel for appellees furnish abundant authority for its action. Chancery pleading and practice have, it is true, been greatly relaxed, and nowhere have courts been more liberal in allowing amendments to bills of complaint than in Virginia, and in Virginia no case has gone further in that direction than that of *Belton v. Apperson*, reported in 26 Grat. 207; but even in that case the court says that the complainant will not be permitted to abandon the entire case made by the original bill, and make a new and different case by the amendment. Without intending to question the authority of *Belton v. Apperson*, which is not at all in conflict with the decree rendered by the corporation court of the city of Bristol in this case, we may refer with approval to the opinion of the supreme court of the United States in *Shields v. Barrow*, 17 How. 130, where the law upon this subject is stated in an eminently clear and satisfactory manner. Mr. Justice Curtis, delivering the opinion of the court, says: "Amendments can only be allowed when the bill is defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer;" "but the complainant is not at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. Under the privilege of amending a bill, a party is not to be permitted to make a new bill." We are of opinion that there is no error in the decree complained of, and it must be affirmed.

(31 Va. 688)

STUART v. PENNIS.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

GROWING TREES—INTEREST IN LAND—SPECIFIC PERFORMANCE.

1. A contract for the sale of growing trees is a contract for the sale of an interest in land, and is to be so treated.

2. Equity will not, in general, decree the specific performance of contracts relating to chattels, but will do so where the remedy at law is inadequate.

Appeal from circuit court, Russell county; Sheffey, Judge.

Bill by one Stuart against one Pennis. A demurrer to the bill was sustained, and complainant appeals. Reversed.

J. J. Stuart and Wm. E. Burns, for appellant. H. A. Routh, W. W. Bird, and J. O. Gent, for appellee.

RIELY, J. This was a suit in equity to compel the specific performance of a contract in writing for the sale of growing timber trees. Upon a demurrer to the bill, it was dismissed by the court.

There was, and could be, no objection urged against the relief sought, growing out of any indefiniteness as to the terms of the contract, or as to its subject-matter. The defense of the appellee was that the subject of the contract was personal property, and not an interest in real estate; and being personal property, and there also being an adequate remedy at law for the breach of the contract, a court of equity would not specifically enforce it. On the other hand, counsel for the appellant claimed that standing trees so pertain to the soil that a contract for their sale is, in law, a sale of an interest in land, and that under the general rule that a court of equity will always enforce, in a proper case, the specific performance of a contract for the sale of land (2 Minor, Inst. 867; Pom. Spec. Perf. § 10), such relief should have been granted in this case. We have been cited by counsel to no decision of this court on this subject, and are ourselves aware of none. Our attention was called to the case of *McCoy v. Herbert*, 9 Leigh, 548, but an examination of it shows that the question in controversy here was not there raised or decided. The sole question there was as to the validity of an assignment of a contract of sale of certain trees standing in the woods, which had been bought for ship timber, and not whether the subject of the contract was an interest in land or chattels. There is scarcely any other subject upon which there is so great diversity of judicial decision. Whenever required to pronounce upon a contract for their sale, courts have seemed uncertain as to whether standing or growing trees should be classed as real or personal property. Not only have

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the courts of different jurisdictions decided differently, but the decisions of the same court within the same jurisdiction have not always been uniform. Particularly has this been the case with the courts of England, and their latest declaration on this question (*Marshall v. Green*, 1 C. P. Div. 35) has not escaped criticism from very high authority. *Hirth v. Graham*, 50 Ohio St. 57, 33 N. E. 90; *Benj. Sales* (Ed. 1892) § 126, and article by Prof. Washburn (the learned author of the *Work on Real Property*) published in the *Albany Law Journal*, and to be found in the note to the case of *Purner v. Piercy*, 17 Am. Rep. 595. The decisions of the highest courts in the several states of the Union have also been greatly at variance with respect to this subject. It will be found, however, upon an examination of them, that the weight of authority preponderates in favor of the view that a contract for the sale of growing trees is a contract for the sale of an interest in land, and is to be so treated. *Hirth v. Graham*, supra; *Owens v. Lewis*, 46 Ind. 488; *Green v. Armstrong*, 1 Denio, 550; *Slocum v. Seymour*, 36 N. J. Law, 138; *Kingsley v. Holbrook*, 45 N. H. 313; *Buck v. Pickwell*, 27 Vt. 157; *Harrell v. Miller*, 35 Miss. 700; *Bish. Cont.* § 1294; and *Washb. Real Prop.* 366, 367. Land includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the land, just as the coal, the iron, the gypsum, and the building stone which enter so largely into the business of commerce. Attached to the soil, they pass with the land, as a part of it. A conveyance of the land carries with it to the grantee the right to the forests and trees growing upon it. In the dealings of men, growing timber is ever regarded as a part of the realty. Upon the death of the ancestor, they pass with it to his devisee, or descend with it to his heir, and not to his executor or administrator. They are not treated as personalty. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion that they constitute an interest in, or are a part of, the land, and must be so treated by the courts. We are the better satisfied with the conclusion reached, in that it has the merit of being easily understood and readily applied, not only to this particular industry, but to the many other useful, varied, and boundless natural products of a similar kind, of the section of the state whence this case comes, in whose development its people are becoming more largely engaged year by year.

But if the contract was not to be treated as the sale of an interest in land, of which it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages for the breach of it, we are nevertheless of the opinion that it would be a proper case for the enforcement of the contract. While the doctrine is well established that a court of equity will not, in general, decree the specific performance of contracts relating to chattels, yet it will do so where the remedy at law is inadequate to meet all the requirements of a given case, and to do complete justice between the parties. The true equity rule is thus laid down by *Story's Equity Jurisprudence* (section 33): "The remedy must be plain, for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for, if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party, in a perfect manner, at the present time, and in future; otherwise equity will interfere, and give such relief and aid as the exigency of the particular case may require." The remedy at law would fall short, in the case at bar, of measuring up to this rule. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. Where the fulfillment or execution of a contract may extend through several years, it would be difficult to estimate the damages. His profits, depending in such case on future events, could not be estimated in present damages without being largely conjectural. As is said by *Pomeroy* in his book on *Contracts* (section 15), "to compel a party to accept damages under such circumstances is to compel him to sell his possible profits at a price depending on a mere guess." Then, again, the trees included within the body of land described in the contract, and bought by the appellant, have not been marked or counted, and he has been forbidden by the appellee to mark or disturb them. He has no way of ascertaining their number but by going on the land, and marking and counting them. After being forbidden to do this, he is without the means of ascertaining the number of the different kinds of trees purchased; and, without knowing their number, it is not possible to ascertain his damages. The remedy at law in this case would clearly be neither adequate nor complete. For the foregoing reasons, we are of opinion that the court erred in sustaining the demurrer to the bill, and the decree complained of must be reversed.

(91 Va. 694)

THOMAS v. STUART'S EX'R.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

DEED—ACKNOWLEDGMENT—ERROR IN RECORD.

Where a deed of a married woman was properly acknowledged as required in 1873, the failure of the clerk to transcribe, in recording it, the words of the acknowledgment, that "[she] did not wish to retract it,"—such words being in the original deed when produced,—does not invalidate the deed.

Appeal from circuit court, Russell county; Kelly, Judge.

Sarah P. Thomas appeals from a decree in favor of W. A. Stuart's executor. Affirmed.

Fulkerson, Page & Hurt, J. S. Ashworth, and H. W. Sutherland, for appellant. J. J. Stuart and Burns & Fulton, for appellee.

HARRISON, J. The appellant, Sarah P. Thomas, united with her husband on the 12th day of March, 1873, in a deed conveying to William Alexander Stuart a tract of land lying in the county of Russell, containing 319 acres. The grantee, and those claiming under him, have owned and possessed the land continuously since that time.

On the 1st day of June, 1890, appellant filed her bill in the circuit court of Russell county setting forth the death of her husband, and claiming that she was the owner in fee simple of 175 acres of the said 319-acre tract of land, and that she was entitled to dower rights in the remainder of the said tract; that the deed to Stuart did not convey her interest in the land, because, at the time it purported to have been executed and acknowledged, appellant was a married woman, and the certificate of her acknowledgment did not state that she "did not wish to retract it."

Without mentioning the various pleadings,—the points of objection thereto being without merit,—it is sufficient to say that the original deed, as executed by the appellant, was produced by W. A. Stuart, her grantee, and one of the defendants to her suit. The original deed,—which had been withdrawn from the clerk's office soon after its recordation,—when produced, disclosed the fact that its execution and acknowledgment by appellant had been in due form of law; the certificate of acknowledgment being before two justices of the peace, and in the words of the statute. It was thus made apparent that the clerk, in transcribing said deed upon the records of his office, had inadvertently omitted from his record of the acknowledgment the words, she "did not wish to retract it." This original deed was again presented to the clerk of Russell county, and on the 19th day of December, 1891, duly admitted and correctly recorded in said of-

fice. These are the essential facts established by the record.

The contention of counsel for appellant is that notwithstanding the original certificate was made by the justices in due form, the same not having been properly recorded, though delivered to the clerk for admission to record, the deed is therefore void, and no title has ever passed from the appellant; that the appellee is bound by the recordation, and cannot look to the original certificate itself, to show that the acknowledgment of appellant was taken in due form. This proposition cannot be maintained, upon reason or authority.

The grantee in this deed did all that he could do, and all that the law required him to do. He delivered the deed in proper form, duly and legally acknowledged, to the clerk of the proper office for recordation. If the original deed is properly acknowledged, and the certificate shows this, and the writing, together with said certificate annexed thereto, was delivered to the clerk to be admitted to record, as to the husband as well as the wife, then her title passes, notwithstanding the fact that the clerk may have omitted to record the acknowledgment as certified by the justices. It would be a strange and unjust doctrine that would impose upon the purchaser a total loss of his property because the clerk had made a mistake in transcribing the deed upon the record; and that, too, in the face of the production of the original deed, which shows that the copy relied on by the appellant is not in fact the true deed. Whatever loss may have been sustained by the grantee in this case, by the intervention of a subsequent innocent and bona fide purchaser, it is certain he can suffer no loss as between himself and his grantor, the appellant here. She is bound by her own deed duly acknowledged and delivered for recordation. The statement of the proposition that the copy of the deed made by the clerk is entitled to higher dignity than the deed itself is its own answer, without argument or citation of authority. This is equally true of the proposition of appellant that her interest in this land has not passed under this deed, because of the mistake of the clerk, in omitting to transcribe from the certificate of her acknowledgment the words. "[she] did not wish to retract it." The original deed is the contract by which the parties thereto must stand or fall. Its recordation is a mere exemplification of the true deed, intended to make a permanent record of the fact, and to give notice to third parties. Its recordation, as between the original parties, is of no consequence, except in the case of a married woman. And under Code 1873, c. 117, §§ 7, 8, whenever the deed is duly acknowledged, and delivered for recordation to the proper officer, then it is, in law, treated as recorded, so far as the married woman is concerned. Any mistakes of the clerk in transcribing the deed upon the books of his office

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

cannot operate to reinvest the married woman with the title to that which she had duly parted with according to the terms prescribed by the statute.

If this deed had never been transcribed upon the record book at all, up to this time, as between the parties, it would make no difference. It has, as we have seen, been properly recorded since the discovery of the clerk's mistake; and hence the entire interest of the appellant passed by the deed, when admitted to record the second time. But, as before stated, we are of opinion that all interest of appellant in the property passed when the deed was first deposited, properly acknowledged, with the clerk for recordation. Its delivery to the clerk for that purpose was a compliance with the statute requiring married women's deeds to be recorded, and the clerk's error in transcribing the deed upon the record book did not defeat or divest the title.

There is no error in the decree complained of, and for the foregoing reasons it must be affirmed.

COX v. PRICE.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

EQUITY—CROSS BILL—JUDICIAL SALES—DEPOSIT OF FUNDS.

1. Plaintiff sold a tract, reserving vendor's lien, and the purchaser sold the same, reserving a like lien. Plaintiff filed a bill to foreclose his vendor's lien, and his vendor, having secured the payment of the sum thus due, filed a cross bill, making all interested parties, and asking that their rights be determined, and the land sold to pay him. *Held*, that the cross bill was properly filed.

2. It is usual to order a commissioner to deposit funds from sale of land in a solvent bank, to await the further order of court, without taking security.

3. The court has power to authorize a commissioner to sell at private or public sale.

Appeal from corporation court of Bristol; Rhea, Judge.

Action by C. B. Price, trustee, against George W. Miles and others. George W. Miles filed a cross bill. From a judgment in his favor, the other parties appeal. Affirmed.

J. H. Wood, for appellants. H. G. Peters and Curtin & Haynes, for appellee.

HARRISON, J. In this case the original suit was brought to subject a certain lot of land to the payment of purchase money due thereon to C. B. Price, trustee, the vendor, from George W. Miles, Jr., his vendee, it being secured by vendor's lien reserved in the deed from Price, trustee, to Miles. After the purchase by Miles, he conveyed the lot to John I. Cox, trustee, for the benefit of said Cox and four other persons, and made

him a deed reserving the vendor's lien to secure unpaid purchase money.

The original bill, filed by C. B. Price, trustee, the first vendor, sets forth his sale to Miles, and the sale by the latter to Cox, trustee, and makes said George W. Miles, Jr., John I. Cox, and the other beneficiaries under the second deed, parties defendant, and asks for a sale of the lot to satisfy the unpaid purchase money due said Price, trustee. The bill was taken for confessed, and a decree was entered for the sale as prayed for. After this decree, George W. Miles, Jr., one of the defendants, and the vendee of Price, trustee, filed his cross bill in the case, setting out all that had been set out in the original bill, and more specifically setting out his sale of the lot to his codefendant J. I. Cox, trustee, and showing the balance of purchase money then due him from said Cox, trustee. This bill further states that, before the day for the sale under the decree entered on the original bill had arrived, the complainant, Miles, had executed a note to C. B. Price, trustee, with satisfactory security, for the amount due him under the decree in the original suit, and that no sale was to take place under that decree unless there was default in the payment of that note. The cross bill makes all parties plaintiff and defendant in the original suit defendants thereto, and asks that the decree for sale in the original suit be reheard, that a decree be entered settling the rights of all parties, and decreeing in favor of complainant for the balance of purchase money due him from his codefendants, J. I. Cox and others, and for a sale to satisfy said decree. The court granted the prayer of this cross bill, decreed in favor of George W. Miles, Jr., the plaintiff therein, the amount due him from his codefendants, Cox and others, and directed a sale of the property by the same commissioner appointed in the original decree.

The chief contention of the appellants is that the corporation court of Bristol ought to have dismissed the cross bill, because the contract therein set out should have been enforced by an independent suit, and not by a cross suit.

There can be no question that the relief sought in both the original bill and in the cross bill is properly the subject of equity jurisdiction. The parties in both were the same, the subject-matter was the same, and a sale of that subject to satisfy liens was the object aimed at by both bills. One of the objects of a cross bill is to obtain full relief to all the parties, and it frequently happens, particularly if any question arises between codefendants to a bill, that a court cannot make a complete decree without a cross bill. Whenever a decision is made upon any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision, or are affected by it, should be provided for, as far as possible. It is the constant aim of a court

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject-matter of the suit.

There could be no possible good accomplished by requiring Miles to bring an independent suit to enforce his vendor's lien against his codefendants, Cox, trustee, and others. He was already a party defendant with them to a suit, brought to sell the lot upon which he held a vendor's lien, subsequent in dignity to that asserted in the original bill. The court could easily settle the rights of all parties in the pending suit. They were all before the court, and all the cross bill did was to bring to the attention of the court the subordinate vendor's lien due to one of the defendants from the others. The cross bill asked that from the proceeds of sale the first lien be paid, and that then the balance due the second lienor be paid him. This cross bill grew out of the matters alleged in the original bill, and was intended to bring the whole subject of controversy before the court, so that complete justice to all the parties interested might be accomplished in the proceeding then pending; and the court therefore properly allowed the cross bill to be filed.

The same result might have been accomplished by filing an answer to the original bill, or a petition in the case setting up the amount of the second vendor's lien, so that the sale of the lot might be made with regard to it. A court of equity, however, looks at the substance of things, and does not regard the form. In this case the rights of all parties to the suit have been properly recognized, and nothing has been done prejudicial to the rights of any one. The plaintiff in the original suit makes no complaint that he has been delayed or prejudiced in any way.

Appellants insist that this is a suit for specific performance, and that Miles could not maintain such a suit, because he had not paid his vendor, Price, trustee. This position is not sound. It is not a suit for specific performance, but one to enforce a lien retained in an executed conveyance. Miles has performed his contract by executing a deed and putting his vendees in possession of the lot. And, further, the cross bill asks that his purchase money to Price be paid out of his recovery from appellants; the amount due him from them being much larger than the sum due to his vendor.

Appellants further insist that it was error to direct the commissioner to deposit the proceeds of sale in a solvent bank until the further order of the court, without requiring the bank to give security. This is the usual and proper practice. Courts must have a depository for money until it can be disbursed, and they can make no better selection for the purpose than a solvent bank. The sale commissioner was a bonded officer, and the appellants were less likely to suffer than those who held the liens upon the lot; and they are not complaining.

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A further objection by appellants is that the court in its decree authorized the sale commissioner, in his discretion, to sell privately or publicly. This was a sound discretion, which the court had the right to exercise. It could not prejudice the appellants, because the sale, whether public or private, had to be reported to the court, and all persons interested would have the opportunity of excepting to the report if the commissioner had exercised the discretion reposed in him to their prejudice, or they could put in an upset bid.

We find no error in the decree complained of, and for the foregoing reasons it is affirmed.

(91 Va. 714)

OTey et al. v. STUART et al.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

QUIETING TITLE—POSSESSION IN DEFENDANTS.

Equity, in the absence of statutory authority, will not entertain a bill to remove a cloud from a title, if the party filing it claims to be the owner of the legal title, unless he is in possession of the land in question.

Appeal from circuit court, Wythe county; Bolen, Judge.

Bill by Peter J. Otey and others against William A. Stuart and others. From a decree for defendants, complainants appeal. Affirmed.

Bolling & Stanley, for appellants. Walker & Caldwell, for appellees.

BUCHANAN, J. This is an appeal from a decree of the circuit court of Wythe county in a suit brought by the appellants, Peter J. Otey and wife and John Floyd (the two latter being the surviving heirs at law of B. R. Floyd, deceased), against William A. Stuart and others, appellees.

The bill alleges that B. R. Floyd departed this life in the year 1880, intestate, leaving a widow and three children (the oldest child being 15 years, and the youngest 1 year, of age); that soon after the death of the decedent his administrator, Robert Gibboney, filed a bill in the circuit court of Wythe county for the purpose of having the lands of the decedent sold, which consisted of several parcels (among them, a tract of 26,100 acres, which is the subject of this suit); that the object of the sale was to enable the administrator to pay the debts of his decedent's estate; that a sale was ordered and made as prayed for, and that William A. Stuart and J. F. Kent purchased the land in question; that the sale was reported to the court, confirmed, and a deed made to them by the court's commissioner; that afterwards Kent's interest in the land was sold and conveyed to Stuart; that the widow and

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

heirs of the decedent and William A. Stuart were made parties defendant to the bill. It is further alleged that the whole proceedings in that cause were absolutely void, and that the deed executed by the commissioner of the court to Stuart is also void, and that it creates a cloud upon their title. The prayer of the bill is that the deed to Stuart and Kent may be set aside, annulled, and canceled, and the complainants restored to the possession of the land. The record in the suit of Gibboney, Adm'r, v. The Widow and Heirs of the Decedent, referred to above, was made an exhibit with the bill. William A. Stuart (one of the defendants in the court below, and an appellee here) demurred to the bill. His demurrer was sustained, and the bill dismissed. From that decree the complainants have appealed to this court.

It is claimed by the appellants that, while their bill is an original bill in form, it was in the nature of a bill of review. In this contention we think they are mistaken. But if it were true that it was a bill of review, or a bill in the nature of a bill of review, the demurrer ought to have been sustained, because the bill shows upon its face that a final decree was entered in the case of Gibboney, Adm'r, v. B. R. Floyd's Widow and Heirs, which it seeks to review, in the year 1872, and the case stricken from the docket more than 17 years before the filing of appellants' bill. The allegations and prayer of the bill show that it is a bill filed for the purpose of removing a cloud upon the title to the land in question. As a bill to remove a cloud from their title, it is also fatally defective. A court of equity, as a general rule, in the absence of statutory authority, does not entertain a bill of this character if the party filing it claims to be the owner of the legal title, unless he is in possession of the land upon which the cloud rests. The jurisdiction exercised by courts of equity in this class of cases is founded upon the theory that the party making it has no adequate remedy at law for the injury of which he complains. If he is out of possession, and is the owner of the legal title, he has ordinarily a complete remedy at law by an action of ejectment. 3 Pom. Eq. Jur. § 1399; Carroll v. Brown, 28 Grat. 791; Stearns v. Harman, 80 Va. 48.

In this case the appellants claim to be the owners of the legal title, and admit that they are not in possession of the land, and thus show, under the rule of law stated above, that they have no standing in a court of equity.

It is also insisted by the counsel of the appellees that the circuit court properly sustained the demurrer to the bill upon another ground, viz. that the bill alleges that the proceedings and deed under which the appellees claim are void, and that, where the party who files such a bill alleges or admits that the instrument or proceeding constituting the alleged cloud upon the title is

void, he needs no relief, and the court has no jurisdiction.

There is much to be said in favor of the view that the aid of a court of equity is needed in a case where the instrument or proceeding constituting the cloud upon the title is void upon its face, as well as in cases where it is apparently good, though in fact not so. Every business man knows that such an instrument or proceeding, although it may in fact be void, is a serious injury to the owner's title, and greatly detracts from its market value; for no one wishes to buy property while in such a condition, or to loan money upon it as a security. But, as it is not necessary to decide this question in order to dispose of this case, we do not wish to be understood as expressing any opinion upon either the question whether or not the proceeding and deed under which the appellee acquired the land was void, or, if void, whether or not a court of equity has jurisdiction to remove such a cloud from the title.

In our opinion, the circuit court properly sustained the demurrer to the complainant's bill, and its decree must be affirmed.

(91 Va. 700)

NORFOLK & W. R. CO. v. DE BOARD'S ADM'R.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

NEGLIGENCE — INJURY TO LICENSEES — DEATH BY WRONGFUL ACT — DAMAGES.

1. It is the province of the jury to determine whether a person is a licensee on a railroad track.

2. One who uses a footpath over a railroad, which has been long used as a walk way by him and others, occupants of adjoining lots, with the knowledge, but without the objection, of the railroad company, is a licensee, and is not wrongfully on said path.

3. Where a railroad company carelessly makes an excavation in a path used by licensees in such a manner as to not be open to common observation of persons walking thereon, and no warning is given, the company is liable for an injury sustained while walking thereon.

4. In assessing damages for an injury causing death, the jury are not limited to the actual loss of services of deceased, but may assess such sum as to them may seem just, looking at all the circumstances of the case, not exceeding the amount claimed in the declaration.

5. Employés of a railroad company, to protect the track, removed a rock which was under a path used by licensees, leaving the path undisturbed. Before the rock was removed, it was visible three or four inches above the ground, and dipped under the path. *Held*, that employés of the company had no such a knowledge of the dangerous condition of the path as to make the company responsible to a licensee who was using the path, and fell through at the point where the rock was removed.

Error to circuit court, Smyth county; Kelly, Judge.

The Norfolk & Western Railroad Company brings error to a judgment in favor of

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

George De Board's administrator. Reversed.

Bolling & Stanley, for plaintiff in error.
Cole & Bell, for defendant in error.

CARDWELL, J. This is a writ of error to a judgment of the circuit court of Smyth county. The action was brought by the defendant in error to recover of the plaintiff in error damages for alleged injuries to defendant in error's decedent, caused by the negligence of the plaintiff in error; and the case, briefly stated, is as follows: George De Board, at the time of the accident from which this suit arose, occupied a blacksmith shop on a three-acre lot of ground lying on the south side of plaintiff in error's line of railroad, about $1\frac{1}{2}$ miles west of Marion Station, and adjacent to a private crossing called Hull's Crossing. De Board, together with the other occupants of this three acres of land, and perhaps other persons in the neighborhood, has been in the habit for a number of years of using a path which crossed this lot of ground and ran along the edge of the railroad embankment or cut a short distance to Hull's crossing; De Board using the path chiefly to go over and get water from a spring on the north side of the railroad. In the afternoon of December 6, 1892, De Board was found in the ditch at the bottom of the railroad embankment or cut, just under where the path ran along on the edge of the embankment, and near the side and at the end of the cross ties of the company's railroad, so much injured that he could not stand alone, and was carried to the house of his son-in-law, the plaintiff in this case, where he, from his injuries, died, as alleged, some time in the following January. This suit was brought by his personal representative at the first March rules, 1893, and the declaration filed charges that De Board's death was caused by the careless and negligent action of the plaintiff in error, through its agents or employes, in removing rock and earth from underneath the path in question, leaving the surface of the path unsupported, and thus making a trap or pitfall for any one passing over or along the path, whereby De Board, in passing along the path, which he had been doing for a number of years past, broke through and fell upon the company's railroad track below, and received the injuries from which he afterwards died. At the trial of the case the court below instructed the jury as follows: "No. 1. The jury are the triors of the facts as to whether or not George De Board was a licensee on the defendant's right of way. If the jury believe from the evidence that the deceased, George De Board, when he received his injuries, was traveling along the footpath or way over the defendant's land, leading to a crossing over defendant's track, by himself and certain other individuals, occupants of an adjoining lot or close, or by the general public, with the knowledge of

the defendant company, and without any objection on its part, then the jury must find that said George De Board was not a trespasser while traveling said path, but that he was a licensee, and not wrongfully traveling said path." "No. 2. The court further instructs the jury that, if they find that George De Board was traveling said path as such licensee, no duty was imposed upon the defendant company to keep the said path in good order and repair, and the said George De Board traveled thereon at his peril. But if the jury believe from the evidence that the defendant company did carelessly and negligently make an excavation beneath said pathway, not open to the common observation of persons walking along said path, and no notice or warning had been given to said De Board, and that said De Board, while walking along said path or way with due caution and care, was injured and killed by reason of said excavation, then the said defendant company is liable to answer therefor in damages. But if the jury believe from the evidence that the supposed excavation complained of was open to the common observation of those traveling along said pathway, and that said De Board, by the exercise of ordinary care, could have observed the same, and that he carelessly and negligently stepped into said excavation, then he was chargeable with contributory negligence, and is not entitled to recover." "No. 3. And the court instructs the jury that, if they find for the plaintiff, in assessing the damages they are not limited to the actual loss of service of deceased, George De Board, but they may assess such sum as to them may seem fair and just, looking to all the circumstances of the case, not exceeding the amount claimed in the declaration."

We are of opinion that these instructions fairly expound the law applicable to the case; but the question to be determined here is, does the evidence in the case sustain the verdict of the jury in favor of the defendant in error, assessing his damages at \$505? Though the jury might have been warranted in finding, from all the circumstances surrounding the case, that De Board was a licensee upon the plaintiff in error's property at the time of his injury, plaintiff in error could not be held liable in damages for the injuries he sustained unless the evidence showed that the agents or employes of plaintiff in error, having charge of the repairs to its railroad track at this point, knew of the dangerous condition in which the path in question was left after the removal of the rock and earth, as alleged in the declaration. The evidence in the case shows that the section hands of the railroad company, a few days prior to the injury of De Board, had taken out a rock immediately west (about one foot west) of where persons usually traveling this path step over a fence which ran to the railroad embankment at that point, because the rock was loose and dangerous,

and was liable to fall into the track and cause the wreck of trains,—the person who took out the rock, testifying for the defendant in error, stating that he had been over the path once or twice; that he knew something of the rock; that he took it out, but did not meddle with the path after taking the rock out; that the rock was loose, and thrown down with little or no exertion, and fell and rolled on the railroad track, and rested against the rail. The evidence for defendant in error further shows that the rock, before it was taken down, was visible above the ground for three or four inches, and dipped south under the path, and had often been sat upon by one of the witnesses, and that any one going along the path, who took the trouble to look, could have seen the rock; that from the top of the bank on which the path ran to the point in the ditch below where the plaintiff's intestate was found, in a "perpendicular line, was about seven feet, being measured to the top of the cross ties." This is all the evidence that even tends to show that the employees of the railroad company had any sort of knowledge that the path in question was left in a dangerous condition after this rock had been removed from the bank as stated, and it cannot be questioned that it was entirely proper that this rock should have been removed. There could be no carelessness or negligence on the part of the plaintiff in error, under the circumstances surrounding the removal of this rock, for which it could be held liable in damages to defendant in error, unless it be shown by satisfactory proof that the section hands, or employees, of the company, when they removed the rock, knew that the path was left in an unsafe condition, and failed to restore it to its original state, or use reasonable precaution to avoid injury to those likely to pass along the path, or notify such persons of the danger; and as the evidence in this case does not, in our opinion, sufficiently show that the employees of the plaintiff in error had knowledge of the dangerous condition of this path, after the removal of the rock, the verdict of the jury is without sufficient evidence to sustain it. It was therefore error in the circuit court of Smyth county to overrule the motion made by plaintiff in error for a new trial on the ground that the verdict is contrary to the law and the evidence; and for this error its judgment must be reversed, and this cause remanded for a new trial, to be had in accordance with this opinion.

SANDERS et al. v. BURK et ux.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

TENDER—SUFFICIENCY—BILL OF REVIEW.

1. Where a bond is payable "on or before" a certain date, a tender, before maturity, of prin-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

cipal and interest to the date of tender is good.

2. A bill of review alleging after-discovered evidence should be dismissed where due diligence would have put the party filing the bill in possession of all the facts.

Appeal from circuit court, Wythe county; Williams, Judge.

Bill of review by William Burk and wife against J. P. M. Sanders and others. Decree for complainants. Defendants appeal. Reversed.

Jos. W. Caldwell and W. H. Bolling, for appellants. Blair & Blair for appellees.

KEITH, P. J. P. M. Sanders, B. F. Stanley, and Jos. W. Caldwell filed their bill in the circuit court of Wythe county, in which they state that about the 24th of April, 1890, they purchased of William Burk and wife a parcel of land in the corporate limits of the town of Wytheville at the price of \$5,000, payable one-third cash and the residue in two equal payments of \$1,666.66 each. Having made the cash payments and executed their bonds for the deferred installments, Burk and wife, on the 3d day of October, 1890, executed to them a deed, and by direction of the plaintiffs conveyed the land to J. P. M. Sanders, as trustee for himself and associates. The vendor's lien for the unpaid purchase money was reserved upon the face of the deed. It was provided in the bonds that they might be paid at or before maturity, a stipulation of some consequence to the plaintiffs, inasmuch as, having bought the property for speculative purposes, they desired to be in a position to make sale thereof at any time, and give the purchasers from them an unincumbered title. It appears that, judgment having been obtained on the first bond a short time before the second became due, the obligors therein tendered to the obligees the full amount of the judgment and paid the bond, principal, and interest to the date of tender. The sum so tendered the obligees refused to receive, claiming that they were entitled to interest up to the time when the bond became due and payable. Thereupon this bill was filed, and the defendants having answered, admitting the sale and purchase of the land upon the terms set out in the bill (except that they deny that it was the intention of the parties to the transaction that the bonds should be payable on or before the 24th of April, 1892, but that the words "on or before" were inserted in the bond by mistake), and admitting that the plaintiffs tendered the sum of \$3,628.80 on the 29th of September, 1891, to them, as mentioned in their said bill of complaint, and that the same money tendered is still in bank, but said Burk and wife refused to accept said \$3,628.80 so tendered them, for the reason that the amount tendered them was less than the amount and interest secured on their note for the deferred payment, which was not due until the 24th of April, 1892, making a difference of the interest from the 29th of September,

1891, to 24th of April, 1892, on the said one-third of \$5,000, to wit, \$1,666.66 which was not tendered them and which they are justly entitled to according to the express terms upon which they sold their land, as shown by the deed herewith filed as a part of this answer marked "Exhibit A."

From this answer, then, it appears that the whole contention between the parties in the original suit was over the interest on \$1,666.66 from September 29, 1891, to April 24, 1892, and that the payment, or a valid and subsisting tender, at the time of the institution of the suit, as to the whole of the residue of the purchase money due by the complainants to the defendants, is expressly admitted in the answer. Upon this answer testimony was taken, bearing chiefly upon the issue raised in the answer, of an alleged mistake in drawing the bond, whereby leave was given the plaintiffs to pay "on or before" the date at which they fell due. The circuit court entered a final decree on the 8th of July, 1892, deciding the matter in controversy as to the interest in favor of the plaintiffs, and directing the money which had been tendered by Sanders on behalf of himself and his associates, and which is declared in the decree, to be still on deposit to the credit of Sanders in the Bank of Wytheville, amounting to the sum of \$1,809.72, to be paid to the appellees; and directing that the payment should operate as a discharge in full for the debt and lien between the parties; and directing that the appellees make and deliver to the plaintiffs a deed to that effect, duly acknowledged for record, and, in default of their doing so for 10 days, appointing a commissioner to do so on their behalf; and ordered further that the plaintiffs recover from the defendants their costs in this cause expended. This decree, as we have seen, was entered on the 8th day of July, 1892, and, on the day following, William Burk and Joanna Burk, his wife, exhibited their bill of review to the decree above referred to, in which the important averment is that the complainants in their answer to the original bill, were wholly mistaken in the admission which they make in said answer with respect to the money which the appellants claimed to have tendered them and to have kept in the bank at Wytheville on deposit since that time. They declare that between the 8th day of July and the 9th day of the same month they have learned the real facts of the matter. They aver, in the bill for review, all the circumstances connected with the tender, and show in the greatest detail what was done with the money after it was tendered, and allege in the most circumstantial way possible all the dealing of the appellants with respect thereto since the date of the alleged tender, whereby, as the bill of review avers, appellants have "destroyed every feature of tender that ever appertained to it, and complainants aver that this court and complainants and their counsel alike have been

misled by said bill into the belief that the said money tendered complainants had been in said bank, and that the same money tendered was still in said bank, separate and distinct;" and then proceed to argue the law applicable to the subject of tender. Upon this bill an injunction was awarded to the final decree of July 8th, and upon the coming in of the demurrer and answer of Sanders, Stanley, and Caldwell, and a statement of facts made by one John G. Brown, agreed to be read as evidence in the cause, the court entered a decree on October 1, 1892, which modifies the decree theretofore rendered, to the extent of decreeing the interest in dispute to the plaintiffs in the bill of review, and from that decree an appeal was taken, which brings the controversy before us for determination.

We are of opinion that there was no error in the decree of July 8, 1892; and we are further of opinion that the bill of review should not have been entertained. Upon the face of the proceedings it appears that if the slightest diligence had been used every fact and circumstance relied upon in that bill could have been ascertained and brought into the record before the entry of the final decree. The parties to the controversy all reside in the town of Wytheville or in its immediate vicinity. Whether or not a sufficient tender had been made was a question of fact. That fact was expressly admitted by the answer to the original bill. It was no longer, therefore, in issue, and, even if it had been, the proof of it would have depended upon evidence which the exercise of the slightest diligence would have brought to the knowledge of the appellees. In so far, therefore, as this bill of review rests upon the allegation of error in the final decree, which it seeks to review, we are of opinion that it should not have been entertained, because there was no error in said decree; and, in so far as it rests upon after-discovered evidence, we are of opinion that it should have been rejected, because it does not appear but that every fact stated in the bill of review could have been ascertained by the exercise of ordinary diligence upon the part of the appellees.

We are therefore of opinion that the decree complained of should be reversed.

(91 Va. 587)

NORFOLK & W. R. CO. v. CARTER.¹

(Supreme Court of Appeals of Virginia. July 11, 1895.)

DIVERSION OF SURFACE WATER—ACTION AGAINST RAILROAD COMPANY—EVIDENCE—DAMAGES—PRACTICE—REMANDING CASE TO RULES.

1. Where a summons is served on an agent of a defendant corporation less than 10 days before return day, in violation of Code 1887, § 3227, a motion to dismiss the action, and then a motion to quash the return of the sheriff on the process, are both properly overruled, the cor-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

rect practice being to remand the case to rules.

2. A landowner may obstruct or hinder the flow of surface water and may turn it back upon the land of his neighbor whence it came; and this right is possessed by a railroad company in respect to its right of way, but it must not be exercised wantonly, unnecessarily, or carelessly.

3. One cannot collect surface water into an artificial channel or volume and pour it upon the land of another, to his injury.

4. A landowner cannot interfere with the flow of surface water in a natural channel or water course, nor divert it from such a course, to another's injury.

5. If a railroad company deposits earth, stone, or gravel removed in the construction of its road upon a landowner's property without his consent, and allows the same to remain there, it is liable to him for such injury as he may sustain thereby.

6. Objections to a bill of particulars must be made before trial, or they are waived.

7. In assessing damages caused by the condemnation of a right of way for a railroad, it is not proper to consider damages which may arise from an illegal act not yet committed by the railroad company.

8. If a railroad destroys the only passway to land by depositing debris upon it while constructing its roadbed, the owner is entitled to damages, which are not adequately measured by the effect of such obstruction upon the value of the land thus cut off.

9. The jury estimated the damages to the plaintiff's land caused by a railroad company's depositing debris thereon and diverting surface water which naturally flowed off his land, but was allowed to remain thereon, at \$1,000. *Held*, that the evidence sustained the verdict.

Error to circuit court, Russell county; Kelly, Judge.

Action by Jack Carter against the Norfolk & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Burns & Fulton, for plaintiff in error. H. A. Routh, for defendant in error.

RIELY, J. Upon the calling of the case for trial, the counsel for the defendant company moved the court to dismiss it, upon the ground that it appeared that the process to commence the suit had been served on an agent of the company, and less than 10 days before the return day. Code Va. § 3227. This the court refused to do. A motion was then made upon the same ground to quash the return of the sheriff on the process, which motion the court sustained, and remanded the case to rules. The refusal of the court to dismiss the suit constitutes the first assignment of error. The action of the court was right, and this assignment of error is without merit.

The plaintiff based his right of action in this case upon two grounds. The first ground was that the defendant, in building the Clinch Valley Division of its road, which runs through the land of the plaintiff, failed to construct in the fills or embankments in its road the proper and necessary number of culverts to carry off from his land the surface water, which, prior to the building of the road, flowed by natural channels into Clinch river; and that the water is thereby obstructed, and

accumulates in ponds on his land, to his injury. Upon the relative rights of adjacent landowners with respect to surface water there is a contrariety of judicial decision. Except where the civil-law doctrine of the servitude of the lower tenement prevails, the general rule is, however, that no action will lie for obstructing the flow of surface water. Where the common law is in force, as in this state, surface water is considered a common enemy, and the courts agree that each landowner may fight it off as best he may. He may obstruct or hinder its flow, and may even turn it back upon the land of his neighbor, whence it came. This results from the dominion the law gives to him over his land. His right to it extends beneath the surface to the center of the earth, and above it to the skies. He is entitled to the free and unfettered control of it above, upon, and beneath the surface, and cannot be held liable for any injury which its reasonable use and enjoyment may cause to other lands in interrupting the flow of surface water. He may change the surface of his own land, or erect buildings or other structures upon it, and thus restrain or divert the surface water which may accumulate on adjacent lands from falling rains and melting snows, without being made liable therefor to their owners. Gould, Waters, § 273; Angell, Water Courses, §§ 108a, 108b; Gannett v. Hargadon, 10 Allen, 106; Taylor v. Fickas, 31 Am. Rep. 114; Sweet v. Cutts, 9 Am. Rep. 276; O'Connor v. Railroad Co. (Wis.) 9 N. W. 287; and Washb. Easem. (3d Ed.) § 353 (3a). And this right is possessed by a railroad company in respect to its right of way as well as by any other owner of real estate. It enjoys the same privileges as any other owner of land; no greater, but no less. Gould, Waters, § 273; Jenkins v. Railroad Co., 110 N. C. 438, 15 S. E. 193; Rowe v. Railroad Co. (Minn.) 43 N. W. 76; Sullens v. Railroad Co. (Iowa) 38 N. W. 545; O'Connor v. Railroad Co. (Wis.) 9 N. W. 287; Railroad Co. v. Stevens, 38 Am. Rep. 139; and Railroad Co. v. Hammer, 31 Am. Rep. 216. This right in regard to surface water may not be exercised wantonly, unnecessarily, or carelessly; but is modified by that golden maxim of the law, that one must so use his own property as not to injure the rights of another. It must be a reasonable use of the land for its improvement or better enjoyment, and the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary. Where the exercise of the rights is thus guarded, although injury may result to the land of another, he is without remedy. Lewis, Em. Dom. § 585; Washb. Easem. (3d Ed.) p. 455; Sweet v. Cutts, 9 Am. Rep. 276; Railroad Co. v. Wicker, 74 N. C. 220; Beard v. Murphy, 37 Vt. 99; Railroad Co. v. Chap-

man, 43 Am. Rep. 280; *Abbott v. Railroad Co.*, 53 Am. Rep. 581; *Taylor v. Fickas*, 31 Am. Rep. 114; *Railroad Co. v. Hammer*, 31 Am. Rep. 216; and 24 Am. & Eng. Enc. Law, 920. The right, thus modified, has also its exceptions. One exception is that the owner of the land cannot collect the water into an artificial channel or volume and pour it upon the land of another, to his injury. The right to fend off surface water does not extend that far. *Davis v. City of Crawfordsville* (Ind. Sup.) 21 N. E. 449; *City of Evansville v. Decker*, 43 Am. Rep. 86; *Railroad Co. v. Stevens*, 38 Am. Rep. 139; *Patoka Tp. v. Hopkins* (Ind. Sup.) 30 N. E. 896; *Rychlicki v. City of St. Louis* (Mo. Sup.) 11 S. W. 1001; *Railroad Co. v. Marley* (Neb.) 40 N. W. 948; *Chalkley v. City of Richmond* (Va.) 14 S. E. 339; 2 Dill. Mun. Corp. § 1051; and *Gould, Waters*, § 271. Another exception to the right, which pertinently applies to this case, is that the owner of the land cannot interfere with the flow of surface water in a natural channel or water course. Where the water has been accustomed to gather and flow along a well-defined channel, which by frequent running it has worn or cut into the soil, he may not obstruct or divert it to the injury of another. *Earl v. De Hart*, 12 N. J. Eq. 280; *Railroad Co. v. Chapman*, 43 Am. Rep. 280; *Gibbs v. Williams*, 37 Am. Rep. 241; *Palmer v. Waddell*, 22 Kan. 355; *Rowe v. Railroad Co.* (Minn.) 43 N. W. 76; and 24 Am. & Eng. Enc. Law, 900-902.

Before proceeding to apply these principles to the case before us, it will be more convenient to notice the other ground upon which the plaintiff based his right of action. This was that the defendant, in constructing its said line, carelessly and negligently deposited large quantities of earth, stone, gravel, and other matter upon the plaintiff's land which adjoined its right of way, and allowed the same to remain there. The defendant acquired its right of way through the plaintiff's lands by purchase, and not by condemnation proceedings. This, however, would make no difference in its duty, nor alter its right or liability. These would be the same in either case. The plaintiff would be barred from a recovery against it, in the case of negligence or want of proper care in the construction of its road, only as to those matters which entered into the assessment in condemnation proceedings, and for which compensation would be allowed. *Railroad Co. v. Daniel*, 20 Grat. 375; *Lewis, Em. Dom.* §§ 89, 293, 572, 573; and *Pierce, R. R.* pp. 179, 218. Damages, under this rule, could be only for what could be foreseen and estimated. They could not with any propriety be assessed for an injury that might happen from an illegal act, or from the negligence or want of skill and care in the construction of its road. The injustice of a contrary rule is manifest. If compensation were included in the assessment for deposit-

ing, outside of its right of way, upon the land of another, the material excavated in building its road, which it would have no right so to deposit, and could not be presumed that it would do contrary to its duty, the deposit might not, as it probably never would, be made, and in such case the owner of the land would receive and the company pay for an injury that could not with propriety be anticipated, and one that in point of fact never happened. No compensation based on such a presumption of negligence would ever be tolerated by the law. Consequently, if the defendant did deposit on the land of the plaintiff, without his consent, earth, stone, gravel, and other matter, which it was necessary to remove in constructing its road, and allowed it to remain there, it is liable to him for such injury as he may have thereby sustained. *Shear. & R. Neg.* (Ed. 1880) § 449; 2 Wood, Ry. Law, § 258; *Pierce, R. R.* p. 266; *Sabin v. Railroad Co.*, 25 Vt. 363; *Railroad Co. v. Gilleland*, 56 Pa. St. 445; and *Whitehouse v. Railroad Co.*, 52 Me. 208.

It only remains to consider the errors assigned in the petition for the writ of error awarded in this case, and apply the principles thus enunciated.

There was a demurrer to the declaration, which contained four counts. The court sustained the demurrer as to the first and third counts, overruled it as to the second and fourth counts, and gave leave to the plaintiff to file an amended declaration. An amended declaration was afterwards filed, containing a single count, in which was set forth more fully and specifically the cause of action that was intended to be embraced in the first and third counts of the original declaration, as to which the court had sustained the demurrer. The gravamen of the amended declaration was that, by reason of the natural slope of the land of the plaintiff to Clinch river, on which it lies, the surface water, which accumulated upon the land in time of freshets, rains, and storms, was accustomed, prior to the building of the railroad, to flow by natural channels across what is now the right of way of the defendant, and thence, over another part of the land of the plaintiff, into the said river; and that the flow of the water to the river along said natural channels was now hindered and prevented by the failure of the defendant to construct under the embankments of its roadbed the proper and necessary culverts for the escape of the water by the said channels into the river, thereby causing the water to accumulate in ponds on the land of the plaintiff, to his injury. No exception was taken to the amended declaration, and, the general issue being pleaded, the parties went to trial on the second and fourth counts of the original declaration and on the single count of the amended declaration. The second count of the original declaration alleged that the defendant, in

constructing its road through the land of the plaintiff, did not use ordinary and reasonable care, but carelessly and negligently piled and deposited large quantities of earth, stone, gravel and other matter upon his land, outside of and beyond its right of way, to his injury. The fourth count is substantially the same as the second, with the additional allegation that it allowed the said material so to remain for a long and unreasonable space of time. Each of the said counts set forth a good cause of action, and the court did not err in overruling the demurrer thereto. This disposes of the second assignment of error.

After there had been a mistrial of the case, the plaintiff was given leave to file a further amended declaration, or a bill of particulars, as he might be advised. In pursuance of such leave, he filed with his declaration, on September 5, 1893, a bill of particulars, by which he gave notice that, in establishing the damages to which he was entitled, he would rely on and prove—First, that the earth, stone, etc., so deposited on his land obstructed the necessary passway to other land belonging to him; and, secondly, what the opening of the passway, or of a new road to the said land, would cost him. No objection was made by the counsel for the defendant to the bill of particulars itself or to its being filed; and at the following November term of the court the trial proceeded in accordance with the declarations, original and amended, and the bill of particulars. It is now claimed that the declaration was sufficiently certain and definite, and that the court erred in permitting the bill of particulars to be filed; and, further, that no testimony should have been admitted to show that the deposit of said material obstructed the passway of the plaintiff to his land, or as to the cost of opening it. This constitutes the third assignment of error. We do not see that the bill of particulars sets up new matter, or is a departure from the cause of action alleged in the declaration. The office of a bill of particulars is to give a fuller and more particular specification of the matter contained in the declaration, or, in this case, of the nature and extent of the injury which the plaintiff claimed that he had sustained. And we are furthermore of the opinion that, if the bill of particulars were liable to technical objection, the defendant, by its counsel, waived such objection by failing to make it in due time before the trial began. To have allowed it to prevail after the trial began, in the form it was made, would have been to take the plaintiff by surprise, to which he ought not to have been subjected.

The fourth assignment of error will be disposed of when we come to consider the refusal of the court to set aside the verdict and award a new trial.

This brings us to the consideration of the instructions, the exceptions to which con-

stitute the fifth, sixth, and seventh assignments of error. The plaintiff offered four instructions, which he asked the court to give to the jury. The defendant objected to all of them except the fourth, whereupon the court overruled objection to the second and third, and modified the first instruction before giving it to the jury. The instructions as given to the jury correctly expound the law, and the objections thereto were properly overruled. The defendant then offered nine instructions, all of which the court gave, except the first and third; modified the eighth; and, in lieu of the first instruction, gave its own, which appears in the record as No. 10. To this action of the court upon its instructions the defendant by its counsel excepted. The charge was, and evidence was introduced to show, that the surface water, prior to the building of the railroad, passed off from the land of the plaintiff by natural channels into Clinch river, and that the damage he had since sustained from the water was caused by the obstruction of these natural channels by the embankments of the road. If so, it would have been incorrect to instruct the jury that such damage was a proper item to be taken into consideration when the defendant purchased its right of way from the plaintiff, and was concluded by such purchase. The defendant would have had no right, as we have already seen, to obstruct a natural channel; and this would have been to assess the defendant in advance for an act that the law forbids. Compensation for an illegal act, which the defendant might never commit, could not be sustained. The instruction was erroneous for the further reason that it made the construction of other railroads the rule by which to determine whether or not the road of the defendant was properly constructed, and not the duties and obligations which the law imposed upon it as the proper test. Instruction No. 1, both as originally asked for and also as modified by the counsel for the defendant, was clearly wrong, and the court rightly rejected it. Every man is entitled to a passway over his own land from one part of it to another; and if the defendant unlawfully destroyed the only passway of the plaintiff, by depositing upon it the debris arising from the construction of its roadbed, he was entitled to damages, which would not be adequately measured by the mere effect the destruction of such necessary passway might have on the value of the parcel of land thus made inaccessible to him. Instruction No. 8, as originally asked for, does not appear in the record, but only as modified by the court. We are unable, therefore, to say whether the court erred in modifying it or not.

The only remaining assignment of error is to the refusal of the court to set aside the verdict and award a new trial. Three grounds were assigned for this motion: First, because the verdict was contrary to the law and the evidence; second, because of the

various misrulings of the court; and, third, because the verdict was excessive. The second ground assigned for the new trial has been already passed upon in discussing the various rulings of the court. No error was found in them, and this ground need not be further considered. It was shown in evidence that the surface water on the land of the plaintiff, prior to the building of the road, escaped from it, over what is now the right of way of the defendant, by natural channels into Clinch river, and that its flow is now prevented by the failure of the defendant to construct in the said channels the necessary culverts under its roadbed; and that consequently the land of the plaintiff is greatly damaged by the accumulation of the water into ponds. There was also abundant evidence to prove that large quantities of earth, stone, gravel, and other debris had been deposited upon the strip of land of the plaintiff which lies between the right of way of the defendant and Clinch river, and that this strip of land furnished the only passway for the plaintiff to another parcel of his land. The evidence also showed that this obstructive material could not be removed, nor a new road opened by the plaintiff to the part of his land thus cut off and rendered inaccessible to him, except at great expense, ranging from a few hundred dollars to a sum exceeding the amount of the verdict of the jury. The evidence further tended to prove that this waste earth and other material were deposited and distributed along on the said strip of land of the plaintiff, by the contractors who built the railroad, by direction of the engineer of the defendant company. The jury, who were the proper triors of the facts, after seeing and hearing the witnesses testify, rendered a verdict for the plaintiff for \$1,000, and the court approved it. It is clear from the evidence, as certified, that the jury were well warranted in finding a verdict in favor of the plaintiff, and, upon a consideration of all the testimony, we cannot say that the verdict is excessive. There is no error in the judgment of the circuit court, and the same must be affirmed.

(51 Va. 706)

NATIONAL MUT. BUILDING & LOAN ASS'N et al. v. ASHWORTH.¹

(Supreme Court of Appeals of Virginia. July 18, 1895.)

ADMISSIONS IN PLEADING—EFFECT—CONFLICT OF LAWS—LOAN OF MONEY—SALE UNDER TRUST DEED—ACCOUNTING.

1. One who has, in his pleadings and admissions, asserted that a concern is a corporation, cannot thereafter dispute it.

2. Where a building association lends money in Virginia to a citizen of that state upon land located there, but the bond is made payable in New York, the contract is a New York contract, and its legality is to be determined by the laws of that state.

3. When a trustee is about to sell land un-

der a trust deed, without giving proper credits, equity will direct an accounting before a commissioner.

Appeal from circuit court, Washington county; Sheffey, Judge.

Bill by Mary J. Ashworth against the National Mutual Building & Loan Association and another. Decree for complainant, and defendants appeal. Reversed.

Rhea & Peters and Penn & Cocke, for appellants. J. S. Ashworth, for appellee.

BUCHANAN, J. The appellee filed her bill in the circuit court of Washington county, praying for an injunction to restrain the appellant W. F. Rhea, trustee, from selling a house and lot to satisfy a debt due from her to the National Mutual Building & Loan Association, the other appellant, and secured thereon by a deed of trust.

The grounds upon which she based her right to the injunction and to the other relief prayed for were:

(1) That the debt secured by the deed of trust was usurious and void, except as to the principal money loaned, and that she was entitled to a credit upon such principal of all the sums she had paid thereon.

(2) That the appellant company was a corporation created under the laws of the state of New York, and had not established an office in this state, as required by section 1104 of the Code of 1887.

The appellants filed their demurrer and answer to her bill, and also filed a cross bill, to which the appellee filed her demurrer and answer, and also filed an amended bill, in which she states the same grounds for relief as were stated in her original bill, though she goes much more fully into the history and the details of the negotiation which resulted in the creation of the debt to secure which the deed of trust upon her property was executed. Upon a hearing of the cause the circuit court held that the transaction complained of was usurious, and that the appellant company was only entitled to recover the principal sum secured by the deed of trust, and that upon this principal must be credited all sums paid by the appellee to the appellant company, of which she was a member, whether paid by her as entrance fees, premiums, or monthly dues as a stockholder and member of such company, or paid upon the principal or interest of the debt secured, and directed an account to ascertain the actual amount of money borrowed by the appellee from the appellant company, and the amount of credits to which she was entitled thereon. From this decree an appeal was taken by the appellants.

A great number of questions were raised and argued in the briefs and oral arguments of counsel, many of which do not arise under the pleadings in the case, or have been settled by the admissions and agreements of the parties.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

One of the questions raised, and earnestly insisted upon by the appellee to sustain her contention, was that the appellant company had never been properly organized under the laws of the state of New York, and that it had no right to exercise the extraordinary powers conferred upon it by its charter in that state, and, since it had no legal existence in the state of its domicile, it could have none here. Whatever may be the defects, if any, of its organization under the laws of New York, they cannot be inquired into in this case.

The appellee, in both her original and amended bills, makes this allegation:

"Your complainant would further show unto your honor that the National Mutual Building & Loan Association of New York is a corporation under the laws of the state of New York, and is not a resident of this state, nor has it an office in this state, as required by section 1104, Code Va. 1887."

In a written agreement made between the parties by their counsel, the appellee admits, among other things, that "the National Mutual Building & Loan Association of New York was duly incorporated under the laws of New York, and authorized to transact such business as was contemplated by the act of the New York legislature, which was certified to the secretary of the commonwealth of Virginia, but denies that it was authorized to transact any business in the state of Virginia, and also denies that it was authorized to enter into the contract under investigation, by the laws of New York."

A party who has alleged in his pleadings the existence of a fact, or expressly admitted it in the facts agreed in the case, will not be permitted in that case to question the existence of such fact. And certainly not in a case like this, where the existence of such facts is both alleged and admitted. For the purposes of this case, the appellant company must be considered as duly incorporated under the laws of the state of New York.

The next question is, did it have the right to do business in this state?

The appellee, in her original and amended bills, claims that it did not have such right, because it did not have "an office in this state, as required by section 1104, Code Va. 1887." That section provides, among other things, that "every company incorporated under the laws of this state, or another state, and doing business in this state, shall have an office in the state at which all claims due residents of the state against such company may be audited, settled and paid."

In the argument of the case it was contended by counsel of appellee that the appellant company had not complied with other provisions of section 1104, nor with the act of March 5, 1890, entitled "An act relating to building & loan associations not incorporated in this state," and that these provisions were conditions precedent to the

right of any foreign corporation to do business in this state, and that all contracts made in the state before such compliance were null and void, and could not be enforced.

In order to raise such question, it was necessary for the appellee to allege in her bill, or amended bill, the failure of the appellant company to comply with the requirements of those statutes, and also to allege in what particular it had failed to do so. It is a fundamental principle of equity pleading that every fact essential to sustain the bill, and relied upon to obtain the relief prayed for, must be stated in the bill. Story, Eq. Pl. § 241.

In this case the only allegation in the appellee's pleadings as to the failure of the appellant company to comply with these statutes was that contained in her original and amended bill, in which she alleges that the appellant company had no "office in this state, as required by section 1104, Code Va. 1887." We think the investigation as to whether the appellant company had complied with the provisions of section 1104 of the Code, and of the act of March 5, 1890, must be confined to the allegations of the appellee's bills upon that subject, viz. that the appellant company had no such office in this state as was required.

It appears from the power of attorney executed by the appellant company on the 29th day of November, 1889, and properly acknowledged and recorded in the corporation court of the city of Roanoke, that Henry Gibson was appointed agent for such company, and his office in the city of Roanoke was designated and entitled "as its proper office at which all claims due by said association to residents of the state of Virginia may be audited, settled, and paid." It thus appears clearly that the appellant company did comply with the statute requiring it to have an office in this state, and, under the pleadings in this case, was authorized to carry on its business in this state.

The next question for us to decide is whether the transaction between the appellee and the appellant company was usurious.

It is contended by the appellee that the contract in question was a Virginia contract, and that it is governed by the laws of this state. The facts agreed show that the application for the loan was made at the office of the agent of the appellant company in Bristol, in the state of Tennessee, and that the contract was concluded in this state, where the appellee then lived, and that all the papers were executed and delivered in this state. The bond given by the appellee to the appellant company for the money borrowed was payable at the office of the appellant company in New York City, and all interest, monthly premiums, and monthly dues were payable on or before the last business day of every month at the same office. When a contract is made or entered into in

one state, to be performed in another, it is, as a general rule, to be governed by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, interpretation, validity, and effect. 1 Daniel, Neg. Inst. § 865; *Andrews v. Pond*, 13 Pet. 65; *Coghlan v. Railroad Co.*, 142 U. S. 101, 12 Sup. Ct. 150. It was said by Chief Justice Taney, in delivering the opinion of the court in the case of *Andrews v. Pond*, cited above, that "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are, to be governed by the law of the place of performance, and, if the interest allowed by the laws of the place of performance is higher than that of the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." 13 Pet., at page 78.

The place where the contract in question was to be performed being the state of New York, it is governed by her usury laws.

Chapter 122 of the Laws of New York, passed April 10, 1851, entitled "An act for the incorporation of building, mutual loan and accumulation fund associations," together with amendments made thereto, are properly proved and filed in the cause. Section 7 of this act, as amended by act of June 9, 1875, contains this provision: "Nor shall the imposition of fines for the non-payment of fines or fees, or other violations of the articles of association, nor shall the making of any monthly payments required by the articles of association, or of any premium for loans made to members, be deemed a violation of the provisions of any statute against usury."

It is thus expressly declared that building associations may demand and receive premiums, dues, and fines without violating the usury laws of New York; and as we understand the act of 1851 of the state of New York, as amended by chapter 564 of the Laws of 1875, and according to the construction placed upon it by the tribunals of that state, the contract made with the appellee is not usurious. *Association v. Read*, 93 N. Y. 474; opinion of the attorney general of the state of New York, printed at pages 46, 47, and 48 of the annual report of the superintendent of the banking department as to the legality of fixed premiums by building and loan associations under act of 1851, dated November 13, 1889.

The appellee is not entitled to the specific relief prayed for in her original and amended bills. But it appears that the trustee was proceeding to sell the house and lot under the deed of trust, for the satisfaction of the debt in controversy, without giving the appellee credit for the "withdrawal value" of her eight shares of stock, which the pleadings of the appellants admit she was entitled to.

Before any sale under the deed of trust

should have been made, the balance of the debt secured thereby ought to have been ascertained, as any uncertainty as to the extent of the charge upon the house and lot might have prejudiced the sale. The circuit court ought, instead of entering the decree it did, to have directed one of its commissioners to have ascertained the balance due upon the debt secured by the deed of trust in accordance with the terms of the contract between the parties.

We are of opinion, therefore, to reverse the decree appealed from, and to enter such decree as the circuit court ought to have entered

(92 Va. 24)

WOOD v. WALKER et al.¹

(Supreme Court of Appeals of Virginia. July 25, 1895.)

SALE OF LAND—ENFORCEMENT OF VENDOR'S LIEN—TENDER OF DEED.

Plaintiff sold defendant a tract of land upon credit, agreeing to furnish a deed of conveyance by sufficient title. Upon default in payment of a portion of the purchase money, the plaintiff brought a bill to subject the land to sale for the balance due, but did not tender a deed as agreed. *Held*, that the bill was demurrable.

Appeal from circuit court, Wythe county; Williams, Judge.

Action by James A. Walker, trustee, and others, against R. R. Wood. Decree for complainants, and defendant appeals. Reversed.

Robert Crockett, for appellant. Walker & Caldwell, for appellees.

CARDWELL, J. This is a suit for the specific performance of a contract for the sale of land. The bill filed at the second February rules, 1891, alleges that appellees, James A. Walker, trustee, under a deed of conveyance of R. R. Moore, and R. R. Moore, on the 27th day of February, 1888, sold to appellant, Robert R. Wood, a tract of land containing 210 acres, situate in Wythe county, adjoining Floyd Davis and others, for the purchase price of \$5,000, for which Wood executed his three bonds, bearing date on the 27th day of February, for \$1,666.66 each, and due the 1st of January, 1889, 1890, and 1891, respectively, with interest from date; that the terms of sale were embodied in a written agreement, signed by all the parties, which is filed as an exhibit with the bill; that Wood took immediate possession of the land under the sale; that although all the bonds have fallen due, they are only subject to the credit of \$3,319.50, as of the 19th day of October, 1890. Averments are then made that nothing further could be realized on the bonds by judgment and execution, that Wood had not paid any taxes on the land, and that plaintiff's claim constituted a lien on the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

land. These, briefly stated, are all the allegations or averments of the bill, and the prayer is that the land be sold, and the proceeds of sale applied to the payment of the purchase money, as evidenced by the bonds, and of the taxes as long as Wood had been in possession of the land, etc. In addition to those mentioned in the bill, the agreement between the parties contains this further provision: "The said tract being all the remainder of the tract purchased by R. R. Moore of F. Spiller, which has not heretofore been sold off, supposed to contain about 175 acres, and the balance of the 210 acres to be taken off the Holland Iron Works land, adjoining the Spiller land, and running about north and south from Crockett's Mill road, to the old turnpike, so as not to interfere with or include the iron bank of R. R. Moore, which is hereby reserved." At the September term of the circuit court, appellant demurred to this bill, because insufficient, and "particularly because no deed of conveyance of the land is exhibited with the bill, in compliance with the terms of the contract of sale"; and the cause was continued to the March term, 1892, when, without disposing of the demurrer, the court decreed a sale of the land for the payment of the balance of the purchase money. From this decree an appeal was allowed to this court, and the only question that need be considered is whether appellant's demurrer to appellees' bill should have been sustained.

The contract between the parties, by fair construction, entitled appellant, upon payment of the purchase money, to a deed of conveyance of the land by a sufficient title, defining the metes and bounds of the land, and in particular those of that portion "to be taken off of the Holland Iron Works land," to make up, with remainder of the Spiller tract, the 210 acres. As we have seen, the bill does not even allege that the appellees had done all that was required of them under the contract, nor their ability and willingness to convey by a sufficient title the property which they had agreed to convey, nor that they had tendered a sufficient deed thereto to appellant. In fact, no allegations or averments of this character are made in the bill. "One who seeks to compel another to fulfill a contract of purchase is required to plead and prove his ability and willingness to convey by a sufficient title the entire property which he has agreed to convey, and a tender of a sufficient deed thereto. * * * The deed must be brought into court, and the tender of it kept good until the suit has been determined." 22 Am. & Eng. Enc. Law, pp. 1039, 1040. "The bill for the specific performance must show that complainant has done everything necessary to entitle him to performance of the contract by the defendant, and that there is a demand on the other party, uncomplished with. The plaintiff should allege the facts constituting performance on his part, so that the court may judge whether he has done

what he ought." Wat. Spec. Perf. 123, 124, and cases cited. The courts in some of the states of the Union have held that a tender of the deed with the bill is not required, but we think the better rule, deducible from the weight of authority, is that complainant be required to allege the facts constituting performance on his part, and tender with his bill a sufficient deed of conveyance of the title of the property he has agreed to sell and convey, that the court may judge whether he has done what he ought, and whether the deed is such a conveyance of the title as the contract requires. In the case of *Kenny v. Hoffman*, 31 Grat. 442, where the contract provided that Kenny was to pay the purchase money as soon as he got a clear title, and where Hoffman had tendered to the agent or counsel of Kenny a deed which only conveyed the legal and equitable interest of the grantors in the land, and all those claiming by or through them, and afterwards filed the deed with his bill for specific performance of his contract with Kenny, and in which he averred that he (Hoffman) had done all that was required of him under the contract, this court held that Hoffman was not entitled to specific performance, as Kenny was entitled to a conveyance, not only with general warranty, but, under his contract as construed, free from incumbrances,—"a clear title." See, also, *Griffin v. Cunningham*, 19 Grat. 571. We are of opinion that the appellees in the case here did not by their bill make a case that entitled them to the specific performance of their contract with appellant, and that, therefore, the circuit court erred in not sustaining the demurrer thereto; and for this error the decree complained of must be reversed and annulled, but the cause will be remanded to the circuit court, with leave to appellees to amend their bill, and have such further proceedings therein as may be proper in accordance with this opinion.

(97 Ga. 286)

ELECTRIC RY. CO. OF SAVANNAH v. SHEFTALL.

(Supreme Court of Georgia. July 8, 1895.)

CONFLICTING EVIDENCE—REVIEW ON APPEAL.

The evidence was conflicting; no error of law was complained of; and, there having been no abuse of discretion by the judge of the superior court, his judgment overruling the certiorari will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Chatham county; Robert Falligant, Judge.

Action by B. F. Sheftall against the Electric Railway Company of Savannah. Judgment for plaintiff, and from an order refusing a certiorari defendant brings error. Affirmed.

The following is the official report:

B. F. Sheftall brought suit in a justice's court against the railway company upon an account for \$32.50. Judgment was rendered

in favor of the plaintiff for that amount, and defendant appealed to a jury, who found the same amount for the plaintiff. By certiorari the defendant alleged that this finding was erroneous, and contrary to law, in that, while the suit was brought on an open account, the evidence disclosed it was really a suit for damages growing out of alleged negligence of defendant's agents in operating one of its cars; that said agents exercised due care and caution in the management of the car; and that any damages resulting to plaintiff from the collision between the car and his buggy were occasioned by his own neglect to exercise the care and caution imposed by law upon him and other drivers. Further, that the entering up of any judgment on said verdict is opposed to the propositions of law governing and controlling a case of this kind. The testimony for plaintiff was that he was driving in a buggy on Henry street in Savannah, with Dr. Weed, to attend a sick call, and when he came to Barnard street his buggy was run into by defendant's electric car; that the first he knew of the car's approach was when the buggy was run into; that no gong was rung; and that the motorman said to plaintiff at the time that it was no use in trying to stop, as he was too close on plaintiff before he saw him. Plaintiff could not see any car when he came to Barnard street. Was not driving fast. Always slowed up his buggy on approaching a railroad track. He was talking with Dr. Weed at the time. Was about 12 feet from the track when he saw the car, and by swinging the horse around quickly saved it, but the buggy was struck on the left front wheel. His reason for slowing up on approaching the track was to save the buggy from breaking down when crossing it. If the bell had rung he would have heard it. It cost \$25 to repair the buggy, and he had to hire another buggy for a week. The time was about 6 o'clock p. m., on January 9th. The testimony for defendant was, in brief, that the car was going up grade, and could not have gained a speed of over five miles an hour; that the bell was rung as usual in approaching the crossing on Henry street; that when the motorman saw plaintiff's buggy he was right upon the crossing, and there was no use in ringing the gong; that he put the brake on, and reversed the car at once; and that nothing was left undone which could have been done to avoid the collision. The buggy wheel was in a strained position, and very little would have broken it. The jar of the collision was very slight. It was a damp, drizzly day, and the rails of the track were wet and greasy (being in the neighborhood of the switch). The motorman did not make the statement attributed to him by plaintiff's testimony; but, if he said anything, it was that on account of the dampness and greasy rails it was impossible to stop the car immediately, and the brake was

almost useless, even when applied, in such a case, as the wheels would slide on the track.

Charlton, Mackall & Anderson and W. C. Hartridge, for plaintiff in error. Barrow & Osborne, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 342)

DAVIS et al. v. PEEL et al.

(Supreme Court of Georgia. July 8, 1895.)

WRIT OF ERROR—DISMISSAL—DEFECT OF PARTIES.

Where the trial of a case, in which two persons were plaintiffs, and a corporation and its creditors were defendants, resulted in a verdict and decree giving to certain of the creditors special liens on the property of the corporation, and the plaintiffs made a motion for a new trial, to the overruling of which they excepted, but failed to serve with the bill of exceptions one of the parties who obtained a special lien by virtue of the verdict and decree, though that party was named in the bill of exceptions as a party defendant, a motion to dismiss the writ of error for want of service on such defendant will be sustained, he being an indispensable party. (Syllabus by the Court.)

Error from superior court, Fulton county; R. T. Dorsey, Judge pro hac vice.

Action by C. A. Davis and others against W. L. Peel and others, trustees, and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

John A. Wimpy, for plaintiffs in error. Porter King, C. A. Read, and Geo. Hillyer, for defendants in error.

PER CURIAM. Writ of error dismissed.

LUMPKIN, J., heard the argument, but declined to participate in deciding this case, because of relationship to one of the parties.

(95 Ga. 799)

BRICE v. CHAPMAN.

(Supreme Court of Georgia. May 13, 1895.)

CERTIORARI TO JUSTICE — QUESTIONS OF FACT — PRACTICE BEFORE SUPREME COURT — ATTORNEYS NOT ADMITTED—FILING OF BRIEFS.

1. This being a case in a justice's court, in which the amount claimed was under \$50, and there being questions of fact involved, the remedy in the first instance for errors committed by the magistrate at the trial was not by certiorari, but by appeal to a jury in the justice's court.

2. No brief filed in this court by an attorney who, at the time the case to which such brief relates is called in its order for a hearing, is not a licensed practitioner at this bar, will be considered; and hereafter, where no appearance is made for the plaintiff in error other than by the filing of such brief, the case will be dismissed for want of prosecution.

(Syllabus by the Court.)

Error from superior court of Brooks county; A. H. Hansell, Judge.

Action by J. W. Chapman against W. F. Brice. Certiorari to the judgment of the justice in favor of plaintiff was dismissed

by the superior court, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

M. Baum, for plaintiff in error. J. W. Edmondson, for defendant in error.

SIMMONS, C. J. 1. This court has frequently held that, where the amount sued for in a justice's court is less than \$50, certiorari will not lie to the judgment of the magistrate, if a question of fact is involved, unless there has been an appeal to a jury in that court. In the present case the action was upon an account for an alleged indebtedness of \$30.50. One of the grounds of the certiorari was that the magistrate erred in rendering judgment in favor of the plaintiff, and this assignment of error involved questions of fact. The judge of the superior court therefore did not err in dismissing the certiorari. *Johnson v. Cummings*, 88 Ga. 12, 13 S. E. 819; *Brooks v. Baker*, 85 Ga. 515, 11 S. E. 840, and cases cited.

2. The bill of exceptions and the brief submitted to us for the plaintiff in error purport to have been signed by the attorney who represented the plaintiff in error in the court below, but the name of this attorney does not appear upon the roll of attorneys admitted to practice in this court. To authorize an attorney to practice in this court, he must be admitted as prescribed by the Code and the rule of court. See Code, § 403; first rule of supreme court. A practice has grown up, of late years, for attorneys to have bills of exceptions transmitted to this court, and to send briefs to the clerk to be read as arguments here, without having complied with the requirements as to admission; and in the recent revision of the rules of the supreme court the last clause of the first rule was added for the purpose of checking this practice. The rule referred to, after providing how attorneys may be admitted, and after declaring that, as matter of comity or professional courtesy, a visiting attorney from another state or territory may, by leave of the court, be heard as associate (or even as leading) counsel, in a single case, without being admitted as a regular practitioner, concludes as follows: "No such indulgence, however, will be extended to any attorney who is a resident of this state." As the revised rules did not go into effect until the 4th of March, 1895, and as the brief in question was filed before that time, we do not enforce this rule in the present case, but we desire to put the bar on notice that hereafter it will be enforced strictly. An attorney practicing in the court below, though not an attorney of this court, may sign and present to the trial judge a bill of exceptions, and have it transmitted here; but in order to appear in this court as counsel in the case, either in person or by brief, he must, on or before the call of the case, be admitted to practice in this court. Judgment affirmed.

(36 Ga. 295)

RING v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

SUPERIOR COURT OF BIBB COUNTY.—DATE OF FINDING INDICTMENT.—PRESUMPTIONS.

There being by law no limit to the length of the terms of the superior court of Bibb county, except that each of its regular and adjourned terms must be adjourned at least five days before the commencement of the next ensuing regular term, where it appeared that an indictment was returned in that court at its November term, 1894, which charged the commission of an offense on the 20th day of February, 1895, although the date of the filing of the indictment was not shown, the presumption was that the court was legally in session, and that the indictment was found after the date last mentioned, there being nothing in the record showing that the court had in fact been previously adjourned for the term.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Mrs. Mamie Ring was convicted of a crime, and brings error. Affirmed.

Dessau & Hodges, for plaintiff in error. W. H. Felton, Sol. Gen., for the State.

LUMPKIN, J. The act of October 22, 1887, provided that the sessions of the superior court of Bibb county should commence on the first Mondays in May and November, and continue from week to week so long as the presiding judge should deem necessary. By the act of November 11, 1889, the time for beginning the spring term of that court was changed to the third Monday in April. The act of September 21, 1887, made it the duty of all the judges of the superior and city courts in this state to adjourn each regular and adjourned term of the same at least five days before the commencement of the next regular term thereof. It will thus be seen that there was no legal limit to the length of the terms of the superior court of Bibb county, except that provided for in the act last mentioned. It follows that the November term, 1894, of that court could have been lawfully in session after the 20th day of February, 1895.

The accused in the present case was put on trial in the city court of Macon upon an indictment which had been transferred from the superior court of Bibb county, in which it was alleged that the offense in question was committed on the day last named. It appeared that the indictment was found by the grand jury at the November term, 1894, of Bibb superior court, but there was nothing to show upon what day it was filed in the clerk's office of that court. The accused demurred to the indictment on the ground that it did not affirmatively show that the offense was committed on a day previous to the finding of the indictment. The objection to the indictment is somewhat plausible, but upon careful examination we do not think it is really meritorious. Of course, the grand jury, while in session at a time prior to the 20th day of February, 1895, could by

carelessness or inadvertence have laid the commission of an offense on that day, and undoubtedly instances of this kind have occurred, though they are at most only rare exceptions to the general rule that an intelligent body of men, in naming a day upon which an offense was committed, will designate some day already passed, and not one yet to arrive. There is nothing in the record to show that the superior court of Bibb county was not in fact in session after the 20th day of February, 1895; and as the grand jury in the indictment alleged that the accused did on that day commit the offense in question, thus referring to an event already passed, it requires, we think, no strain to presume that the court was in session, and that the indictment was found after the date last mentioned. If it affirmatively appeared on the face of the indictment that the offense could not possibly have been committed on the day alleged therein, a demurrer based on this ground would undoubtedly have been good. This indictment, however, has no such infirmity, and with the aid of the presumption above mentioned—which we think a proper one to invoke—there is no difficulty in sustaining the indictment as one legally returned, and charging the commission of the alleged offense on a day in the past. Judgment affirmed.

(96 Ga. 289)

MEADERS v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

BREACH OF THE PEACE — USE OF ABUSIVE LANGUAGE—JUSTIFICATION—CHANGE OF SENTENCE BY COURT.

1. A wrongful trespass upon personal property in the presence of its owner may or may not amount to such provocation as will justify the latter in using to the wrongdoer on the spot opprobrious words or abusive language tending to cause a breach of the peace. When, in a prosecution for using language of this kind, such a trespass is alleged by the accused as his provocation for so doing, it should be left to the jury to determine whether or not there was in fact such a trespass, and, if so, whether or not it was in their judgment sufficient to justify the accused.

2. After passing sentence in a criminal case, and reducing the same to writing, the court should not change it, and make the penalty more severe, simply because counsel for the accused gave notice of his intention to move for a new trial.

(Syllabus by the Court.)

Error from superior court, White county; J. J. Kimsey, Judge.

John Meaders was convicted of a misdemeanor, and brings error. Reversed.

J. W. H. Underwood and H. H. Dean, for plaintiff in error. Howard Thompson, Sol. Gen., and F. M. Johnson, for the State.

SIMMONS, C. J. 1. The plaintiff in error was indicted under section 4372 of the Code, which declares that "any person who shall, without provocation, use to or of another, and

in his presence, opprobrious words, or abusive language tending to cause a breach of the peace, * * * shall be guilty of misdemeanor," etc. In order to convict under this section; the state must prove that the words were used without provocation; and, if the accused defends on the ground that he had provocation, this defense raises an issue which must be submitted to the jury. The evidence in this case shows that there was a line fence between the premises of the accused and those of the prosecutor's father, and that, in the absence of the accused, the prosecutor and his father, with others, tore down the fence, and moved it to another place, and were thus engaged when the accused came upon the scene. He did not know until then that they were tearing down and carrying off the fence, and it was immediately upon his arrival on the scene that he used the language for which he was indicted. The court instructed the jury, in substance, that under this state of facts the accused was not justifiable in using the words. The court thus assumed to pass upon the defense of the accused without submitting it to the jury, and thereby decided that the conduct of the prosecutor was not a sufficient provocation. We think this was error. It was for the jury to say whether there was a provocation, and, if so, whether it was sufficient to justify the accused in the language attributed to him. See *Collins v. State*, 78 Ga. 88.

2. It is complained in the bill of exceptions that after the verdict was rendered, and the court had pronounced a sentence of \$25 fine or 12 months in the chain gang, and the defendant gave notice of a motion for a new trial, the court asked defendant's counsel whether, if the case was affirmed, the court would have the right to resentence the defendant; to which counsel replied that he did not think the sentence could be changed in such event; whereupon the court said: "Well, I can change the sentence now. I will change it to \$50," and struck out the word "twenty-five," and inserted "fifty" in its place. It is alleged that the court had no right to alter the sentence, or make the penalty more severe, and that this was a punishment imposed upon the defendant for giving notice of a motion for a new trial. As a general rule, the judgments of a court are within its breast until the end of the term, and a sentence may be amended at any time during the term and before execution has begun. 21 Am. & Eng. Enc. Law, "Sentence," p. 1084. And see *Railroad Co. v. Jackson*, 86 Ga. 684, 13 S. E. 109, and citations. But, while the court had a right to change the sentence at the time he did, it was not proper to change it because counsel for the accused gave notice of an intention to move for a new trial. The presumption is that the sentence first imposed was, in the opinion of the court, a proper punishment for the offense, and no further reason for

changing it appears from the record than that stated in the bill of exceptions. While we do not hold that the judgment of the court below should be reversed because of the change of the sentence under these circumstances, we deem it proper to signify our disapproval of the practice. Judgment reversed.

(96 Ga. 301)

HAMILTON v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

CRIMINAL LAW — INSTRUCTIONS — REASONABLE DOUBT—CIRCUMSTANTIAL EVIDENCE.

When, in the trial of a criminal case, the evidence against the accused was entirely circumstantial, it was the duty of the judge not only to charge upon the law of reasonable doubt, but also, whether so requested or not, to state to the jury the rule usually applicable in such cases, to the effect that the evidence must connect the accused with the perpetration of the alleged offense, and must not only be consistent with his guilt, but inconsistent with every other reasonable hypothesis.

(Syllabus by the Court.)

Error from superior court, Camden county; J. L. Sweat, Judge.

Robert Hamilton brings error from a judgment of conviction. Reversed.

Alex. A. Lawrence and Atkinson & Dunwoody, for plaintiff in error. W. G. Brantley, Sol. Gen., for the State.

LUMPKIN, J. We shall deal with only one of the questions made by the motion for a new trial in this case. The evidence against the accused was entirely circumstantial, and the presiding judge failed to state the rule of law applicable in criminal cases to proof of this character. It can hardly be doubted that in every criminal case it is the duty of the judge, even without a request, to charge concerning the law of reasonable doubt. There was no complaint that this was not done in the present case; but we think it equally clear that, in a case where the state depended for conviction upon circumstantial evidence alone, it was likewise the duty of the judge, whether so requested or not, to instruct the jury, in substance, that to authorize a verdict of guilty the evidence must connect the accused with the perpetration of the alleged offense, and must not only be entirely consistent with his guilt, but inconsistent with every other reasonable hypothesis. The failure to give some such instruction, in a close and doubtful case like the present, will entitle the accused to a new trial. The law upon this subject is very concisely and aptly stated in 12 Am. & Eng. Enc. Law, p. 879, from which we make the following quotation: "Where the prosecution relies solely upon circumstantial evidence to secure a conviction, it is incumbent on the trial court to instruct the jury as to the law applicable to such proof. No particular form of language is required. If

the ideas conveyed are correct, and so expressed as to meet the comprehension of the jury, it is sufficient." And see the cases there cited. In *Barrow v. State*, 80 Ga. 191, 5 S. E. 64, this court intimated that, in a case in which the court ought to instruct the jury specifically as to the law of circumstantial evidence, a failure to do so might be cause for a new trial, unless the court did in fact substantially give the jury all necessary instructions as to the amount and character of proof requisite in such a case to justify a conviction. That was hardly a case of purely circumstantial evidence; but, on the assumption that it could be so regarded, this court thought that the charge of the trial judge, who is now the chief justice of this court, in effect conformed to the rule above laid down. It would be easy to cite authorities in great number sustaining the doctrine announced in the headnote, but we are sure it will be accepted as good law without further support. Judgment reversed.

(97 Ga. 213)

WALKER et al. v. STATE.

(Supreme Court of Georgia. July 8, 1895.)

WRECKING TRAINS—EVIDENCE—REVIEW ON APPEAL.

1. It being alleged in an indictment, under the act of October 12, 1885, for an attempt to wreck a railroad train, that the railroad upon which the attempt was made was the railroad of the Southern Railway Company, and it not being alleged, or necessary to allege, that the railroad was owned or operated by an incorporated company, there was no error in permitting the state to show by parol that the road was in fact known as the railroad of the Southern Railway Company, and it was not necessary to produce the charter of the company.

2. The evidence, though not so conclusive as to be entirely satisfactory to this court, if dealing with it originally, was nevertheless sufficient to authorize the verdict; and, the same having been approved by the trial judge, this court will not control his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Hall county; J. J. Kimsey, Judge.

Evans Walker and Richard Bates were convicted of wrecking trains, and bring error. Affirmed.

The following is the substance of the official report:

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in admitting the evidence of Homer Jones, T. N. Hanle, Y. K. Southard, A. A. Wilbanks, and John T. Smith, over the objections of the defendants' counsel, as to the name of the railroad, when the name should have been proved by the charter of said railroad. It appears from the record that Jones testified that the railroad is known as the Southern Railway Company, and was so known at the date when the obstructions were found on the

track. Hanle testified that the railroad is now the Southern Railroad, and that it is now known by and was known as the Atlanta & Charlotte Division of the Southern Railroad, when the obstructions were placed on the track. Southard testified: "A railroad runs in about a quarter of my house, in Hall county. It was called the Richmond & Danville Railroad. It is called the Southern Railroad now." Wilbanks testified: "A railroad runs near my house, in Hall county. It is the Southern now." Smith testified: "A railroad runs near my house, in Hall county. It is the Southern Railroad now. It was named the Southern at that time." Further, because there is no railroad regularly chartered in the state of Georgia by the name of the Southern Railway Company. Further, because the name by which the railroad is chartered, upon which the alleged obstructions were placed, is the Atlanta & Charlotte Air-Line Railway Company. Further, because the evidence of Hanle shows that it is the Atlanta & Charlotte Division of the Southern Railway Company, and not the Southern Railway Company. Further, because the indictment charges that six cross ties were used, and the evidence shows that only four were used.

Fletcher M. Johnson, for plaintiff in error.
Howard Thompson, Sol. Gen., for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 186)

RAWLS v. STATE.

(Supreme Court of Georgia. July 15, 1895.)

CRIMINAL LAW — INSTRUCTIONS — WEIGHT OF EVIDENCE.

The court having in its charge to the jury expressed an opinion as to the probative value of certain vitally important evidence introduced by the state, it was, under section 3248 of the Code, error requiring a new trial.

(Syllabus by the Court.)

Error from superior court, Charlton county; J. L. Sweat, Judge.

Charlie Rawls was convicted of forgery, and brings error. Reversed.

The following is the official report:

There were two counts in the presentment against Rawls. One charged that in Charlton county, on July 1, 1894, he unlawfully, etc., forged and altered an order for money reading originally: "Mr. J. P. Stallings: Pay Charles Rawls 2 dollars for dipen. B. A. Chesser,"—by substituting the figure 3 for the figure 2, with intent then and there to defraud said Stallings and said Chesser. The second count charged that at the same time and place defendant unlawfully did "alter" and publish as true a false, fraudulent,

and altered order for money: "Mr. J. P. Stallings: Pay Charles Rawls 3 dollars for dipen. B. A. Chesser,"—then and there well knowing said order to be falsely and fraudulently forged and altered, with intent to defraud said Stallings and Chesser. Defendant was found guilty, and, his motion for new trial being overruled, excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Further, because the court erred in charging: "In considering that question, if the jury find that Mr. Chesser, whether skilled in writing and reading or not, had this order before him as it was being written and after it was written, and if they find that he has testified in the case that, looking upon the order as it was written by his wife, that the figure 2 was then upon the order, and if they believe that testimony, that would be sufficient upon that question." Alleged to be error, because a direction to the jury, and authorizing them to find a certain conclusion from an impossible act, and therefore contrary to law. Error in charging: "Now, if the jury is satisfied, looking to any confession which may have been made by this defendant, and to all the facts and circumstances as proven in the case; if the jury is satisfied that this defendant received the order in question, it having been written, as having written, as claimed, for two dollars, and he altered it so as to make it call for three dollars,—then, being satisfied of that, the jury would be authorized to convict him." Alleged to be error, because the jury may have concluded that it was an intimation, and amounted to an instruction, by the court, that a confession had been made by defendant, and was therefore contrary to law. Error in charging: "You may inquire as to what the evidence shows Mr. Chesser was indebted to this defendant at that time,—whether he was owing him two dollars or three dollars, or whether the defendant claimed he was owing him two dollars or three dollars. This is a pertinent inquiry which you may make, and it is also a pertinent question for you to consider in connection with the fact, if it be true, that this defendant presented the order in question to Mr. Stallings." Alleged to be error, because it was in the province of the jury to determine their verdict from all the sworn evidence, and not to make special inquiry into statements which were intended in themselves, and pointed in no way to the commission of the act as charged; and therefore contrary to law.

C. C. Thomas and J. S. Williams, for plaintiff in error. W. G. Brantley, Sol. Gen., and Harrison & Peeples, for the State.

PER CURIAM. Judgment reversed.

LUMPKIN, J., not presiding.

(97 Ga. 330)

**WILSON COAL & LUMBER CO. v. HALL
& BROWN WOODWORKING
MACH. CO.**

(Supreme Court of Georgia. July 8, 1895.)

**SALE—CONSTRUCTION OF CONTRACT—CONTINUANCE
—EVIDENCE—TRIAL.**

The court properly construed the contract of sale which was the basis of the plaintiff's claim of title, and committed no error in overruling the motion to continue. A conversion was legally established beyond dispute by the admission of the defendant, and, there being no disputed question of fact, save only as to the hire, and the plaintiff being entitled at the trial to elect the form of the verdict, and having done so, the court committed no error of law in directing a verdict for the plaintiff in accordance with such election, leaving to the jury the question as to the value of the hire; and the verdict upon that question is supported by the evidence.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by the Hall & Brown Woodworking Machine Company against the Wilson Coal & Lumber Company. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

The Hall & Brown Woodworking Machine Company sued the Wilson Coal & Lumber Company for certain machinery, alleged to be of the value of \$677.94, and \$156.81, claimed as hire of the machinery. Upon the trial, plaintiff introduced a contract made between it, by its attorneys, and defendant, June 30, 1892. This contract stated that La Fontaine & Ellis owe the Hall & Brown Woodworking Machine Company \$677.94, evidenced by two notes due at six and nine months from July 2, 1891, with interest at 6 per cent. per annum from July 2, 1891. These notes were given for machinery, as mentioned therein, and contain a reservation of title to said property and a mortgage lien thereon until paid, which notes are referred to and made a part of this contract. The Wilson Coal & Lumber Company, having purchased the machinery at public sale, May 28, 1892, and having paid \$100 for the same, subject to the lien and rights of the Hall & Brown Woodworking Machine Company, are privileged to take possession of said machinery under this agreement, and sell it, subject to the lien created by this contract, and the said notes of La Fontaine & Ellis; the Wilson Coal & Lumber Company agreeing to give the notes of the purchasers to whom they may sell the machinery, payable to the Hall & Brown Woodworking Machine Company, due not exceeding 12 months from this date, with interest at 6 per cent. per annum, containing a reservation of title to said machinery, or to pay for same in cash. Plaintiff introduced, also, the notes of La Fontaine & Ellis; also the report of the receiver, in a case of Spence et al. against La Fontaine & Ellis, that he had sold the property of La Fontaine & Ellis, and that ma-

chinery and buildings were sold to the Wilson Coal & Lumber Company. One of the attorneys for plaintiff, the Hall & Brown Woodworking Machine Company, testified that he demanded the property specified in the declaration, from defendant, by making demand both upon its president and its secretary and treasurer, and that they refused to deliver the property. Plaintiff introduced various witnesses who testified that the rent of new machinery, of the class specified in the declaration, would be from 25 to 33½ per cent. of the value of the machinery. These witnesses did not know the condition of preservation of the machinery in question when it went into the hands of defendant, and did not know the value of the machinery. Two of them testified that they were familiar with planing-mill machinery, and one of them that he was pretty well posted upon the prices of machinery; that, in his opinion, from the machinery specified in the declaration, it would be worth for rent from \$250 to \$300 per annum; that, if the machinery was worth \$1,200, the rent would be from \$300 to \$400 per annum, his estimate being based solely upon new machinery of the class which he understood to be first class, as specified in the declaration. The other testified that, according to his opinion, the machinery specified would be worth for hire from 25 to 30 per cent. of its value, this estimate being based upon new machinery. Defendant objected to the testimony as to the hire exceeding the amount of hire claimed in the declaration up to the time of bringing suit, and objected to any testimony as to hire after the date of the suit, inasmuch as no hire was claimed after that date, but only \$156.81 up to the time of the suit. The objection was overruled, and to this ruling defendant excepted. Plaintiff then offered an amendment to the declaration, by striking said claim of \$156 for hire, and alleging that plaintiff was entitled to reasonable rental or hire from the date of the delivery of the machinery to La Fontaine & Ellis, to wit, \$50 per month. To this amendment defendant objected, but the objection was overruled. Defendant then moved to postpone or continue the case for some reasonable time, that it might be allowed to procure evidence to meet the amendment; that it was not prepared with evidence to combat the statement in the amendment that the machinery was worth \$50 per month, having relied upon the statement in the declaration that the hire was only worth \$156.81 up to the filing of the declaration, and no hire having been claimed subsequent to that time; and that defendant was not prepared to go on with the case. The court refused to continue, and required defendant to proceed, to which ruling also defendant excepted. In a note to this ground of exception, the court states: "The plaintiff in a trover suit having the right to postpone his election until the trial, whether

he would take hire or interest, etc., the court thought he need not allege any amount as hire at all, and that an amendment as to this point conferred no right to continue on the ground of surprise." Defendant moved to nonsuit plaintiff, on the ground that plaintiff's evidence did not show that the property was in the possession, custody, or control of defendant at the time of bringing the suit. This motion was overruled, and to this ruling, also, defendant excepted. In a note to this ground the court states: "The undisputed evidence was that defendant took possession under the contract, and, on demand before suit, refused to surrender, which was a conversion." For defendant, its president testified: "Defendant bought the machinery at a receiver's sale, and paid \$100 for it. The receiver announced at the sale that there was a balance due plaintiff in this case as purchase money of the machinery, and that plaintiff retained a lien for the amount. Afterwards the contract in evidence was executed. At the time of making the demand testified to, nor at the time of bringing the suit, was the machinery in possession, custody, or control of defendant. It was not in its power, at the time of making the demand, nor at any time since, to deliver the machinery, and plaintiff's attorney was notified, at the time of making the demand, that the machinery was not in the possession, custody, or control of defendant. Witness has been in the lumber business about 23 years, has handled a great deal of dressed lumber, has been brought in close contact with planing mills, and knows about planing-mill machinery. Machinery of the class specified in the declaration, new, would not be worth for rent more than 10 to 15 per cent. per annum of its value. This machinery, when it came into defendant's possession, was second-hand, having been used about a year. It was in a fair state of preservation. It was sold as second-hand, and would not bring upon the market more than half the value of new machinery. Second-hand machinery never did bring as much as new machinery, although it might be in an excellent state of preservation. Machinery of the kind specified in the declaration, if properly taken care of, should last 20 years. Defendant had possession of the invoice book of La Fontaine & Ellis. In it was an invoice of the machinery sued for, and the price of the machinery was \$1,515."

In addition to the exceptions above mentioned, defendant excepted upon the ground that the court erred in charging the jury as follows: "The facts of the case are for the most part undisputed, and the conclusion to be derived from the indisputable facts becomes a matter of law; and it is my duty to instruct you what the law is arising out of the undisputed state of facts." Also, because the court erred in charging: "This is a free country. Bearded men under our law are permitted to make their own beds, and

are allowed to lay in them, no matter how uncomfortable they may be." Defendant alleged that this charge had no relation whatever to the case. In a note the court states: "This charge should be considered in the light of its context, and I have ordered the entire charge sent up." Also, because the court erred in charging: "This contract, which I will call the 'Wilson Agreement,' and which you will have out with you, dated the 30th day of June, 1892, I construe as follows: This is an agreement between this plaintiff and the Wilson people, in which the Wilson people recite that they bought at a receiver's sale, for \$100, the property that previously had been in the possession of La Fontaine & Ellis. They agree here, on the face of this contract, that there is due on the property \$677.94 at the time this agreement was entered into. The Wilson Company took possession of it under what is called the 'privilege' of this contract, and they are authorized by the terms of the contract to do one of two things with it: Either the Wilson Company is authorized to sell it to somebody else, and to make purchase-money notes for it from that new vendee or that new purchaser, with title reserved in this plaintiff; or the Wilson Company is authorized to keep it themselves,—in which case they are bound to pay for the same in cash. It is so written in the contract. Now, there is no dispute here that the Wilson Company did not sell this property to anybody else, and therefore that proposition of the contract we may set to one side. There is no dispute that they kept it and used it for themselves, or, at least, retained in their own possession, without having sold it." Defendant contends that this was a clear expression of opinion upon a question of fact disputed in the case. In a note the court states: "The court was construing the written contract in the light of the undisputed evidence." Also, because the court erred in charging: "Now, under the circumstances, I hold that the Wilson Company agree under this contract to pay that \$677.94, and agree that until they do pay it that the title shall be reserved in this plaintiff, which is as it had been previously reserved under the old contract with La Fontaine & Ellis. That is the construction I give it. It is undisputed here that the Wilson Company have not paid anything. Therefore, these plaintiffs in this trover suit have a right to recover this property as their own, because the Wilson Company says, in effect, I will pay you for it in cash according to this contract, which is \$677.94, and the title is reserved in you, and you can have it back if I do not pay you for it." Also, because the court erred in instructing the jury as to the form of verdict, as follows: "Therefore, I instruct you to find a verdict as follows: That the jury find for the plaintiff so many dollars, indicating the sum, as hire; and we

further find for the plaintiff the property mentioned in the declaration, the duty to surrender the said property being discharged if the defendants shall, within a certain day, you fixing a reasonable time, pay the sum of \$677.94. As I understand it, this is the whole law and all of the gospel in this case." Also, because the court erred in charging: "This contract between the Wilson people and these plaintiffs is a contract fixing its own obligation as between themselves, and that any amounts paid by La Fontaine & Ellis previous to these defendants' getting possession of the property cannot be taken into consideration by the jury under this Wilson agreement. It does not inure to the benefit of the Wilson people at all." There was a verdict for plaintiff for \$335 hire and machinery described, "or to pay \$677.95 with interest, in sixty days."

Arnold & O'Bryan, for plaintiff in error.
Bishop & Andrews, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 341)

**HUNNICUTT & BELLINGRATH CO. v.
RAUSCHENBERG.**

(Supreme Court of Georgia. July 8, 1895.)

REVIEW ON APPEAL—BRIEF OF EVIDENCE—NEW TRIAL.

It being impossible to determine the questions of law made in this case without reference to the evidence introduced upon the trial, and there being in the record no such brief of the evidence as is required by law, this court cannot undertake to determine that the trial judge abused his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

The Hunnicutt & Bellingrath Company brings error from an order refusing a new trial on a judgment obtained by A. Rauschenberg. Affirmed.

B. H. & C. D. Hill, for plaintiff in error.
Glenn & Maddox, for defendant in error.

PER CURIAM. Judgment affirmed.

(95 Ga. 288)

MILLER v. SMYTHE.

(Supreme Court of Georgia. Jan. 14, 1895.)

LIABILITY OF LANDLORD FOR FAILURE TO REPAIR—NEGLIGENCE OF TENANT—INSTRUCTIONS.

1. The action being by a tenant against a landlord for the recovery of damages occasioned to goods by the falling of shelves in a store, which it was alleged the defendant had negligently failed and refused to repair, it was error to charge, in effect, that if the danger of the shelves falling was not imminent, the tenant was not called upon to avoid it; and that, if both parties knew of the condition of the shelves, and the tenant notified the landlord to repair, until he did so, or attempted to do so, the tenant, unless the danger was imminent, could leave the goods thereon, and in the event

of damage thereto could recover. This charge amounted to instructing the jury that leaving the goods on the shelves, under the circumstances indicated, would not be such negligence on the part of the plaintiff as would defeat a recovery, and thus deciding a question which was peculiarly one for the jury themselves.

2. Where injury was occasioned to the property of a tenant by the negligent failure of the landlord to make needed repairs to the premises, the plaintiff, though guilty of some degree of negligence contributing to the injury, may nevertheless recover, provided his negligence did not amount to a want of ordinary care, the exercise of which would have prevented the injury; but in such case the negligence of the plaintiff should be considered by the jury in reducing the damages.

3. In the trial of an action for injury to property alleged to have been occasioned as above stated, it was, according to the ruling in *Railroad Co. v. Luckie*, 13 S. E. 105, 87 Ga. 6, error to charge, without qualification, the following: "If the plaintiff's negligence contributed to the damages, the jury should reduce the amount to the extent of [the plaintiff's] contribution to it."

4. The requests to charge, so far as legal and pertinent, were covered by the general charge of the court, which charge, except as indicated in the preceding notes, substantially presented the law of the case.

(Syllabus by the Court.)

Error from city court, Richmond county; W. F. Eve, Judge.

Action by Mary D. Smythe against Leroy J. Miller, trustee. From a judgment for plaintiff, defendant brings error. Reversed.

J. R. Lamar, for plaintiff in error. W. K. Miller and C. H. Cohen, for defendant in error.

SIMMONS, O. J. This was an action by a tenant against a landlord for the recovery of damages occasioned to goods by the falling of shelves in a store, which it was alleged the defendant had negligently failed and refused to repair. The case was formerly before this court on exceptions to the overruling of a demurrer to the declaration. See the report, 92 Ga. 155, 18 S. E. 46. The trial of the case resulted in a verdict for the plaintiff. A new trial was refused, and the defendant excepted.

1. There was evidence that for some months previous to the falling of the shelves the top of the shelving projected from the wall, that the plaintiff "thought it might be unsafe," and repeatedly sent for the defendant to repair the defect, and that the defendant promised to attend to it, but neglected to do so. It was insisted on the part of the defendant that, if he was negligent in not repairing the shelves, the plaintiff, in allowing the goods to remain on them under these circumstances, was guilty of such negligence as should preclude a recovery. On this subject the court gave in charge to the jury the following instructions, to which the defendant excepted: "If the danger was not imminent, the tenant was not called on to avoid it." "If the tenant and the landlord both knew of the condition of the shelves, and the tenant noti-

fied the landlord to repair, until he did so, or attempted to do so, the tenant, unless the danger was imminent, could leave the property thereon, and, in the event of damage thereto, recover therefor." We think this was error. This was equivalent to saying to the jury that leaving the goods on the shelves, under the circumstances indicated, would not be such negligence on the part of the plaintiff as would defeat a recovery; thus deciding a question which was peculiarly one for the jury themselves. The Code (section 2972) declares that, "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover," and the principle embodied in this section is applicable as well to injuries to property as to injuries to the person. *Macon Co. v. Chapman*, 74 Ga. 107, 109; *Branan v. May*, 17 Ga. 136; and see *Railroad Co. v. Neely*, 56 Ga. 544 (5). Ordinary care is that care which every prudent man takes of his property (Code, § 2061); and it was for the jury to say whether the conduct of the plaintiff came up to that standard or not. They had a right to say, if they saw proper, that it was not ordinary care for the plaintiff, knowing that the shelves were in danger of falling if allowed to remain as they were, to wait until the danger had reached the point of being "imminent" (in other words, until the shelves were about to fall) before removing the goods; and that she was, therefore, not entitled to recover. This right the court took from the jury by the instructions above quoted.

2. Section 2972 of the Code, above referred to, provides that in other cases than those in which the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence "the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." If, therefore, the injury in question was occasioned by the negligence of the landlord in failing to repair the shelves, the plaintiff, even though in some degree negligent, could nevertheless recover, provided her negligence did not amount to a want of ordinary care, the exercise of which would have prevented the injury. Negligence on her part short of a want of such care should be considered by the jury in reducing the damages. See 3 *Suth. Dam. (2d Ed.)* § 873, marg. p. 169. It follows that the court did not err in refusing to charge that, if the plaintiff knew the shelves were unsafe, and negligently allowed the crockery to remain on them, she could not recover.

3. According to the ruling of this court in *Railroad Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105, it was error to charge, without qualification, that, "if the plaintiff's negligence contributed to the damages, the jury should

reduce the amount to the extent of [the plaintiff's] contribution to it." If the plaintiff's negligence contributed to the injury, and was such negligence as amounted to a want of ordinary care, it would not be a case for merely reducing the amount of the recovery, but, as we have already shown, there could not be any recovery at all. In the absence of qualification to this effect, the jury may have understood that, if both parties were negligent, the plaintiff's negligence would merely operate to reduce the amount of the recovery. Under the decision above referred to, such a qualification was not rendered unnecessary by the fact that the judge had already instructed the jury that a want of ordinary care on the part of the plaintiff would defeat a recovery.

4. The requests to charge set out in the motion for a new trial were, so far as legal and pertinent, covered by the charge of the court as given, which, except as we have here indicated, was substantially correct. Judgment reversed.

(95 Ga. 707)

TITLE GUARANTEE & LOAN CO. OF SAVANNAH v. HOLVERSON et al.

(Supreme Court of Georgia. April 1, 1895.)

APPEAL — PARTIES — ABATEMENT AND REVIVAL — SALE OF DECEDENT'S PROPERTY — CONFIRMATION.

1. Where one who was a party defendant in error to a case in this court, in his representative capacity as trustee and executor of a deceased testator, himself died, and, upon his death being suggested, the case was continued for the purpose of allowing a party to be made in his stead, the administrator of the individual estate of the deceased defendant in error could not, at the next term, properly be made a party defendant in error, it not appearing that it was a case involving any personal or individual liability on the part of the deceased defendant in error, arising from his office as trustee and executor, or otherwise; and, although this court passed an order allowing the administrator to be made a party, the case must nevertheless be dismissed for want of proper parties, the order just mentioned expressly providing that the effect of granting the same should be determined when the case came on for consideration upon its merits.

2. Under the facts disclosed by the record in this case, there was no error in confirming the sale, or in adjudging that the plaintiff in error was bound by its bid.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

The Title Guarantee & Loan Company of Savannah became purchaser of land sold at the suit of Annie E. Holverson, by her next friend, S. F. Dupon, executor and trustee, and others, and from an order of confirmation it brings error. Brought forward from last term under Code, §§ 4271a-4271c. Affirmed.

Isaac Beckett and Edward S. Elliott, for plaintiff in error. McAlpin & La Roche, for defendant in error.

LUMPKIN, J. By the will of Christie Holverson, certain realty therein described was devised to S. F. Dupon, as executor and trustee, in trust for the maintenance, education, and support of Annie E. Holverson, a minor, with a provision that, if she should die before attaining her majority, the trust should be for the use and benefit of the orphans of the Lutheran Church of Savannah. The will also provided that, in the event it should become necessary to sell or dispose of any part or the whole of the real estate of the testator, payment therefor should be made by the purchaser in bonds of the state of Georgia, the proceeds of such sale to be held by the trustee for the sole benefit of the said Annie E. Holverson. The latter, by her next friend, filed in the superior court of Chatham county a petition praying for a sale of the realty which had been devised as above stated, for the purpose of reinvestment. The petition alleged that she had requested the executor to make such sale and reinvestment, but that he had refused to do so; and the prayer was that the court direct him to sell the property, and deposit the proceeds, after paying expenses, in bank until the further order of the court. Process was prayed against the orphans of the Lutheran Church, by their legal representatives, the trustees of the Protestant Lutheran Church, and against Dupon, as executor and trustee. Dupon answered, admitting the allegations of the petition, setting forth certain good reasons why it was not to the interest of the estate to comply literally with the provisions of the will, and sell upon terms requiring the purchaser to pay for the property in bonds of the state of Georgia, and recommending that the property be sold for cash, and the proceeds be reinvested in some security or investment that would yield a reasonable income or profit. The trustees of the Protestant Lutheran Church of Savannah, alleging themselves to be also trustees of the orphans of that church, answered, admitting the allegations of the petition, and, so far as their interest was concerned, joining in the request that the court grant the relief prayed for by the petitioner. A decree was rendered directing a sale of the property and a deposit of the proceeds in a certain bank until the further order of the court. At that sale, the Title Guarantee & Loan Company became the purchaser, but refused to comply with its bid, and afterwards resisted, on various grounds, an application for a confirmation of the sale, which was duly filed in behalf of Annie E. Holverson by the same next friend who had represented her in the original petition for sale and reinvestment. The court passed an order confirming the sale and declaring the company bound by its bid. It excepted, and brought the case to this court for review. While the writ of error was pending here, Dupon died. Upon a motion to make parties, this court allowed the administrator of his individual estate to be made a

party defendant in error; but, in the order so doing, expressly provided that the effect of granting the same should be determined when the case came on for consideration upon its merits. This was done because a motion had been made to dismiss the writ of error for the want of proper parties, and the question was reserved for further consideration. Afterwards it was held that the administrator of Dupon was not a proper party defendant in error in his stead, and it was ordered that the writ of error be dismissed. There was a motion to reinstate, which, on proper cause shown, was granted. The administrator *de bonis non* with the will annexed of Christie Holverson was made a party, and the case was then decided upon its merits.

1. While the executor of an executor is the proper legal representative of the first testator, the administrator of an executor is not. This was conceded by counsel for the plaintiff in error. The whole difficulty arose because, by mistake, the wrong person was made a party defendant in error in the first instance, and the consequences of this mistake were removed by the reinstatement of the case and the making of the proper person a party.

2. We will briefly notice four only of the objections made by the Title Guarantee & Loan Company to the confirmation of the sale by Dupon under order of the court; the other objections, several in number, not being, in our opinion, of sufficient importance to require special mention. First. It was insisted that the court had no authority to grant to an executor, as such, the power to sell property for the purpose of making a change of investment. Even if this be so, it must be remembered that the will of Christie Holverson also conferred upon Dupon the office of trustee, and expressly directed that a sale for reinvestment should be made, if necessary. There can be no doubt that the judge of the superior court was the proper official to pass the order for a sale by the trustee; and, although the application was made by the beneficiary, the answer of the executor, in effect, adopts it, and makes its prayer his own. Second. It was further contended that the original order of sale was void because guardians *ad litem* were not appointed for the orphans of the Lutheran Church. According to the decision of this court in *White v. McKeon*, 92 Ga. 343, 17 S. E. 283, it is exceedingly doubtful whether the orphans of the Lutheran Church were necessary parties at all to the application for sale, they being, as appears from the facts of this case, contingent both as to person and event. But, even if they were, the trustees of the church, in their answer, expressly allege that under their charter they are also the legal trustees of the orphans; and there does not appear to have been any controversy as to this matter. Third. The order of sale did not direct that the same should be made

within 60 days from the date of the order, as required by the act of September 5, 1887 (Acts 1887, p. 56), and it was therefore urged that, because of this omission, the sale was void. In point of fact, however, the sale was actually made within the 60 days, and this was sufficient. In the application for confirmation, the petitioner prayed that the order of sale be so amended nunc pro tunc as to expressly declare that the sale shall take place within 60 days from its date; but the court very properly held this amendment was unnecessary, and that the sale, so far as this question was concerned, was valid without such amendment. Fourth. It sufficiently appeared that the terms of the will rendered a sale in strict compliance therewith practically impossible, for no one could afford to buy at a high price the bonds of this state, for the sole purpose of becoming a bidder, with no certainty at all that he would really become the purchaser; and to confine the sale to those persons only who might happen to have on hand a sufficiency of the bonds in question to buy the property would result in there being practically no competition at all among the bidders. The property would probably be sacrificed, and thus the intention of the testator in providing for an advantageous sale and reinvestment would utterly be defeated. The judge, therefore, very wisely ordered the sale to be for cash, and the fact that he so ordered is no cause for holding the sale invalid. Besides, even after the sale, it was still within the power of the judge, if deemed advisable, to order the cash proceeds to be reinvested in Georgia bonds, which would practically carry out the provisions of the will. Judgment affirmed.

(96 Ga. 451)

WOOD v. SOUTHERN EXP. CO.

(Supreme Court of Georgia. March 2, 1895.)

NEW TRIAL — DISCRETION OF COURT—CARRIERS—LIMITING LIABILITY—DAMAGES.

1. The trial court having adjudged that a new trial be granted on the general grounds that the verdict was contrary to law, contrary to evidence, and without evidence to support it, unless the plaintiff would write off from this verdict an amount sufficient to reduce his recovery to \$50, and the plaintiff having declined to do this, the result was the general grant of a new trial, with which this court will not interfere, it being the first grant of such new trial.

2. There was nothing in the evidence to authorize the judge below to fix upon the sum of \$50 as the amount of the plaintiff's recovery, if entitled to recover at all.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by Arthur Wood against the Southern Express Company. From a conditional order directing a new trial unless plaintiff would write off a portion of a verdict, plain-

tiff and defendant both assign error. Affirmed.

Estes & Jones, for plaintiff in error. Erwin, Du Bignon & Chisholm and Dessau & Hodges, for defendant in error.

SIMMONS, C. J. In this case the court below adjudged that a new trial be granted on the general grounds that the verdict was contrary to law, contrary to the evidence, and without evidence to support it, unless the plaintiff would write off from the verdict an amount sufficient to reduce his recovery to \$50. The judge, in fixing this amount, appears to have done so upon the idea that, if the plaintiff was entitled to recover anything, the amount of the recovery should be governed by the stipulation in the express company's receipt that if the value of the property was not stated at the time of the shipment, and specified in the receipt, the holder thereof would not demand of the company a sum exceeding \$50 for loss of or damage to the shipment. No value was specified in the receipt, but, according to all the evidence as to the actual value of the shipment, it was worth considerably more than \$50. Treating this stipulation as an attempt to limit the liability of the carrier, it was ineffectual, because it does not appear that the shipper expressly assented to it (Code, § 2068; *Express Co. v. Newby*, 36 Ga. 635; *Purcell v. Express Co.*, 34 Ga. 315); and, even if he had agreed to it, the stipulation would not be valid as to loss involving negligence on the part of the carrier (*Railroad Co. v. Keener*, 93 Ga. 808, 21 S. E. 287). If the facts bring the case within the provision of the Code that "the carrier may require the nature and value of the goods delivered to him to be made known, and any fraudulent acts, sayings or concealment by his customers will release him from liability" (section 2080), the plaintiff is not entitled to recover anything at all. See *Express Co. v. Everett*, 37 Ga. 688; *Green v. Express Co.*, 45 Ga. 309. In no view of the case, therefore, was the court warranted in the direction given as to the amount of the verdict. The defendant, however, having declined to write the verdict down to the amount fixed by the judge's order, the result was the general grant of a new trial; and, in accordance with the well-settled rule of this court as to the first grant of a new trial, the judgment of the court below must be affirmed.

The cross bill of exceptions is dismissed. See *Moonaugh v. Everett*, 88 Ga. 67 (2), 13 S. E. 837, in which the ground of dismissal was the same as that presented by the motion to dismiss in the present case.

¹ This section reads as follows: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby."

(95 Ga. 294)

HARRISON v. STILES.

(Supreme Court of Georgia. Jan. 14, 1895.)

USURIOUS LOAN—EFFECT ON BROKER'S COMMISSIONS.

Where one having money agreed with a broker to make a loan to the latter's principal, in consideration of the maximum legal rate of interest and one-half of the commissions which the principal had contracted to pay the broker to negotiate the loan, the agreement was usurious and illegal, and the proposed borrower, upon refusing to accept the loan, did not become liable to pay the broker for his services in procuring the agreement to lend the money on the terms stated. This is true whether the fact that the broker had promised one-half of his commissions to the owner of the money in order to induce him to agree to make the loan was known to the broker's principal or not.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by S. W. Stiles against Sarah Ann Harrison. A judgment of nonsuit was vacated, and defendant brings error. Reversed.

The following is the official report:

To the petition of Stiles against Sarah N. Harrison, defendant pleaded the general issue. Upon the trial, at the close of plaintiff's evidence, a nonsuit was granted. During the term plaintiff moved to set aside the judgment of nonsuit and reinstate the case, alleging that the judgment of nonsuit was error. This motion was sustained, to which ruling defendant excepted. Plaintiff testified: Defendant employed him to negotiate for her a loan of \$800, for which she was to pay interest to the lender at 8 per cent. per annum, and was to secure the lender for repayment of the loan by deed to certain realty in Atlanta; and defendant agreed to pay plaintiff, for his services in negotiating the loan, a commission of \$150. Plaintiff procured one Purtell to make the loan to defendant, agreeing to pay Purtell one-half of the commission if he would lend the money, and Purtell agreed to make the loan to defendant at the rate of interest specified, and in consideration of the further payment to him by plaintiff of \$75, one-half of the commission. Thereupon plaintiff offered to the defendant to comply with his contract to furnish her said loan, and she refused to receive it, and stated that she had borrowed the \$800 from another source, on said sole ground that she was ignorant at the time of plaintiff's agreement with Purtell to divide the commissions. The suit was for \$150 commissions for negotiating the loan. The motion for nonsuit was on the ground that the evidence showed that the alleged contract made by plaintiff with Purtell on behalf of defendant was tainted with usury, and was illegal, and therefore plaintiff had no right to recover any commission. In the motion to reinstate it was alleged: The court held that the contract which Stiles made with Purtell for lending \$800 to Mrs. Harrison was an illegal contract, because Purtell was reserving usurious interest, to

wit, by being interested to the extent of one-half in the commissions, and hence that this contract was an illegal one, which Mrs. Harrison was not bound to consummate, and that her failure to do so entailed no liability on her part to pay the commissions, and that the fact that she did not know at the time that Purtell was thus reserving usury, but declined it on other grounds, did not affect the proposition that it was an illegal contract, so far as Purtell, one of the parties thereto, was concerned, and therefore one which equity would not compel her to specifically perform, on the disclosure of the fact that half of the commissions paid by her were to be used as usury in procuring Purtell's assent thereto.

J. H. Gilbert, for plaintiff in error. E. M. & G. F. Mitchell, for defendant in error.

LUMPKIN, J. The substance of the declaration and the evidence introduced in support of it are stated by the reporter. The court sustained a motion to nonsuit the plaintiff on the ground that the contract between Purtell and Stiles for the lending of the money was illegal and usurious. Afterwards the court reconsidered this decision, and granted a motion to reinstate the case. While the question presented is not entirely free from doubt, we are of the opinion that the court's first view of the case was the correct one. By the terms of the agreement between Purtell and Stiles, the former was undoubtedly to receive usurious interest for the use of his money. He was to be paid 8 per cent., which is the highest legal rate in this state, and, in addition thereto, one-half of the commissions which were to be paid Stiles for negotiating the loan. It does not appear that the client of Stiles was aware of the details of this agreement, or that she knew a part of the commissions she had contracted to pay Stiles was to be turned over to Purtell as a part of the consideration of the loan. We do not think, however, that her ignorance as to this matter is material in arriving at a proper solution of the case. As between Purtell and Stiles, the contract was undoubtedly usurious and illegal. In other words, Stiles, as agent, had made a contract in behalf of his principal which was incapable of legal enforcement, and we do not think he is entitled to recover for services rendered in effecting such a contract. While it is true that, if the contract had been fully executed, the borrower would have paid no usurious interest directly to the lender, it is also true that one of the results of the execution of this contract would have been a violation of our usury laws on the part of Purtell. A direct agreement by the borrower to pay the lender 8 per cent. interest and a bonus or commission for the use of the money would undeniably have been usurious. She could not have made for herself a legal contract to

this effect, and we hold that her agent could not indirectly do the same thing in her behalf by supplementing the interest she was to pay with a part of his commissions. Purtell undoubtedly could at will have repudiated the agreement he had made with Stiles, and could accordingly have declined to lend the money; so, really, Stiles had not made for his client a contract which she could enforce in the event Purtell refused to comply with its terms. The fact that he was not at all likely to refuse, and that the repudiation came from her, is of no consequence. On the doctrine of mutuality, she certainly could decline compliance if he could. See *Brown v. Baer*, 79 Ga. 347, 353, 354, 5 S. E. 72. The agent, having negotiated for his principal a contract which was not in law a valid and legal one, was not entitled to compensation, for the principal had the right to reject such a contract, even though the other party was willing to carry it out. Judgment reversed.

(95 Ga. 326)

HENDERSON v. STATE.

(Supreme Court of Georgia. Jan. 28, 1895.)

PLEA OF MISNOMER—SUFFICIENCY—LOTTERIES—WHO ARE PRINCIPALS—CONFESSIONS—INSTRUCTIONS.

1. A plea of misnomer should not only state the true name of the accused, but should further allege that he was not known and called by the name under which he was indicted.

2. Section 4549b of the Code comprehends within its terms not only the actual proprietor, but all persons who in any manner participate in the management of the lottery, or in the promotion of the scheme or device for the hazarding of money, or other valuable thing, prohibited by that section. Participation in the illegal design and in the execution of the illegal purpose makes all persons engaged in the criminal enterprise principals.

3. By the terms of section 4545 of the Code, a witness in a criminal case arising under any of the sections therein designated is compellable to testify to any matter of fact within his knowledge in connection with the offense alleged to have been committed, even though his testimony may tend to criminate himself, and he is then entitled to the protection specified in that section; but in a criminal case, where a witness, though not compellable so to do, freely and voluntarily testifies to facts tending to criminate himself, his testimony may thereafter be given in evidence against him. Hence, where, upon the trial of another for the maintenance of a lottery, a witness so testifies, he is not thereafter entitled to the protection afforded by the section first above mentioned, the maintenance of a lottery not being an offense embraced within any of the sections therein designated.

4. While those portions of the charge of the court to which exception was taken, considered alone, may be subject to slight criticism, yet, viewed in the light of the entire charge, the errors assigned upon them are not well taken. The charge, as a whole, was sufficiently full and accurate, and in accord with the law. No substantial error was committed by the court. The verdict was supported by the evidence, and the judge properly denied a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

May Henderson was convicted of conducting a lottery, and brings error. Affirmed.

Garrard, Meldrim & Newman, for plaintiff in error. W. W. Fraser, Sol. Gen., for the State.

LUMPKIN, J. 1. The real name of the accused was William Male Henderson. He was indicted as "May Henderson." He filed a plea of misnomer, which was stricken. This plea set forth what his real name was, but failed to allege that he was not known and called by the name under which he was indicted. Under these circumstances, the court was right in striking the plea. *Wilson v. State*, 69 Ga. 224.

2. In misdemeanors, all are principals. Section 4549b of the Code makes it unlawful "for any person, or persons, either by themselves, servants, agents, employees, or others, to keep, maintain, employ, or carry on any lottery in this state, or other scheme or device for the hazarding of any money or valuable thing." It is manifest, we think, under the provisions of this section, that any person who participates in the management of a lottery, or in the promotion of any other scheme or device for the hazarding of money or other valuable thing, is a principal in the perpetration of the offense thus prohibited. It was insisted that no person was indictable under this section, except the proprietor or owner of the illegal lottery, but this contention is not sound. The object of the statute evidently is to prevent the carrying on of such a lottery by any person, and to make every one who participates in the design or purpose of carrying on the same, a criminal. The proprietor, in a strict sense, is the principal in the first degree; and, were the offense a felony, those participating with him in its perpetration might be either principals in the second degree, or accessories, according to the facts of the particular case. It is well settled, however, that these distinctions do not prevail in misdemeanors, and one who is guilty at all is indictable as a principal. The correctness of the statement above made, to the effect that all are principals who participate in the illegal design and in the execution of the illegal purpose to maintain or carry on a lottery, is not affected by the fact that section 4549c of the Code makes indictable certain specific acts, which of themselves constitute parts of the business of conducting a lottery. Indeed, this section itself forbids the doing of the acts it prohibits, by any person or persons, either by themselves, servants, employees, agents, or others. It seems to have been the purpose of the act of 1877, from which the two above-cited sections were taken, to suppress lotteries, by making it an offense to maintain or carry on one, or to do any of the several acts entering into the conduct of such a business; and the statute was framed, doubtless, with a view to reach

all persons who might carry on, or participate in carrying on, the forbidden enterprise.

3. The proviso to the section first above cited, which is in the following words, "provided, that nothing herein shall affect any of the laws now existing against gaming," recognizes at least a technical, if not a substantial, distinction between the offense prohibited by this section and the offense of gaming, proper. It was insisted that where, in a prosecution based upon this section, a witness testified to facts tending to criminate himself, he would be entitled to the protection given by section 4545 of the Code, which provides that: "On the trial of any person for offending against sections 4538, 4540, 4541, 4542, and 4544 of this division, any other person who may have played and betted at the same time or table, shall be a competent witness, and be compelled to give evidence; and nothing then said by such witness shall at any time be received or given in evidence against him in any prosecution against the said witness, except on an indictment for perjury, in any matter to which he may have testified." The argument was that a violation of section 4549b was really "gaming," and that, as this section became a part of our statute law by the act of 1877 (Acts 1877, p. 112), the provisions of section 4545 should be extended to cases arising under that act. We do not think this argument is sound, or leads to the conclusion stated. The offenses prohibited by sections 4538, 4540, 4541, 4542, and 4544 are of a different nature from the offense prohibited by section 4549b; and it would be straining to hold that the provisions of section 4545 as to the protection of witnesses should be applied to cases arising under the act of 1877, on the idea that the offenses prohibited by this statute are merely acts of "gaming." These offenses could hardly have been in contemplation at all when section 4545 became a part of our Criminal Code, and we are quite clear that the provisions of that section do not, in any view, extend to cases prosecuted under the act in question. This being so, the question really before us is whether or not the testimony of a witness as to facts tending to criminate himself may afterwards be given in evidence against him, when it appears that, though not compellable so to do, he freely and voluntarily made the statements implicating himself. This question certainly can have but one answer. A voluntary confession of guilt, not improperly induced, is always admissible against the party who makes it; and the general rule on this subject is not changed by the fact that the confession happens to be made under oath, while the party is being examined as a witness in another trial.

4. We will not comment upon all of the grounds of the motion for a new trial. Some of them allege error in certain portions of the charge of the court. Those portions, considered alone, may perhaps be subject to

slight criticism; but, taking the charge as a whole, it submitted the case very fairly to the jury. In other grounds of the motion, complaint is made as to the admission of certain evidence, and also as to alleged improper remarks by the solicitor general. We do not think any of these matters are of sufficient importance to require special notice.

On the whole, we are satisfied that no substantial error was committed by the trial court; and, there being ample evidence to sustain the verdict, the judgment denying a new trial will not be disturbed. Judgment affirmed.

(35 Ga. 330)

CUNNEEN v. STATE.

(Supreme Court of Georgia. Jan. 28, 1895.)

CRIMINAL TRIAL—CONTINUANCE—LOTTERIES—EVIDENCE.

1. The motion for a continuance, on the ground of the absence of a material witness, being in all respects complete, and the expected testimony of the witness being vitally important to the accused upon the merits of the case, it was error requiring a new trial to refuse to grant the continuance because of evidence, introduced by way of counter showing, to the effect that the absent witness had on a previous occasion made a statement, not under oath, inconsistent with what the movant deposed he was able and expected to prove by this witness.

2. The issue being whether the accused carried on, or participated in carrying on, a business made criminal by law, there was no error in ruling out the following question to a witness, and his answer to the same: "Q. You know that he does not carry on this business himself; you regarded him simply as a person checking up books? A. Yes, sir; that was our instructions."

3. All other questions involved in this case which will probably arise on the next trial are, so far as material, covered by the rulings of this court in the case of *Henderson v. State* (this day decided) 22 S. E. 537.

(Syllabus by the Court.)

Error from city court of Savannah; *A. H. MacDonell*, Judge.

John J. Cunneen was convicted of conducting a lottery, and brings error. Reversed.

The following is the official report:

By special presentment, John J. Cunneen was indicted for keeping, maintaining, and carrying on a scheme and device known as a "policy lottery," for the hazarding of money and other valuable thing. He was tried in the city court of Savannah, and found guilty, and his motion for a new trial was overruled. He moved for a continuance on account of the absence of W. J. O'Dell, and assigns error on the overruling of this motion. In support thereof he made affidavit "that W. J. O'Dell is a witness in behalf of defendant, and is absent; that he has been subpoenaed; that he resides in the county where the above case is pending; that his testimony is material; that such witness is not absent by the permission, directly or indirectly, of this applicant; that he expects that he will be able to procure the testimony of such witness at the next term of the court; that the applica-

tion for a continuance is not made for the purpose of delay, but to enable him to procure the testimony of such absent witness; that there is no other witness by whom he can prove the same facts; and that deponent expects to prove by said absent witness that deponent did not keep, maintain, or carry on a scheme for the hazarding of money or other valuable thing, called a 'policy lottery.' Deponent further says that he is informed and believes that the reason of the absence of said witness is on account of illness, and appends, as part of this affidavit, the certificate of Dr. R. J. Nunn. Deponent does swear that said witness was sick, and that he is absent from the city." Attached to this affidavit was a statement signed by R. J. Nunn, M. D., that "W. J. O'Dell is ill with rheumatism, and is out of the state for treatment." This was dated two days before the date of defendant's affidavit, and does not appear to have been sworn to. Defendant amended his affidavit as follows: "That the said witness has been tried and found guilty for carrying on the selfsame scheme or device for which this defendant has been indicted or accused; that said O'Dell has full knowledge of the fact, and all attending circumstances; that he knows that the said scheme is not kept, maintained, or carried on by this defendant; that said O'Dell is expected to testify that this defendant has no connection with the keeping, carrying on, or maintaining said scheme or device." The solicitor general showed by the sheriff that the subpoena for O'Dell had not been issued until after O'Dell had left the city, and had not been served because of O'Dell's absence. It is further assigned as error that the court permitted the solicitor general, in opposition to the motion for continuance, to introduce the statement made by O'Dell at the trial of a case against him in the same court at the July term, 1894, over defendant's objection; that this statement was not under oath, and was not made in the presence of Cunneen; and that there was no traverse to the affidavit for continuance, and no traverse would lie as to the facts expected to be proved by the absent witness. The statement objected to was: "Gentlemen: All I have to state is that this business belongs to Nez Taylor. He owed me money, and I went down there to get this money. As far as this negro carpenter is concerned, I never remember having seen him. I never employed him in any way, manner, or form. He may have been employed by some one else, and got paid for it. I don't know anything about it. I never employed him."

Garrard, Meldrim & Newman, for plaintiff in error. W. W. Fraser, Sol. Gen., for the State.

LUMPKIN, J. 1. The court overruled a motion for a continuance, which was based on the ground of the absence of a material wit-

ness for the accused. The substance of the showing for a continuance is set forth by the reporter. An examination of it will show that it was in all respects complete, and that the expected testimony of this witness was vitally important to the accused upon the merits of the case. This the trial judge doubtless recognized, but refused the continuance, it seems, because it appeared in a counter showing to the motion that on a previous occasion the witness had made a statement, not under oath, inconsistent with what the accused deposed he was able and expected to prove by this witness. The court ought to have continued the case, and thus have allowed the accused the opportunity to have the jury pass upon the credibility of the witness. He might have denied making any statements inconsistent with his testimony on the stand, or, even if he admitted making contradictory statements, it would at last be a question for the jury to determine what portions, if any, of his evidence they would accept as true, and what portions they would disregard. We are constrained to grant a new trial because of the overruling of the motion to continue. It is impossible for us to say what the verdict would have been, had the absent witness been present, and had he testified. It is certain that, if the jury believed what the accused swore he could prove by this witness, there could have been no conviction.

2. It is quite clear that no error was committed in ruling out the question and answer set forth in the second headnote. The effort was to prove by the witness that the accused did not himself carry on the business of conducting a lottery, and the form of the question, and the terms in which the answer was couched, show that it was really the opinion of the witness, and not his knowledge of facts, which was sought to be elicited.

3. Some of the questions involved in this case are substantially the same as those ruled upon in the case of *Henderson v. State* (just decided) 22 S. E. 537, and for this reason need not be here again stated. Others relate to matters which will not probably arise on the next trial, and therefore do not call for discussion at this time, and the remaining questions raised by the motion for a new trial are of but minor importance. Judgment reversed.

(95 Ga. 321)

KEHOE v. HANLEY.

(Supreme Court of Georgia. Jan. 28, 1895.)

HARMLESS ERROR—RULINGS ON EVIDENCE—ASSIGNMENTS OF ERROR—INSTRUCTIONS.

1. Where evidence alleged to be illegal was admitted without objection, and thereupon opposing counsel, in effect, stated to the court, in general terms, that he objected to all such evidence, but made no motion to rule out the evidence already in, and no more such evidence was offered or admitted, it is not cause for a new trial that the court "overruled" the general objection made in the manner above stated, even if the evidence referred to was in fact illegal.

2. A ground of a motion for a new trial which merely alleges that the court erred in leaving to the jury the construction of a designated portion of a written contract in evidence does not plainly and distinctly specify the error complained of. The language of the court "in leaving to the jury" the matter in question should be pointed out.

3. The charge requested was substantially covered in the general charge given to the jury. The evidence warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action between William Kehoe and Andrew Hanley. From the judgment rendered, Kehoe brings error. Affirmed.

O'Connor & O'Byrne, for plaintiff in error. Garrard, Meldrim & Newman, for defendant in error.

LUMPKIN, J. 1. A witness on the stand was asked, and answered, several questions with reference to the authority of an architect to bind the owner of a building which was being constructed. No objection was made by the opposite party, either to these questions or answers; but when the examination had reached a certain point his counsel stated generally to the court, "We object to all questions tending to elicit from the witness answers as to the authority of the architect generally, as we have a definite contract in this case, and testimony of this kind cannot bind our client." According to the recital in the motion for a new trial, "the objection was overruled"; but the court certifies that no motion was made to rule out or exclude any of the answers which had already been admitted, and that subsequently no more questions of this kind were asked. The "objection" above quoted was certainly not equivalent to a motion to rule out the testimony already in, and could only relate to testimony of the same kind yet to be introduced; and, as no more such testimony was offered or admitted, we find nothing in the court's action affording any just cause of complaint.

2. It was alleged that the court erred "in leaving to the jury" the construction of a particular clause in a written contract which had been introduced in evidence. This clause was sufficiently described in that ground of the motion for a new trial in which this assignment of error was made, but unfortunately the motion fails to state how, or in what manner, the court left to the jury the matter in question. It is therefore impossible for this court to say whether error was committed or not. Undoubtedly, the judge ought not to leave to the construction of the jury any portion of a plain and unambiguous written contract. This is a well-settled rule, but we are unable to say whether it was violated, or not, because we have not before us the language used by the trial judge in this connection, and therefore

cannot determine whether the same would have the effect contended for by counsel, or not.

3. Another ground of the motion for a new trial was based upon the refusal of the court to give in charge to the jury a certain written request. The request was pertinent and legal, but, as the substance of it was fully covered by the general charge of the court, its refusal is not cause for reversal.

The evidence was decidedly conflicting, but there was enough in support of the verdict to sustain it. On the whole, we see no legal reason for granting a new trial. Judgment affirmed.

(95 Ga. 363)

CHARLESTON & S. RY. CO. v. GREEN
et al.

(Supreme Court of Georgia. Feb. 5, 1895.)

NEW TRIAL—ERRONEOUS INSTRUCTIONS.

It affirmatively appearing from the undisputed evidence introduced by the defendant that its servants exercised full diligence, and the evidence as a whole showing conclusively that the destruction of the plaintiff's mules was not due to the defendant's negligence, a verdict for the latter was the only one legally possible in the case. Such a verdict having been rendered, it should not have been set aside, even if some errors were committed by the trial judge in charging the jury; and, consequently, the court erred in granting a new trial because, in the judge's opinion, the charge was in some particulars erroneous.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Green, Gaynor & Co. against the Charleston & Savannah Railway Company. There was a verdict for defendant, and a new trial granted. Defendant brings error. Reversed.

The following is the official report:

This was an action against the railroad company for killing four mules and crippling another. The testimony for the plaintiffs tended to show that the mules broke loose from their inclosure at night, and wandered about seven miles on the public road, until they came to a railroad crossing, and then walked upon the railroad track a distance of nearly half a mile, where they reached a very long trestle, which was being filled in with dirt by the defendant. The tracks in the soft and newly-laid earth indicated that they walked thereon, and their bodies were found below the trestle, which was 12 or 15 feet high, indicating that they had been knocked off by a train. The testimony for the defendant tended to show that the mules were struck by an engine drawing a passenger train, which was running slowly, between 4 and 5 o'clock on a foggy morning in November; that they were not seen by the engineer until he was within 20 steps of them, and could not have been seen sooner on account of the fog and darkness; and that when he did see them he applied brakes, reversed the engine, and blew

the whistle, but it was impossible to stop the train in time to avoid striking the animals. About 30 or 40 yards from the trestle was a house occupied by a watchman employed by the defendant. There was conflicting testimony as to the rate of speed at which the train was running, it appearing for the plaintiffs that this watchman had stated that it was running at the rate of 35 miles an hour. It appeared that the killing occurred on the South Carolina side of the Savannah river, opposite Chatham county; and the defendant introduced certain sections of the General Statutes of that state, forbidding the owner of any horse, mule, or any other domestic animal to permit the same to run at large beyond the limits of lands owned or controlled by him, and providing that the owner shall be liable for all damages sustained by stock so trespassing. It is further provided that any person, other than the owner, who shall remove, destroy, or leave down any portion of an inclosure for animals, and any person who shall willfully or negligently violate the first section mentioned, shall be guilty of a misdemeanor, punishable by fine or imprisonment, and that it shall be a misdemeanor for any person willfully to allow his team to travel outside of the road on the cultivated lands of another, etc.

The court charged the jury that the engineer of the train would not be bound, in the exercise of ordinary care and diligence, to anticipate that the plaintiffs would violate the law and permit the stock to run at large; that defendant had the right to presume that plaintiffs were obeying the law, and not permitting the stock to run at large; that it would be for the jury to determine what, in the exercise of ordinary care, those concerned in the conduct and management of the train ought to have done; and that, if they were not bound to anticipate the presence of stock running at large upon the track, they would not be bound to look out for such stock, but would only be bound to exercise ordinary care and diligence to prevent injuring it after discovering its actual presence on the track, or that it was in a place where it was liable to be injured by the train. Upon the sole ground that this charge was erroneous, the court granted a new trial after verdict for defendant. In the order granting a new trial, the judge states that the erroneous instruction was reiterated and stressed in several parts of the charge, viz: "The railway company had the right to presume that there would be no stock on its track, if the stock law requiring owners to keep their stock fenced up was in force at the time of the killing and injury to the mules." The other grounds of the motion allege: That the verdict was contrary to law and evidence, and that the court's charge, as an entirety, is erroneous, in that it fails to give the essential legal principles involved in the case, and in that it gives those

upon which the defendant relied, reiterating the same, and fails to give those upon which plaintiffs relied. Also, that the judge failed to charge the legal principle, which was essential, and which was insisted on by plaintiffs in the argument, that a railroad company shall be liable for any damage done to stock or other property by the running of its locomotive or cars, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company. Also, that the judge failed to charge the legal principle, which was essential, and which was insisted upon by plaintiffs in the argument, that, where the owner proves that the stock was killed by a railroad train, this imposed on the company the burden of showing that it was in the exercise of all ordinary and reasonable care and diligence. Also, that the judge failed to charge the legal principle, which was essential, and which was insisted upon by plaintiffs in the argument, that where all the witnesses present are not sworn, and do not testify, and are not accounted for, the jury can infer that there was negligence on the part of the company. Also, that the judge erred in allowing the watchman at the trestle to be put on the stand for the defendant, over objection of plaintiffs, after the defendant had announced "Closed," the witness having been in court, available, all the time, and not being called in rebuttal, but for the purpose of overcoming the legal principle invoked by plaintiffs as set forth in the ground last stated; said witness being put up after plaintiffs had announced that they would rely on this principle of law. Also, that the court erred in charging: "On the contrary, after it came to the attention of those concerned in the conduct and management of this train that the stock was on the track, or was in a position where it was liable to be injured by the train, it would be incumbent upon them to exercise ordinary care and diligence to prevent any injury occurring to the stock; and if they failed to exercise that degree of diligence, and the stock was injured, as alleged, the defendant company would be liable." It is contended that this instruction holds that the railroad company must exercise ordinary care and diligence only after it came to their attention that the stock was on the track, or in a position where it was liable to be injured; freeing the company from any diligence prior to the taking place of one of those two events. Also, that the court erred in charging: "If you find that the stock law requiring owners of stock to keep their stock fenced up was in force, the defendant is not required to use the same care and caution as in localities where such law is not in force." Also, that the court erred in charging that "this railway company is under no obligation to have a watchman on the lookout to keep

stock from getting on its track"; this being given alone, as a distinct proposition, without any further instruction what, if the company did have a watchman, the legal effect of that would be.

Erwin, Du Bignon & Ohlsholm and W. L. Clay, for plaintiff in error. Geo. A. Mercer & Son, for defendants in error.

LUMPKIN, J. The official report contains a condensed statement of all the material facts developed by the evidence. It will require only a casual examination of the same to show that the company exercised the full measure of diligence required by law, and that the killing of the plaintiffs' mules was in no sense due to the negligence of the company's servants in charge of the train. This being so, a verdict for the defendant was the only outcome of the trial legally possible. Such a verdict was rendered. The trial judge set it aside, and granted a new trial, not because he was dissatisfied with the verdict upon the merits of the case, but because, in his opinion, he committed an error in charging the jury. This appears from a written opinion filed by the judge, in which are set forth his reasons for granting the new trial. The mules were killed in South Carolina, and it was contended that, under the stock law of that state, the plaintiffs were negligent in permitting their mules to run at large. The court charged, in substance, that, where the owners are required to keep their stock fenced in, the railroad company is not bound to expect or anticipate the presence of stock upon its track. After hearing the motion for a new trial, the judge reached the conclusion that this charge was erroneous, and for that reason alone set the verdict aside. We do not feel called upon to consider or determine whether the charge in question was or was not correct. The verdict being right, and the only one which, in any view of the law, could have been properly rendered under the evidence, it is entirely immaterial whether the instructions of the court were correct propositions of law or not. *Taylor v. Street*, 82 Ga. 723, 9 S. E. 829; *White v. Magarahan*, 87 Ga. 217, 13 S. E. 509. Judgment reversed.

(35 Ga. 395)

SAVANNAH ST. R. R. v. JACKSON.

(Supreme Court of Georgia. Feb. 5, 1895.)

APPEAL—REVIEW.

Whether the proper procedure in suing out the certiorari from the city to the superior court was observed, or not, there was no error in dismissing the certiorari. The only complaint being that the verdict was contrary to law, the evidence, and the charge of the court, and was excessive, and there being, in addition to the presumption raised by law against the company, evidence in the plaintiff's favor from which the jury could properly infer negligence on the part of the defendant, and the latter hav-

ing introduced no evidence, and consequently having failed to rebut the plaintiff's prima facie case, or in any manner show the exercise of due diligence, and it not appearing that the verdict was excessive, this court will not reverse the action of the judge of the superior court in declining to set the verdict aside.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by William F. Jackson against the Savannah Street Railroad. From a judgment for plaintiff, defendant brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. Seabrook & Morgan and Gignilliat & Stubbs, for defendant in error.

LUMPKIN, J. Jackson recovered a verdict against the Savannah Street Railroad, an incorporated company, in the city court of Savannah. The defendant carried the case to the superior court by certiorari, alleging in its petition that the verdict was contrary to law and the evidence, and to the charge of the court, and was excessive. The certiorari was dismissed, and the judgment of the city court sustained. Quite an interesting question was presented and argued in this court, as to whether or not the proper procedure was observed in suing out the certiorari from the city to the superior court. It was insisted for the defendant in error that the judgment of the superior court in dismissing the certiorari was right, because the case was not legally carried to that court, and consequently the merits of it could not there be considered and passed upon. We find, however, upon an examination of the record, that it is unnecessary to decide the question thus made. Granting, for the sake of the argument, that the case was regularly before the superior court, the judgment rendered was the proper one, even upon the assumption that the judge of that court undertook to pass on the merits of the case. An inspection of the evidence will show that the plaintiff made out at least a prima facie case against the company. This was sufficient to entitle him to a verdict, in the absence of any rebutting testimony in behalf of the defendant; and, as the latter introduced no evidence at all, the plaintiff's right to recover stood legally demonstrated. The amount of the verdict, in view of all the facts, was reasonable, and therefore the complaint that it was excessive is without merit. We cannot know positively, from the record, whether the judgment of the superior court dismissing the certiorari, and affirming the judgment of the city court, was based upon the ground that the case was improperly brought up, or upon the ground that the verdict in the plaintiff's favor was right upon the facts; but this is immaterial, because, in any view of the case, no good reason for disturbing the judgment of the city court was shown. Judgment affirmed.

(95 Ga. 376)

COMER v. DUFOUR.

(Supreme Court of Georgia. Feb. 5, 1895.)

COLLECTION OF CHECK—DELAY OF BANK CORRESPONDENT—DISCHARGE OF INDORSER.

1. Where, after the indorsement of a check by an accommodation indorser, it was cashed by a bank and duly sent for collection to its correspondent in the city where the bank upon which the check was drawn was located, and there, together with a number of other checks, was duly presented to the drawee for payment, and the runner of the correspondent accepted in payment of all these checks a small sum of money and a check of the drawee upon another bank in the same city, which check, had it been promptly presented would have been paid, but, having been held by the runner, or the bank he represented, for two or more hours, during which time the drawee failed, in consequence of which the check last mentioned was dishonored, *held*, that under these facts the bank which cashed the original check could not hold the accommodation indorser liable for the amount thereof; and this is true although after the drawee's check had been dishonored the original check was reclaimed and duly protested.

2. The facts as above stated having been agreed upon by the parties, direction is given that the superior court render a final judgment in favor of the defendant.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by H. M. Comer, receiver, against Julius A. Dufour. Judgment for defendant, and plaintiff brings error. Affirmed.

Lawton & Cunningham and H. W. Johnson, for plaintiff in error. Gignilliat & Stubbs, for defendant in error.

SIMMONS, C. J. The receiver of the Central Railroad & Banking Company (of which the Central Railroad Bank is a part) brought suit in a justice's court against J. A. Dufour, upon a check for \$75, dated at Baltimore, January 9, 1892, upon J. J. Nicholson & Sons, bankers, by S. H. Brosius, payable to the order of A. M. Brosius, and indorsed by A. M. Brosius and by J. A. Dufour, which check had been protested for nonpayment. The case was submitted upon an agreement as to facts, and the justice rendered judgment in favor of the plaintiff. A writ of certiorari to this judgment was sustained by the superior court, and the case remanded to the justice's court for a new trial. To this ruling the plaintiff excepted. The facts agreed on were as follows: On January 11, 1892, defendant, accompanied by A. M. Brosius, went to the Central Railroad Bank and requested the assistant cashier, Ulmer, to cash the check in question. Brosius being a stranger to Ulmer, he told defendant he could not cash the check unless it was indorsed by him. Defendant thereupon indorsed it, and it was cashed. On the same day it was forwarded by mail by the Central Railroad Bank to its correspondent in Baltimore, the Citizens' National Bank, for collection. The Citizens' National Bank received it, and acknowledged the receipt on

January 14, 1892, and on the same day, about 11 o'clock, by its regular runner, presented this check, with other checks and drafts on J. J. Nicholson & Sons, to said firm for payment, the aggregate of all the checks and drafts so presented being \$1,748. The runner accepted \$48 in cash and the uncertified check of J. J. Nicholson & Sons on the Western National Bank for \$1,700, in payment for the checks and drafts presented, the custom of Nicholson & Sons being to give their check for the hundreds, and cash for the balance, unless for any reason cash or certified check for the whole amount were demanded. The checks and drafts so presented to Nicholson & Sons, including the check in question, were canceled by them and charged up to the drawers thereof. The check book of Nicholson & Sons showed that three or four checks (including one for about \$1,900 and another for about \$2,200) drawn by them on the Western National Bank after the check for \$1,700 was delivered to the runner of the Citizens' National Bank were paid by the Western National Bank before the \$1,700 check was presented to it, said check not having been so presented at any time before half-past 1 o'clock. Banking hours in Baltimore were from 9 to 3 o'clock in the day. The Western National Bank was three squares from the bank of Nicholson & Sons, and nearly seven squares from the Citizens' National Bank. It was not over five minutes' walk from the first place and ten minutes from the latter. Nicholson & Sons failed about 1:45 o'clock of said day, and the Western National Bank refused payment of the check drawn by them for \$1,700. The Citizens' National Bank replevied the checks and drafts which its runner had delivered to Nicholson & Sons, after 2 o'clock, and during that afternoon protested all of them for nonpayment and on the next day returned to the Central Railroad Bank the check sued on here.

1. If the holder of a bank check neglects to present it for payment within a reasonable time, and the bank fails between the time of drawing and the presentation of the check, the drawer is discharged from liability to the extent of the injury he has sustained by such failure. An indorser is discharged absolutely. *Daniels v. Kyle*, 1 Ga. 304, 5 Ga. 245; 2 Morse, Banks (3d Ed.) §§ 421, 422. What is a reasonable time will depend upon circumstances and the relation of the parties between whom the question arises. When the facts are undisputed, the question is one of law to be determined by the court. If the check is received at a place distant from the place where the bank upon which it is drawn is situated, and is forwarded by due course of mail to a person in the latter place for presentment, the person to whom it is thus forwarded has until the close of banking hours on the next secular day after he has received it to present it for payment, unless there are special cir-

circumstances which require him to act more promptly. 2 Morse, Banks (3d Ed.) § 421; Daniel, Neg. Inst. (4th Ed.) § 1591. The holder cannot, however, after having once presented the check, derive any advantage from the fact that he could, without being chargeable with unreasonable delay, have held it longer before making presentment. The first presentment fixes the rights of the parties. If the drawee is then ready and willing to pay, and the holder allows the fund to remain longer in the hands of the drawee, or if he accepts in lieu of money a check of the drawee, he does so at his peril. 2 Morse, Banks (3d Ed.) § 426; 2 Daniel, Neg. Inst. (4th Ed.) § 1593; Simpson v. Insurance Co., 44 Cal. 139; Anderson v. Gill (Md.) 25 L. R. A. 200, 29 Atl. 527. If his acceptance of the drawee's check does not of itself discharge an indorser of the original check, the indorser should certainly be held discharged if the substituted check is not presented promptly and the collection is thereby defeated. Such presentment cannot be delayed at the risk of the indorser for any time beyond that within which, with reasonable diligence, the presentment can be made. In this case, it appears that presentment of the substituted check could have been made in about five minutes from the time it was received, the bank upon which it was drawn being only three squares distant from the bank of J. J. Nicholson & Sons, the drawees of the original check; but it was not presented for two hours and a half or more after it was received by the collecting bank, and by reason of this delay the collection was defeated. Under these circumstances, we think the collecting bank failed to exercise due diligence, and its principal, the plaintiff in this case, was not entitled to recover against the defendant, the indorser of the original check. In the case of Anderson v. Gill, supra, under circumstances almost identical with these, the drawer of the check sued upon was held discharged. In that case, as in the present case, the original check was drawn upon J. J. Nicholson & Sons and was presented to them on the day of their failure, about 11 o'clock a. m., and their check upon the Western National Bank received in lieu of it and not presented until after the failure, though presented within banking hours of the same day. In that case, also, the original check was recovered from Nicholson & Sons and protested on the same day; but it was held that this made no difference,—that, although the collecting bank was not bound to have made demand upon Nicholson & Sons when it was made, still, having made it, and, by its own choice, not having received the cash, it could not, if it had not used due diligence, claim the right to undo what it had done, and by a subsequent demand put itself in the position it would have occupied had it not made the first demand at the time it did make it, or done the act it then did. A full discussion

of the subject, with numerous citations of authority, will be found in the opinion of the court in that case. See, also, Smith v. Miller, 43 N. Y. 171, 52 N. Y. 545; Bank v. Samuel, 20 Fed. 664; People v. Cromwell, 102 N. Y. 477, 7 N. E. 413; also cases cited in note to Anderson v. Gill, in 25 L. R. A. 200, 201, 29 Atl. 527.

2. The facts of this case, as above stated, having been agreed upon by the parties, direction is given that the superior court render a final judgment in favor of the defendant. See Code, § 218, par. 2, and section 4284; Railroad Co. v. Kent, 91 Ga. 693, 18 S. E. 850. Judgment affirmed, with direction.

(95 Ga. 381)

OCEAN STEAMSHIP CO. v. CHEENEY.
(Supreme Court of Georgia. Feb. 5, 1895.)

STEAMSHIP COMPANY—LIABILITY FOR EMPLOYEES' INJURIES—LOADING VESSEL.

This court having adjudicated at the October term, 1893, that upon the facts then appearing it was error to grant a nonsuit, and the plaintiff at the last trial having, by his evidence, made substantially the same case, a verdict in his favor, after its approval by the trial judge, will, not be disturbed.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Henry Cheeney against the Ocean Steamship Company. Judgment for plaintiff, and defendant brings error.

Lawton & Cunningham, for plaintiff in error. Saussey & Saussey, for defendant in error.

LUMPKIN, J. This case has twice already been before this court. On the first trial in the city court, there was a verdict for the plaintiff, and this court reversed a judgment refusing to grant a new trial. 86 Ga. 278, 12 S. E. 351. It appeared from the evidence then before this court that a hatch tender had been stationed at the hatchway for the purpose of warning the persons in the hold below, engaged in storing the cotton with which the ship was being loaded, to stand aside when a bale was about to be thrown down, and that the plaintiff was injured by a bale of cotton, of the throwing down of which the hatch tender negligently failed to give any warning. This court held that inasmuch as the hatch tender was a fellow servant of the plaintiff, engaged in the same business, the latter could not recover for injuries occasioned by the negligence of the former; and this was all that was then decided. The next trial in the city court resulted in a nonsuit, and the plaintiff brought the case to the October term, 1893, of this court. 92 Ga. 726, 19 S. E. 33. The evidence, as it then appeared in the record, differed essentially, in a most material particular, from the evidence adduced at the first trial. In the brief of evidence before us at the

term last mentioned, nothing appeared from which it could be inferred that a hatch tender had been employed at all, or that any person acting in that capacity was in fact stationed at, or ordered to attend, the hatchway. In view of this fact, the case, upon its merits, was not at all the same as when it made its first appearance before this court; and we held that the court erred in granting a nonsuit, which was, in effect, an adjudication that on the facts then before us a verdict for the plaintiff could be sustained. At the third trial in the city court there was a verdict in his favor, and the evidence in support of it was substantially the same as on the last preceding trial. This being so, it is perfectly consistent with the decision reported in 92 Ga. and 19 S. E., to affirm the judgment of the trial court in refusing to set the verdict aside. There is no special necessity to review and compare the evidence introduced, respectively, on the last two trials. It was earnestly insisted that the first decision rendered by this court adjudicated that there could be no legal recovery in behalf of the plaintiff. This is true only so far as that decision relates to the evidence then under consideration, but certainly this court has never decided that there could be no recovery upon an essentially different state of facts. At the first trial the plaintiff endeavored to recover upon evidence showing negligence on the part of his fellow servant, the hatch tender. On the last two trials he rested his right to recover upon the alleged negligence of the company in failing altogether to supply a hatch tender, and, in our opinion, each time supported his contention by at least enough evidence to warrant the jury in finding that such negligence existed, and occasioned the injuries of which he complained. Judgment affirmed.

(95 Ga. 290)

ENTELMAN et al. v. HAGOOD.

(Supreme Court of Georgia. Feb. 5, 1895.)

**TRESPASS BY LANDLORD—TENANT HOLDING OVER
—FORCIBLE EJECTMENT—NONPAYMENT
OF RENT.**

1. Whatever may have been, at common law, the right of a landlord, with respect to removing, without resort to legal proceedings, a tenant holding beyond his term, in view of the statutes of this state providing for the summary ejection of tenants under legal process, and the public policy thereby manifested, a landlord who, without such process, forcibly and violently ejects a tenant and his personal goods from the rented premises, is liable to the latter in an action of trespass, although the tenant was holding over beyond this term, was in arrears for rent, and had received legal notice to quit.

2. The verdict, in view of the evidence, being contrary to the law as above announced, and the court having expressly, for this reason, granted a new trial, the judgment will not be disturbed.

(Syllabus by the Court.)

v.22s.E.no.13—35

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Mary M. Hagood against A. H. Entelman and another. Judgment for plaintiff, and defendants bring error. Affirmed.

R. R. Richards, for plaintiffs in error.
P. M. Russell and A. C. Wright, for defendant in error.

LUMPKIN, J. 1. Mary M. Hagood brought an action of trespass against Entelman and another for forcibly ejecting her and removing her goods from certain premises which she had rented from Entelman, and of which she was still in possession. Under the charge of the court, which was adverse to the plaintiff's right to recover, there was a verdict for the defendants. A new trial was granted, the court being of the opinion, after further consideration, that, even if the plaintiff was a tenant holding over after the expiration of her term, and after legal notice to vacate the premises, she could not be forcibly dispossessed by the landlord without subjecting the latter to an action of trespass; he having an appropriate remedy for her summary dispossession, under section 4077 et seq. of the Code. The case therefore turns largely upon the question whether or not a landlord may, without resort to legal proceedings, forcibly eject a tenant holding beyond his term, without becoming liable to the tenant in an action of trespass. It would seem that at common law the landlord had the right, after the expiration of the tenant's term, to immediately re-enter and take possession of the rented premises, and that in so doing a resort to force was legal, provided no more force was used than was actually necessary to eject the tenant. It is manifest, however, that proceedings of this kind would have a tendency to cause breaches of the peace; and, in this country especially, it is more than probable that they would frequently result from attempts by landlords to forcibly evict tenants who were unwilling to peaceably and quietly surrender possession of premises. Cases of this kind bear some analogy to those in which owners of personality, of which others are unlawfully in possession, undertake to repossess themselves of the same without the aid of the law. The act of 1821 (Cobb's Dig. p. 590) provided a remedy, by possessory warrant, for the speedy recovery of personality; and, as appears from the preamble of that act, one of the purposes of its passage was to prevent violence and quarrels and bloodshed. This was, to some extent at least, indicative of the public policy of this state to preserve peace and tranquility by providing a legal remedy which would render it unnecessary for persons to undertake with their own hands the redress of wrongs inflicted by unlawfully depriving them of their chattels;

and we are of the opinion that the same policy actuated the general assembly, at least to some extent, in providing the remedy for recovering possession of real estate now embodied in the above-cited sections of the Code. In view of that remedy, there is now no need for a landlord to use personal force to accomplish the summary ejection of a tenant who no longer has a right to occupy the rented premises. The legal remedy is full, ample, and capable of speedy enforcement, and one of its objects must have been to prevent landlords from resorting to personal force to regain possession of their property. In *Fox v. Brissac*, 15 Cal. 223, Baldwin, J., after stating that the early English authorities asserted the right of the landlord to enter for a breach of covenant in the lease, and forcibly eject the tenant, adds: "But modern decisions, and the reason and policy of the law, are opposed to it. See 4 Kent, Comm. 119; Tayl. Landl. & Ten. § 531; *Sampson v. Henry*, 11 Pick. 379. The law gives ample redress, and a summary process for the vindication of the rights of the landlord, in such instances; and no more reason is perceived for allowing this extraordinary mode for redressing personal grievances in the case of real estate than in the case of chattels. To hold the doctrine contended for would be of dangerous tendency, and lead to breaches of the peace and oppression." The language just quoted coincides aptly with what has already been said above. In *Gear, Landl. & Ten. § 177*, it is remarked that the common-law right of forcible expulsion of the tenant is superseded in some of the states by statutes of forcible entry and detainer. Accordingly, it has several times been held in Illinois that the common-law right to enter, and use all necessary force to obtain possession of the premises from one who may wrongfully withhold the same, has been taken away by the statute of forcible entry and detainer of that state. See *Reeder v. Purdy*, 41 Ill. 279; *Jasper v. Purnell*, 67 Ill. 358; and *Westcott v. Arbuckle*, 12 Ill. App. 577. Again, in *Brock v. Berry*, 31 Me. 293, it was held that, in case of a tenancy at sufferance of a house and lot, the landlord was chargeable in trespass *quare clausum fregit*, if he entered by force, to the injury of the tenant or his family, even after two months' verbal notice to quit. We also have a statute of forcible entry and detainer, which is available for the purpose of ejecting those who, without right, take possession of the lands or tenements of another. Code, § 4085 et seq. But the remedy peculiarly appropriate for the expulsion of tenants holding over is that laid down in section 4077 et seq., already mentioned. The question with which we have been dealing is not, we are frank to say, absolutely free from doubt; but, after careful reflection, we believe we have adopted the safer course, in holding as announced.

2. Assuming that our view is the proper one, a verdict in this case in favor of the plaintiff could have been sustained; and we think the trial judge was right in granting a new trial, and that he gave the correct reason for so doing. Judgment affirmed.

(95 Ga. 346)

LACEWELL v. STATE.

(Supreme Court of Georgia. Feb. 18, 1895.)

ASSAULT WITH INTENT TO MURDER—SELF-DEFENSE
—REQUEST TO CHARGE—NEWLY-DISCOVERED EVIDENCE.

1. It was not error, in a trial for assault with intent to murder, to refuse to give in charge to the jury a written request of the accused which contained the following language: "Whenever a man exercises the right of self-defense, and sets up such right in answer to a charge of assault with intent to murder, he must be understood by the jury to have acted on the facts as they at the time appeared to him,"—although in other respects the request was unobjectionable, and one which ought to have been given.

2. Where, in the trial of a criminal case, a special request to charge, based on the statement of the accused, was presented, but refused because not couched in terms entirely legal and appropriate, it was not improper for the presiding judge to shape his instructions to the jury with reference to the sworn evidence in the case and the law applicable thereto; it appearing from the charge, as a whole, that the jury were fully informed as to the statutory provisions concerning the statement, and that the accused was otherwise given the benefit of what the statement contained, in case the jury should accept the same as true.

3. The newly-discovered evidence in this case comes up to all the legal requirements as to diligence, materiality, and importance, and is of such character as to entitle the accused to a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

John Lacewell was convicted of an assault with intent to murder, and brings error. Reversed.

W. I. Heyward and J. E. Robinson, for plaintiff in error. C. D. Hill, Sol. Gen., and Harrison & Peeples, for the State.

LUMPKIN, J. Lacewell was convicted of an assault with intent to murder, upon Barrett, by shooting him with a pistol. The state, by several witnesses, made out a plain and very strong case of guilt. The accused introduced no evidence, but made a statement which, if true, would have authorized the jury to find that he acted under the fears of a reasonable man, and shot in self-defense. The court was requested to charge the jury as follows: "There need not have been actual danger to Lacewell, but if the circumstances were of such a character as to have justified a reasonably courageous man to believe that he stood in immediate peril of his life, or the infliction upon him of injuries amounting to a felony, and that, act-

ing under such fears and under such circumstances, he shot Thos. A. Barrett, he could not be convicted of an assault with intent to murder; for such shooting would be justifiable, under the law, although it would have appeared afterwards that such appearances of danger were false, and that there was in fact neither the design to take away his life, or to inflict such injury upon him, nor real danger that it would be done. Whenever a man exercises the right of self-defense, and sets up such right in answer to a charge of assault with intent to murder, he must be understood by the jury to have acted on the facts as they at the time appeared to him; and if, without fault or carelessness on his part, he was honestly misled as to the character and purpose of the conduct, and defended himself rightly and justly, according to the facts as they at that time reasonably appeared to him, then he would be justified, even though the facts were otherwise, and there was in truth no real necessity for the shooting of Thos. A. Barrett."

1. The request was, in substance, about the same as the charge given in *McDuffie v. State*, 90 Ga. 788, 789; 17 S. E. 105, by our Brother Atkinson, who was at that time on the circuit bench. In alluding to the charge in that case, and having in mind the facts there presented, we remarked that it was most favorable to the accused, but did not otherwise pass upon its merits. As a whole, and taken altogether, it presents a fair view of the law of reasonable fears. It is not, however, absolutely free from criticism. The phrase, "whenever a man exercises the right of self-defense, and sets up such right in answer to a charge of assault with intent to murder, he must be understood by the jury to have acted on the facts as they at the time appeared to him," is capable of being misinterpreted, and, taken alone, might have misled the jury. Strict and close attention to the language immediately following this phrase might, perhaps, have prevented any misapprehension of the real meaning intended to be conveyed by the words quoted; but, on the whole, we think it safer for the judge not to say to the jury, in any criminal trial, that the accused must be understood to have acted on the facts as they appeared to him. They might, in many cases, feel authorized to conclude from the evidence that he acted with no reference at all to the facts appearing at the time of the perpetration of the alleged offense, but from malice, or some other motive or reason. Notwithstanding, therefore, the ruling of this court in *Underwood v. State*, 88 Ga. 47, 13 S. E. 856, following *Hayden v. State*, 69 Ga. 732, to the effect that when a legal and pertinent request to charge, based upon the statement of the accused, has been made in writing, it should be given, we do not think that in the case at bar the judge committed any error in refusing to give in

charge to the jury the request above quoted, in the precise language in which it was written, and therefore his declining to charge this request would not be cause for a new trial.

2. The court, however, did not entirely ignore the request presented, but so far respected it as to charge the jury as follows upon the subject of "reasonable fears": "Now, you will observe, gentlemen of the jury, the defendant must have acted from a reasonable fear that a felony would be committed upon him, in order to justify him. Now, then, you are to take all the evidence that is before you, and see if he did act from a reasonable fear, and if he did act, in shooting Barrett (if you believe he shot him), in a spirit of self-defense; and in doing that you must look at the case as it presented itself to the defendant at the time he did the shooting. But it is with this qualification: You must believe that the circumstances were sufficient to produce upon his mind the conviction that Barrett would take his life if he didn't shoot him. While you are to look at the case from his standpoint, yet you must believe from the evidence that he was justified in taking such a view of it. The law holds him bound to it." Error was assigned upon so much of the above-quoted charge as is embraced in the last two sentences, and it was insisted here that the effect of the language excepted to was to restrict the jury to the evidence alone, in passing upon the question as to whether Lacewell did or did not act under the influence of reasonable fears, and to exclude entirely from the jury all consideration, in this connection, of the statement made by the accused. It appears from the charge, as a whole, that the jury were fully informed as to the statutory provisions concerning the statement, and that the accused was given the benefit of all the statement contained, in case the jury should accept the same as true. Indeed, it can hardly be doubted that, if the jury had really believed Lacewell's statement, they would surely not have convicted him. Imputing to them ordinary common sense, it is not reasonable to suppose they would find the accused guilty of assault with intent to murder, if his statement satisfied them he shot in self-defense, and for the purpose of preventing the infliction of a felony upon him. Be this as it may, the trial judge complied substantially with the rule announced by this court in *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64, cited in *Miller v. State*, 94 Ga. 1, 21 S. E. 128. Before dismissing this branch of the case, we deem it not improper to refer briefly to a portion of the above-quoted extract from the charge of the court to which there was no exception. It will be seen that the judge, in effect, told the jury that, in order to justify Lacewell's act in shooting Barrett, they must believe that the circumstances were sufficient to produce up-

on Lacewell's mind the conviction that Barrett would take his life if he did not shoot Barrett. We do not understand this to be the law. The word "conviction" is too strong. It is only necessary that the accused should have acted under the fears of a reasonable man. The great right of self-defense would be emasculated of most of its value if, before one could exercise it, he must be convinced, to a demonstration, that he was in danger of being killed, or having some other felony perpetrated upon him. This is obvious, without elaboration. The doctrine of the court's charge would overturn the well-settled rules upon this subject which have been announced by this court from the time of its organization. Inasmuch, however, as no error was alleged as to that portion of the charge which we have just discussed, we could not, and would not, have granted a new trial because of the instructions it contains. At the same time, we feel constrained to say we do not sanction the use of the language which we have pointed out as objectionable.

3. We grant a new trial in this case solely because of the newly-discovered evidence. The alleged crime was committed on the 14th day of June, 1894, at one of the most public corners in the city of Atlanta. Immediately after the shooting, and without having opportunity to observe who were on the streets, the accused was arrested and placed in jail, and was tried on the 3d day of the ensuing July. Being in jail, he had no opportunity to search for or converse with witnesses, and his counsel both depose that they used all the diligence in their power, and did all they could, to find persons by whom they could prove the facts of the case, but were unable to accomplish anything in this direction before the trial took place. After the accused was convicted a number of persons voluntarily came forward, and disclosed what they knew of the transaction. There are, in the record, the affidavits of no less than seven persons, containing statements sustaining and closely corroborating the account of the difficulty given by the accused in his statement at the trial, which, as we have already observed, supported the theory of self-defense. The character of all these newly-discovered witnesses is strongly vouched for in the affidavits of other persons filed with the motion for a new trial. We are unable to say that if the testimony of these witnesses had been introduced before the jury the result would not have been different. Justice should be speedy, but it should also be sure. We do not mean to intimate what the verdict at the next trial ought to be, but we leave the case open upon its merits, to be determined by a fair and impartial jury, who, under our system, are regarded as the best judges of the credibility of witnesses, and are the supreme triors of all questions of fact. Judgment reversed.

O'DELL v. STATE.

(95 Ga. 333)

(Supreme Court of Georgia. Feb. 27, 1895.)

KEEPING POLICY LOTTERY — CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The grounds of the motion for a new trial are without substantial merit. The evidence of guilt was clear and convincing, and the supreme court will not, therefore, overrule the judgment of the trial court, refusing to set the verdict of guilty aside.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

William J. O'Dell was convicted of keeping a policy lottery, and brings error. Affirmed.

The following is the official report:

William J. O'Dell was found guilty of keeping a policy lottery, and his motion for a new trial was overruled. (1) Daniel Jenkins was introduced by the state, and testified: "I was in defendant's employment on July 4, 1893, and so continued for about nine months. I was employed to write policy tickets. People called off different numbers, and I wrote them out, and gave it to them. Defendant had about ten others employed, called 'vendors,' writing policy tickets. This concern had offices and branches in different parts of the town. The main office was in Congress Street Lane, between Bull and Drayton streets. There was nothing at all in the office but the man who stayed there writing. In the branch offices there were men writing tickets, just the same as in the main office. The writing was going on continually. Branch offices were located in different parts of the city." The witness was asked, "Where did you keep your office?" Defendant objected to this question on the grounds that it assumed the witness kept an office, that it was misleading, and that the answer might tend to criminate him. The objection was overruled. (2) John King testified: "My business is writing policies. I am writing for what is called the 'Charleston Wheel.' We called the tickets 'The Only Genuine.'" Witness was asked, "Who are you writing for?" Defendant objected on the grounds that the question was leading, and that it assumed that the witness was acting for another. The objection was overruled. The witness answered: "I was employed by Mr. Harris and Mr. Taylor. I am writing for Mr. William J. O'Dell, acting as principal. I have been writing for him about two years." (3) The state introduced certain alleged tickets, which, the motion for new trial recites, are attached to, and form a part of, the brief of evidence. This recital is not borne out by the transcript in this court. Defendant objected to the tickets on the grounds that there was nothing to connect him with them; that they did not appear to have been issued by him, or by his authority; and that one of them appeared to have been issued subsequent to the finding of the indictment. The objections were over-

ruled. The court charged the jury that "a reasonable doubt is not a fanciful doubt, but such a doubt as would naturally arise in the mind of a reasonable man, either from the evidence, or from the lack of evidence." Assigned as error, in restricting the doctrine of reasonable doubt to the evidence, or lack of it, and in holding that a reasonable doubt cannot arise from the prisoner's statement. (4) The court further charged that the jury may believe the prisoner's statement, in preference to sworn testimony, or may disbelieve it, according as it carries conviction, or fails to carry conviction, to their minds. Assigned as error, in requiring that the statement must carry conviction to the minds of the jury.

(5) The court charged: "In misdemeanor cases, there are no such things as accessories, as there are in felonies. All persons engaged in the carrying on or commission of the offense are equally guilty with the principal. In this case, if the jury should believe that the policy lottery was a scheme which embraces the turning of a wheel in which tickets had been placed; that tickets had been previously sold by writers, and purchased by men, with the hope or purpose of winning prizes, and that these tickets were placed in a wheel, and that the wheel was turned, and a certain number of tickets taken out; and that, if the numbers that were on the tickets were the numbers drawn, those who held the tickets won the prizes, and in this way prizes were won, and paid over to parties who bought tickets from these writers; and if the jury believe that there was a general scheme, which embraced the turning of a wheel at a certain office; that there were branch offices for the selling of tickets and the hazarding of money in the hope of winning prizes,—that would constitute a lottery contrary to the laws of this state, and persons attached or connected with it, either as writers, ticket writers, or whether engaged in carrying the books to the central office, and whether they acted at the central office, in receiving those books, or in turning the wheel, or in taking the numbers out of the wheel, or in paying over the prizes, all parties who were directly connected with it, and participated in it, whether as employés or otherwise, would be equally guilty of a violation of the law." Error because (1) whether certain facts or conditions would constitute a lottery is a question of fact, for the jury, and not of law, for the court; (2) the court expressed an opinion as to the evidence; (3) the charge was not warranted by the evidence; (4) direct connection and participation in a lottery do not make the participant guilty of keeping, maintaining, and carrying on a lottery; (5) the charge is misleading, because elements besides mere participation must exist, such as time, place, etc., before the prisoner would be guilty. (6) The court charged: "If the jury believe from the evidence that the defendant was not connected with the carrying on of the lottery, and was not in charge of

it, and that he simply went there to collect money, and had no connection with the carrying on of the lottery, the jury will acquit him. On the other hand, if they believe he was directly connected with it, that he gave directions to others, or that he paid prizes, or that he received the books, or that he did any act at all in the carrying on of the general scheme of a policy lottery, the jury will find him guilty." Error because (1) it restricts the jury to the evidence, and excludes the consideration of the prisoner's statement; (2) it invades the domain of the jury by charging that they will find him guilty; (3) it is not a correct expression of the law; (4) verdict contrary to law and evidence.

Garrard, Meldrim & Newman, for plaintiff in error. W. W. Fraser, Sol. Gen., for the State.

LUMPKIN, J. There were many grounds in the motion for a new trial. After examining them all carefully, we are satisfied they are without substantial merit. We think this will appear, without argument, from an examination of the reporter's statement, in which these grounds are set forth. The evidence clearly and satisfactorily shows that the accused was guilty. This being so, the supreme court will not diligently search for errors upon which to predicate the granting of a new trial. Judgment affirmed.

(95 Ga. 406)

CENTRAL RAILROAD & BANKING CO. v. COOPER.

(Supreme Court of Georgia. Feb. 27, 1895.)

ACTION AGAINST RAILROAD COMPANY — INJURIES TO GOODS SHIPPED — STORAGE ON UNCOVERED PLATFORM — ISSUES PRESENTED — INSTRUCTIONS.

1. Where the sole ground of liability alleged in a declaration against a common carrier was that the defendant negligently and carelessly unloaded the plaintiff's goods in the rain, and stored the same on an open, uncovered platform, "in the rain and weather," whereby the goods were rendered totally worthless, it was error to charge that if the goods were delivered to the wrong person, some one not authorized by the plaintiff to receive them, that would be a conversion by the defendant, and the plaintiff would be entitled to recover the full value of the goods, and to refuse to charge a written request to the effect that the action was not for the recovery of damages sustained by the plaintiff from the loss of his goods because of their delivery to the wrong person, but for damages resulting from the negligent manner in which the goods were unloaded and left exposed.

2. There being nothing in the pleadings or evidence properly presenting as an issue in the case the question whether the person by whom the plaintiff's goods were unloaded from the defendant's car was or was not authorized to receive the goods for the plaintiff, and the controlling question being whether that person, in unloading and storing the goods, was acting as the agent of the plaintiff or of the defendant, the court erred in so shaping its instructions to the jury as to present for their consideration the question first above stated, and in so qualifying the written requests of the defendant as to submit that question for their determination in

connection with, and as a part of, the question of agency above mentioned.

3. The charge, as a whole, did not properly submit the real issues involved, nor authorize the jury to pass upon the merits of the defense, which, if found true, would render a recovery for the plaintiff legally impossible. Because of the errors above indicated, and irrespective of other alleged errors, there should be another trial.

(Syllabus by the Court.)

Error from superior court of Houston county; C. L. Bartlett, Judge.

Action by M. L. Cooper against the Central Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Reversed.

Steed & Wimberly and John R. Cooper, for plaintiff in error. Hardeman, Davis & Turner, for defendant in error.

LUMPKIN, J. 1. The declaration alleged that the plaintiff shipped over the defendant's road 12 tons of guano, to be delivered to him at Perry, and that on its arrival at that place the company negligently and carelessly unloaded the guano "in the rain, and stored the same on an open, uncovered platform, in the rain and weather; that said guano was thoroughly wetted, and by said wetting, caused by said rain, it became totally worthless." No other ground of liability than as above stated was mentioned, or even hinted at, in the declaration; so there was no allegation upon which it would be legally possible to base a recovery in the plaintiff's favor upon the theory that the defendant was guilty of a wrongful conversion of the guano by delivering it to a person not entitled to receive it. Nevertheless, the court more than once instructed the jury, in substance, as indicated in the first headnote, and refused to charge a written request which correctly set forth the real character of the action. It hardly requires argument to show that the errors thus committed absolutely entitled the defendant—against whom the jury found a verdict for the full amount sued for—to a new trial. No plaintiff can recover upon a cause of action, however just or well sustained by proof, which is totally distinct and different from that alleged in his declaration; and this is so although palpably irrelevant evidence may have been received without objection. The instructions given by the court may, as abstract propositions of law, have been entirely correct, but they had no application or pertinence whatever to the issues involved in the case on trial.

2. The guano was unloaded from the railroad car by a boy named Allen, who was employed as a messenger at the depot of the defendant; but it does not appear that it was any part of his duty to unload freight cars. It is clear from the evidence that the expense of unloading the plaintiff's guano devolved upon him, and not upon the railroad company, and that he recognized this

fact. The real vital question at issue in the case was whether Allen was employed by the plaintiff as his agent to unload the car, or whether, in unloading the same, Allen was acting as the servant of the depot agent. Upon this question the evidence was conflicting; but there was nothing either in the pleadings or in the evidence properly presenting as an issue in the case the question whether or not this boy was authorized to receive the goods for the plaintiff, or that he undertook so to do. The court, however, in different portions of its charge to the jury, presented for their consideration and determination the question just indicated, and emphasized its supposed importance by making certain qualifications of written requests to charge submitted by the defendant's counsel. For instance, the court charged as follows: "If the railroad delivered the goods to the wrong person by mistake, or to a person not authorized to receive them, though they be delivered for the consignee or owner, the carrier believing him to be at the time the agent of such consignee or owner, that would not relieve the carrier, because the carrier must, at his peril, know that the person to whom he makes such delivery has authority to receive the goods." And again, after charging the following request: "If you should believe from the evidence that the plaintiff employed one Allen to unload the guano for him, and agreed to pay Allen fifty cents for unloading it for him, and Allen, being so employed by him, did unload the guano for him, and unloaded it negligently or improperly, or in the rain, and if the plaintiff was present at any time while it was being unloaded in the rain, and made no effort to prevent it, and did not at the time call the attention of the defendant's agent to the fact, or signify to defendant or its agent that he objected to the manner in which it was being unloaded, or make any request that it be stored differently, until several days later, when he refused absolutely to receive the guano, I charge you that you may consider these facts in determining the question whether the loss, if any, was not due to the plaintiff's own act, or attributable to his own negligence,"—the court qualified the same by adding after the words, "employed one Allen to unload the guano for him," the words, "and receive the goods"; and after the words, "and Allen being so employed by him," the additional words, "and authorized by him to receive the goods." In view of the real issue upon which the case should have been made to turn, the nature of which has been already stated, it seems clear, without further elaboration, that the above-quoted instructions must necessarily have been misleading to the jury, and that their effect was to cut off the defendant from its real defense.

3. The motion for a new trial contained numerous grounds. It is unnecessary, how-

ever, to notice them in detail, enough having been already said to show that the case was not properly tried, and to outline the principles which should control its determination. We will only add that, taking the charge as a whole, it did not even substantially submit the real issues involved in the case, but altogether prevented the jury from passing upon the merits of the defense, which, if found true, would render a recovery for the plaintiff legally impossible. Judgment reversed.

(95 Ga. 430)

**CENTRAL RAILROAD & BANKING CO.
v. ROBERTSON.**

(Supreme Court of Georgia. Feb. 27, 1895.)

**ACTION AGAINST RAILROAD COMPANY—DEFECTIVE
CROSSING—DUTY TO REPAIR.**

1. Where a railroad company builds and undertakes to keep in repair for the accommodation of the public a bridge over or approach to a private crossing, this is such an invitation to the public to use the same as would render the company liable for injuries resulting from defects negligently permitted to exist or remain in the bridge or approach, even though it be not affirmatively shown that such crossing is one which the company is bound by statute to keep in safe order and condition. This case is distinguishable from *Cox v. Railroad Co.*, 68 Ga. 446.

2. While the charge of the court as to "checking the train" may not have been entirely appropriate, yet, as the case really turned upon the question whether or not the defendant had negligently permitted the crossing to become and remain unsafe for want of repairs, and the plaintiff's evidence affirmatively showed the existence of such negligence, and that the injury complained of resulted therefrom, while the evidence introduced for the defendant was merely negative as these matters, the charge in question was harmless, and affords no cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Houston county; C. L. Bartlett, Judge.

Action by George B. Robertson against the Central Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Steed & Wimberly and John R. Cooper, for plaintiff in error. M. G. Bayne, for defendant in error.

SIMMONS, C. J. Robertson sued the railroad company for damages which he alleged had been sustained by him from the running of its train of cars against his mules and wagon while they were stalled upon the track at a crossing kept up by the defendant because a cross-tie placed in the crossing by the defendant was rotten and broken, etc. There was a verdict for the plaintiff for \$75, and, the defendant's motion for a new trial being overruled, it excepted.

It was contended on the part of the railroad company that the crossing at which the injury occurred, not being a public road or a private way established pursuant to law, the

company was under no duty to keep it in repair, the only statutory requirement as to the keeping in repair of crossings by railroad companies being that contained in section 706 of the Code, which provides that "all railroad companies shall keep in good order, at their expense, the public roads or ways established by law, where crossed by their several roads, and build suitable bridges and make proper excavations or embankments according to the spirit of the road laws." It appears from the evidence that the bridge or crossing at which the injury occurred was built and kept up by the railroad company, and according to the testimony of the defendant's "supervisor," who was the officer charged with the duty of looking after repairs of the track and crossings upon its line of road, "the crossing was put there to accommodate the settlement." In view of these facts it does not matter whether the crossing was one which the defendant was required by statute to keep in repair or not. Where a railroad company builds a crossing over its road, and undertakes to keep it in repair for the accommodation of the public, this is equivalent to an invitation to the public to use the same; and if a person using the crossing sustains injury from defects negligently permitted to exist or remain in the crossing, the company will be liable in damages, independently of any statutory provision on the subject. The principle which governs in such cases has been stated thus: "When the owner or occupier of land, by invitation, express or implied, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by the unsafe condition of the land or its approaches, and under such an express or implied invitation he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." *Oil Mills v. Coffey*, 80 Ga. 145, 4 S. E. 759. "The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers; and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." *Sweeny v. Railroad Co.*, 10 Allen, 373. The rule here laid

down has been applied in numerous cases against railroad companies, similar to the case now under consideration. See, among others, the following: *Stewart v. Railway Co.*, 14 Am. & Eng. R. Cas. 679, and cases cited in note; *Murphy v. Railroad Co.*, 133 Mass. 121; *Railroad Co. v. Bridges* (Tex. Sup.) 12 S. W. 210, 39 Am. & Eng. R. Cas. 604, and note; *Retan v. Railroad Co.* (Mich.) 53 N. W. 1094, 1097. As was said by the court in *Stewart v. Railway Co.*, supra: "It would be no answer for the defendant to say: 'I was not bound to make the crossing in the first instance; nor was I bound, after having made it, forever after to keep it in repair. I could abandon it at any time;' for all this might be true, and yet, so long as the defendant was continuing to hold out to the public an invitation to cross, it was virtually saying, 'This crossing is safe;' and it was its duty to use care to make its representations good." The present case is distinguishable from that of *Cox v. Railroad Co.*, 68 Ga. 446. That case was controlled by the statute of limitations, the court holding that the action was barred by the statute; and upon its merits it differs essentially from this case. Although the declaration in that case alleged that the crossing was in a dilapidated condition, and that the injury resulted from such condition, the proof failed to show dilapidation, and the only defect shown was that the bridge was narrower than the road at the crossing, which fact was well known to the plaintiff, for the railroad at that point passed through his own farm, and he had been using the bridge daily for months, sometimes as much as 20 times a day. The court held that the railroad company was not required by the statute to build and maintain the bridge, and was not liable for damages because it had constructed a bridge narrower than the law required.

2. While the charge of the court as to "checking the train" may not have been entirely appropriate, yet, as the case really turned upon the question whether or not the defendant had negligently permitted the crossing to become and remain unsafe for want of repairs, and the plaintiff's evidence affirmatively showed the existence of such negligence, and that the injury complained of resulted therefrom, while the evidence introduced by the defendant was merely negative as to these matters, the charge in question was harmless, and affords no cause for a new trial. Judgment affirmed.

(95 Ga. 439)

GUNN v. GUNN.

(Supreme Court of Georgia. Feb. 27, 1895.)

RIGHT TO CONTINUANCE — DELAY IN EMPLOYING COUNSEL—CASE PENDING IN ANOTHER STATE—DECREE ESTABLISHING TITLE—FAILURE TO SPECIFY LANDS—SUPPLEMENTARY PETITION.

1. Where the defendant in an equitable petition involving various and complicated matters made no effort to employ counsel until af-

ter the lapse of more than eight months from the service of the petition upon him, and then began negotiations with an attorney whose business engagements prevented his giving immediate attention to the case, and had not fully employed him up to the time the case was called for trial, there was no abuse of discretion in refusing a continuance in order to allow the defendant to complete his contract with his attorney, and make preparation for the defense; nor was the court bound to grant a continuance because the defendant had pending for trial at the same time an important case in another state, upon which trial his attendance was necessary.

2. Where counsel announced to the court that they represented the defendant only for the purpose of moving for a continuance and arguing a demurrer to the plaintiff's petition, and declined to have their names marked on the docket for the defendant, or to appear for him generally, and were fully heard upon the motion to continue and upon the demurrer, and no plea or answer was filed for the defendant, there was no error in refusing to allow such counsel, after the introduction of evidence by the plaintiff, to argue the case, upon its merits, to the jury.

3. Where a wife instituted an equitable proceeding against her husband for the purpose of establishing her title to various parcels of realty, in which he had invested money belonging to her, the title, as to some of these parcels being in him individually, and, as to others, in him as trustee for her, and there was a verdict in her favor as to all the property described in her petition and in an amendment thereto, and the decree, in general terms, but not by particular description, was broad enough to embrace other realty not so described, but which, in an affidavit filed by the defendant in the nature of an answer to the petition, he admitted to be her property, the wife could maintain a second equitable petition for the purpose of establishing and rendering certain her right to the property described in that affidavit, and not expressly mentioned or described in the petition, or the verdict rendered thereon; and it was germane to the purpose of the second petition to obtain an injunction restraining the husband from interfering with her enjoyment of the property she had recovered in the first case, and also that to which the petition in the second case referred.

4. No substantial error, if any at all, was committed by the court in admitting evidence, or in charging the jury. The demurrer was properly overruled, and no sufficient cause for reversing the judgment below appears.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Petition by Hattie A. Gunn against U. M. Gunn. Judgment for petitioner, and defendant brings error. Affirmed.

Steed & Wimberly, for plaintiff in error.
L. D. Moore, for defendant in error.

SIMMONS, C. J. 1. The plaintiff's petition was filed, and a copy served upon the defendant, in July, 1893. The case was one involving various and complicated matters, but the defendant took no step towards employing counsel to represent him until April, 1894,—shortly before the trial. He then commenced negotiations with a firm of attorneys for that purpose, but these negotiations had not been completed when the case was called for trial, in May, 1894. Upon the first call of the case, at the trial term, the attorneys who had been consulted by him re-

requested a postponement, and stated that the terms of the contract of employment had not been completely arranged; that the records necessary to understand the case were voluminous, and the facts complex, necessitating going into an accounting for a number of years; that they had been continuously engaged with other business since they had been consulted by the defendant, and they were not prepared to go into the trial of the case; and they declined to allow their names marked on the docket. The court assigned the case for trial, and several days after, on the final call, a member of the same firm of attorneys stated to the court that the defendant had left to attend the trial of a case in Florida, in which he was a party, and that they were powerless to defend him. Counsel presented an affidavit of the defendant, in which he stated that his presence at the trial of the case in Florida was necessary; also that his presence was necessary at the trial of the case at bar, and that he had negotiated with counsel to prepare him a defense therein, but, owing to other engagements of counsel, he had not been able to have them do so; and he asked that the case should be postponed until he could get back from the hearing in Florida. The court then asked counsel if he should mark his name for the defendant, to which counsel replied that he would represent him to present said affidavit, and to make and argue a demurrer. No plea or answer had been filed. Under this state of facts, the court did not abuse its discretion in refusing a continuance. The defendant knew for upwards of nine months before the trial that the case would stand for trial at that term, and there was no reason why he should not have employed counsel long enough beforehand to afford them full opportunity to investigate the case and prepare for the trial. Certainly there could be no excuse for his waiting until the case was called for trial without having made a definite engagement with counsel to represent him in the defense of the case. The fact that the defendant had a case in another state, which was about to be tried, was not a ground which the court was bound to recognize as sufficient.

2. Counsel demurred to the petition. The demurrer was overruled, and the case proceeded to trial upon the merits. The plaintiff introduced her evidence, and closed. No plea or answer was filed, and no evidence introduced, in behalf of the defendant. The counsel who had represented the defendant in the motion to continue the case, and in arguing the demurrer, proposed to address the jury upon the merits of the case, but the court refused to allow this, and error is assigned upon this ruling. As we have seen, the counsel who proposed to address the jury in behalf of the defendant had declined to have their names marked on the docket as representing him, and had announced to the court that they would rep-

resent him only in moving for a continuance, and arguing a demurrer to the plaintiff's petition. Under this state of facts, the court did not err in refusing to allow them to argue the case to the jury.

3. It appears from the record that the plaintiff and the defendant were married since the enactment of the married women's act of 1866; that at the time of the marriage the wife owned a large estate, consisting of bonds, stocks, and cash, which went into the husband's hands; and that, with money belonging to her, he bought large quantities of real estate, taking some of the deeds thereto to himself as trustee, and others to himself individually. A judgment was obtained against him by Harris, and an execution issued thereunder was levied upon some of this realty. The wife filed a claim to the property, and pending the claim case she ascertained, for the first time, that her husband had caused the deeds to the property to be made to himself, as above stated. She then filed an equitable petition against Harris and her husband, setting forth these facts, and praying that the deeds be canceled, and that all the property thus conveyed to her husband be decreed to be her own, in her individual right. In her petition, and an amendment thereto, she described particularly certain tracts of the land referred to, and prayed discovery from her husband as to other tracts purchased with her money. The husband filed an affidavit in the nature of an answer, disclosing, in addition to the tracts described in the petition and the amendment, other tracts of land which he had caused to be conveyed to himself as trustee and as an individual, and which he admitted to be her property. The jury rendered a verdict as follows: "We, the jury, find and decree that the property described in the petition and amended petition was purchased with the funds of Hattie A. Gunn; and we find that the said U. M. Gunn shall convey all of said property, by absolute deed, to the said Hattie A. Gunn, and that the decree of the court shall operate as such conveyance," etc. The court thereupon decreed that the title to the several tracts of realty described in the petition and the amended petition was in the plaintiff; that the defendant was not trustee, as to this "or any other property which may have been conveyed to him as such trustee"; and that "all titles taken by himself as trustee for her be canceled, and title vested in her, by this decree." It will be seen that, while the verdict embraced only the tracts of land described in the original and amended petition, the decree embraced, not only that property, but all other property which may have been conveyed to the defendant as trustee for his wife. After this decree was rendered the husband continued to assert possession and control of that part of the property admitted in his affidavit to be the property of the wife, which had not

been specifically described in the petition and the amendment thereto; claiming that the verdict did not cover such property, and that, as to property not embraced in the verdict, the decree was inoperative. The wife then filed another petition, the object of which was to have a specific verdict and decree as to that part of the property. In this petition she described the property in question, alleging that it was hers, and had been bought with her own money; that her husband still claimed possession of it, and sought to exercise control over it; that he interfered with her tenants, seeking to eject them by dispossessionary warrants, and claiming that he had the legal title to the property. The petition alleged also that, by reason of his cruel treatment and threats, she had been compelled to separate from him, and had filed a suit for divorce, which was then pending, but that he nevertheless forced himself into her house, and made threats against her person, etc. She prayed that the deeds by which the property in question had been conveyed to her husband as trustee and as an individual be canceled, and the title decreed to be in her, and that an injunction be granted restraining him from interfering in any manner with the property and from interfering with her personally. Under this state of facts, we think the petition was maintainable, and that the plaintiff was entitled to the relief sought therein. The decree rendered upon the former petition embraced, not only the property specifically described in that petition, but was intended to apply to all other property held by the husband which had been purchased with funds belonging to his wife. Inasmuch, however, as it was not definite and certain in its terms, as to the particular property covered by this part of the decree, we think it was proper, in view of the claim set up by the defendant, that the second petition should be entertained, for the purpose of establishing and rendering certain her rights in the premises. This petition was in the nature of a supplemental bill, in aid of the decree, to carry it out and give it a fuller effect; and, so far as the main purpose of the petition was concerned, it did not seek to obtain relief of a different kind, or upon a different principle, from that sought and granted in the original proceeding. See Story, Eq. Pl. & Prac. § 338. And we think it was germane to the purpose of the second petition to obtain an injunction restraining the husband from interfering with the plaintiff's enjoyment of the property she had recovered in the first case, and also that to which the petition in the second case referred.

4. No substantial error, if any at all, was committed by the court in admitting evidence, or in charging the jury. The demurrer was properly overruled, and no sufficient cause for reversing the judgment below appears. Judgment affirmed.

(32 Va. 1)

WATKINS v. WEST WYTHEVILLE LAND & IMPROVEMENT CO.¹

(Supreme Court of Appeals of Virginia. July 25, 1895.)

SALE OF LAND—ACTION FOR PRICE—PLEA OF SET-OFF—BREACH OF AGREEMENT—MISREPRESENTATIONS—EXPRESSIONS OF OPINION.

1. One sued for a balance due upon the purchase of certain lots filed, under Code 1887, § 3299, a special plea alleging that at the time of the sale, and as a part thereof, the plaintiff, in consideration thereof, agreed that there should be built upon adjoining lands owned by the plaintiff an hotel to cost \$50,000; that the plaintiff failed to carry out this agreement; and that the defendant was damaged \$900 by this breach of contract. *Held*, that said plea was admissible, under the statute.

2. A statement made by a seller of lots, that there will be built upon adjacent land owned by the seller an hotel, store, factory, and other manufacturing plants; that the same are in process of erection; and that an electric railway will run near the property,—are not such statements as will afford a ground for damages in case the plans are not carried out.

Appeal from circuit court, Wythe county; Williams, Judge.

Action by the West Wytheville Land & Improvement Company against Warner M. Watkins. Judgment for plaintiff, and defendant appeals. Reversed.

J. J. A. Powell and C. B. Thomas, for appellant. W. S. Poage and Walker & Caldwell, for appellee.

HARRISON, J. The West Wytheville Land & Improvement Company sold to Warner M. Watkins four lots for the aggregate price of \$1,000. Of this sum, \$250 was paid in cash. A deed was made to the purchaser, and a contemporaneous deed of trust was executed to secure \$750,—the balance of the purchase money. Payments were made on the balance thus secured, and the vendor instituted this action to recover of the vendee \$333.33, with interest; that being the balance remaining unpaid upon the transaction.

The defendant filed three special pleas in writing, under section 3299 of the Code, alleging that the plaintiff represented at the time of the sale that certain valuable improvements would be erected on the company's lands, near the lots bought by defendant, which would greatly increase their value; that these representations were false; that the improvements had not been made, and that the lots had consequently become of little value,—worth not more than \$25 each, aggregating \$100; and that he had suffered damage to the amount of \$900, which he claimed as offset to the plaintiff's claim, and asked for judgment against the plaintiff for \$566.67, the difference between the damages claimed and the balance of the purchase money sued for.

To the filing of these pleas the plaintiff objected, and the court sustained the objec-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

tion, and rejected said pleas. The court then entered judgment in favor of the plaintiff, and the defendant obtained a writ of error from this court.

It is insisted that these pleas were properly rejected, because the defense set up under them was a purely equitable one, and could not be made at law; that the defendant, by his pleas, sought to rescind and set aside his contract of purchase, and to reinvest the vendor with the title to the lots.

We do not understand this to be the purpose or effect of these pleas. On the contrary, they expressly set out the value of the lots, in consequence of the false representations complained of, and only claim damage by way of offset for the difference. The purchase price of the lots was \$1,000. The pleas allege that they are now worth \$100, and that the damage sustained, which is filed as offset, amounts to \$900. No rescission of the contract of sale is asked for, nor is any needed. The defendant has a deed to the lots, and, if he were to prevail with his defense, he would only have to move the court, under the statute (section 2498), to have the deed of trust resting on the lots marked "Satisfied" on the deed book, and produce the judgment in his favor as evidence of its satisfaction.

The party claiming to have been damaged by fraud and misrepresentation in the sale or purchase of real estate may elect to ask a court of equity to rescind the contract, or proceed at law for damages. Under the rejected pleas, the defendant had clearly elected to keep the lots and seek compensation for the damage sustained.

Section 3299 of the Code is as follows:

"In any action on a contract, the defendant may file a plea, alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit."

The language of this statute is broad and comprehensive, and was intended to avoid a multiplicity of suits, and give full opportunity for making defenses at law under the special plea of set-off provided for by it. Before this statute was as broad in its terms as now, Judge Lee, in commenting upon it,

in *Watkins v. Hopkins*, 13 Grat. 743, says: "The diminution in the value of the subject by reason of the vendor's shortcomings should, therefore, in some form, be made good to the vendee; and I can perceive no good reason why compensation should not be made good in this form by an equitable plea of set-off under our statute. Indeed, it seems a very appropriate mode by which the diminution of the value of the thing purchased may be compensated by a corresponding diminution of the price to be paid. There is nothing in the terms of the statute to restrict the plea of equitable set-off to contracts in relation to personalty. The terms of the act are general,—'in any action on a contract,'—and it includes contracts by deed, as well as contracts by parol; and there can be no reason for excluding all contracts relating to the sale and purchase of real property from its operation."

In the case of *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457, this court held pleas under section 3299 good which were filed for the purpose of recovering damages for a deficiency in the quantity of land, and for the loss of one-half of a spring which the vendor represented was on the land sold.

In the case of *Mangus v. McClelland* (decided at the present term of this court) 22 S. E. 364, in which special pleas filed under section 3299 were rejected, it appeared that the object of the pleas was, not only the recovery of damages for the false representation made to the defendant, but to have the contract between the parties rescinded, and to reinvest the vendor with the title to the lots which he had conveyed to the vendee; and a deed was filed with the pleas from the defendant reconveying the several lots to the plaintiff, and waiving and relinquishing all claim upon them on the part of the defendant. The court held that the pleas were not available in such a case, because a court of law was not competent to do complete justice between the parties, and recourse must, of necessity, be had to equity. The only object of the pleas in the case at bar was the recovery of damages by way of set-off resulting from failure of consideration, in consequence of the false representations of the vendor.

In a case, therefore, where the equitable grounds relied on would require a rescission of the contract, and a reinvestment of the vendor with the interest alleged to have been sold, a plea by way of special set-off, under section 3299, could not be relied on; but where no rescission is asked for, and none is needed,—the only purpose of the plea being to ascertain the damage sustained by reason of the default of the vendor,—the plea can be relied on, and the defense made at law under the statute. The pleas were therefore improperly rejected on the ground that the defense could not be made at law.

The second and third pleas make, in somewhat different form, the same defense.

They allege: That the inducement to the defendant to buy the lots was the representation by the plaintiff, at the time of the sale, that there would be built upon the company's land, and near the lots sold defendant, an hotel to cost \$50,000; that an electric street-car line would be built, running near said hotel, and that, on land adjacent and near thereto, a large stove foundry, and other manufacturing plants, would be erected, and were in process of erection; and that by reason of said improvements, and particularly the hotel, the lots would be very desirable and valuable. That these representations were relied on by the defendant, and constituted the sole inducement to the purchase.

A misrepresentation, the falsity of which will afford a ground of action for damages, must be as to an existing fact. It must be an affirmative statement or affirmation of some fact, in contradistinction to a mere expression of opinion, which ordinarily is not presumed to deceive or mislead. This is the general rule in all this class of cases, and we are unable to perceive that the case stated in these two pleas comes within any exception to the rule.

When, for the purpose of obtaining a subscription, a promise was made that a branch road would be built, it was held that this promise was but the expression of an existing intention, which was liable to be changed, and was no defense. *McAllister v. Railroad*, 15 Ind. 11, cited in *Cook, Stock, Stockh. & Corp. Law*, § 138. The pleas under consideration allege the mere expression of an opinion by the plaintiff, or its agents, that the improvements mentioned would be built. This is not such an affirmative statement or affirmation of fact as would make the plaintiff liable in damages, and was therefore no defense, and these two pleas were properly rejected as insufficient.

The first plea does not allege any fraud, misrepresentation, or other conduct on the part of the plaintiff that would entitle the defendant to the relief sought; but it does allege, substantially, that at the time of making the writing sued on, and contemporaneously with the contract of sale, and as a part thereof, the plaintiff, in consideration that the defendant would purchase the lots, undertook, and then and there faithfully promised the defendant, that there should be constructed and built upon said company's lands, and near the lots sold, an hotel to cost not less than \$50,000; that the defendant, relying upon this promise and undertaking of the plaintiff, did buy the lots, and execute the writing sued on. It is further alleged that the plaintiff did not perform its promise or undertaking, and that by reason of the breach he has suffered damage to the amount of \$900. If the allegation made in this plea can be supported by legal proof, the defendant would be entitled to recover, and hence it must be held to be a good plea,

and the defendant be afforded an opportunity to prove the case stated in it by such legal evidence as he may be able to produce on the trial.

For the reasons stated the court is of opinion that the second and third pleas were properly rejected, and is further of opinion that it was error not to allow the first plea to be filed. The judgment of the circuit court must therefore be reversed and set aside, and this case remanded for a new trial to be had herein in accordance with the views expressed in this opinion.

(21 Va. 612)

NORFOLK & W. R. CO. v. MILLS et al.¹
(Supreme Court of Appeals of Virginia. July 11, 1895.)

CONTRACT FOR RAILROAD WORK—CONCLUSIVENESS OF ENGINEER'S ESTIMATE—FRAUD AND MISTAKE—PRIOR DECISION ON APPEAL—EFFECT.

1. A contract for the excavation of a railroad tunnel provided that the compensation should be \$1.75 per cubic yard, unless a coal vein running through the tunnel was, in any sections of the tunnel, less than four feet wide, in which case the compensation should be \$3.50 for excavation of such sections; and it also provided that payments should be made monthly on estimates of the company's engineer, whose decision should be final. *Held*, that the mistake of the engineer in allowing only \$1.75 per cubic yard of excavation in sections where the vein of coal entirely disappeared, was such a violation of the contract as to amount to a fraud, and that consequently his finding and estimate were not conclusive.

2. A decision on appeal is conclusive upon any subsequent appeal in the same cause.

Buchanan, J., dissenting.

Error to circuit court, Roanoke county; Dupuy, Judge.

Action by Mills & Fairfax against the Norfolk & Western Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Watts, Robertson & Robertson, for plaintiff in error. Penn & Cocke and Eppa Hutton, Jr., for defendants in error.

CARDWELL, J. This case is the sequel to the case of *Mills v. Railroad Co.*, 90 Va. 523, 19 S. E. 171, and grows out of a contract under seal between Mills & Fairfax and the Norfolk & Western Railroad Company, dated the 1st day of February, 1887, whereby Mills & Fairfax agreed with the railroad company to build a specified portion of the Elkhorn branch of the Flat Top extension of the company's line of railroad, including the tunnel to be excavated to a finished section in a rectangular shape 16 feet wide and 19 feet high above subgrade, through the Flat Top mountain on the No. 3 coal bed. The contract is voluminous, but the whole controversy depends upon the price to be paid for the excavation of certain sections of the tunnel, Henry Fairfax, one of the contractors, who did the work, and

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

for whose benefit the suit is brought, maintaining that he is entitled to \$3.50 per cubic yard instead of \$1.75, the amount allowed him. The following provisions in the contract bear directly on this subject: "For Flat Top Tunnel excavation, coal at 85 cents per ton of 2,240 lbs; for Flat Top Tunnel excavation, rock and other material, at \$1.75 per cubic yard. The nineteen (19) feet of height of the section [of the tunnel] will be made up in its lower half, partly of No. 3 coal bed, and in its upper half of the overlying slates, fire clay, and sandstone. * * * If the coal bed should become of a less thickness than four feet, exclusive of the slates and coal not usually mined in run of mine coal in adjoining collieries, this will entitle the contractor to a price of three and one-half (\$3.50) dollars per cubic yard for the entire section of the tunnel, instead of the prices for coal and other excavation mentioned herein."

The contract also contains these provisions: "(3) Payment is to be made by the party of the second part for work done and materials furnished under this contract, on or about the fifteenth day of each month, upon proper estimates, rendered on the last day of the preceding month, for the work done and materials furnished during the preceding month, to the extent of and not beyond 85 per cent. of the amount of such estimates; and such monthly estimate, to be valid, must be accompanied by the certificate of the engineer of the company approving the same and declaring that the work done and materials furnished as therein stated are according to this contract, and that the charges for the same are according to this contract; and without such certificate no estimate shall be valid, and no payment can be demanded; and, in all questions connected with such estimates and the amounts payable thereby and thereunder, the decision of the said engineer shall be final and conclusive on all parties; and the balance thereof, or the 15 per cent. remaining on such estimates, shall not be payable until the whole work to be done under this contract has been fully completed, but shall be kept as part of the security for the performance of this contract on the part of the parties of the first part."

IV. "When the engineer in charge has furnished his certificate that all the work embraced in this contract has been completed agreeably to the specifications, and in accordance with the directions and to the satisfaction and acceptance of the said engineer, there shall be a final estimate made of the quality, character, and value of said work, according to the terms of this agreement, when the balance appearing due to the said parties of the first part, according to the certificate of said engineer, shall be paid to them, within thirty days thereafter, upon their giving a release under seal to the party of the second part from all claims or demands whatsoever growing in any manner out of this agree-

ment, and upon their procuring and delivering to the party of the second part full release, in proper form and duly executed, from mechanics and material men, of all liens, claims, and demands for materials furnished and provided, and work and labor done and performed upon or about the work herein contracted for under this contract."

All work under the contract having been completed by Henry Fairfax, to whom Mills had assigned all interest therein, and Fairfax refusing to accept payment according to the final estimate made out and certified to by the engineer, under the fourth clause of the contract, an action of covenant was instituted in the court below to recover the 15 per cent. reserved under section 3 of the contract, and the difference between \$1.75 per cubic yard and \$3.50 for a section of 1,200 lineal feet, equal to 13,200 cubic yards, of the tunnel, from which the coal vein entirely disappeared.

The allegations contained in the three counts in the declaration filed may be briefly stated as follows: First. That the work upon the tunnel was completed by plaintiffs on July 8, 1888 (the stipulation in the contract requiring its completion by August 1, 1887, having, during the progress of the work, and for a valuable consideration, been waived by the defendant company), in the most workmanlike and substantial manner, and to the satisfaction and acceptance of the engineer of the defendant company, and in accordance with the stipulations, etc., in the contract; that the defendant did not carry out or comply with the stipulations, etc., of the contract, in this: that it had not paid the plaintiffs \$3.50 per cubic yard for 1,200 lineal feet of the tunnel, making 13,200 cubic yards, for which plaintiffs were entitled to receive \$3.50 per cubic yard, but paid plaintiffs only \$1.75 per cubic yard for the 13,200 cubic yards; that the coal bed did not only become of a less thickness than four feet, exclusive of slate, etc., but disappeared entirely from the tunnel for 1,200 lineal feet, at 11 cubic yards per running foot,—making 13,200 cubic yards,—and for which plaintiffs are entitled to compensation at the rate of \$3.50 per cubic yard, according to contract, etc.; that the defendant company did, by its engineer, on the 8th of July, 1888, make a so-called final estimate of said work, but the alleged final estimate is not according to the price fixed for the section of the tunnel in which the coal bed "No. 3" became of less thickness than four feet, etc.; that, after the completion of the work on the tunnel and the acceptance thereof by the engineer, the defendant company has failed to pay the plaintiff the 15 per cent. retained by the defendant and remaining due to plaintiff, according to the tenor and effect of the contract, etc., although plaintiffs were then, and have ever since been, ready and willing, upon the performance by the defendant of the covenants and agreements of the contract

on its part with the plaintiffs, to give a release under seal to the defendant, and to provide and deliver to defendant a full release, in proper form and duly executed, from mechanics, etc., as provided for in the contract; and that both the monthly and final estimates made by the engineer were not made according to the terms of the contract, but were made in open and direct violation of the terms and intentment of the agreement under seal between the parties, in this: that, by the estimates of the engineer, the price of \$3.50 per cubic yard, fixed by the contract or agreement for the section of the tunnel in which the coal bed "No. 3" became of less thickness than four feet (and, in fact, wholly disappeared from the tunnel) was altered by the engineer, and put at \$1.75 per cubic yard, and that, in so doing, the engineer made a mistake so gross as to amount to a fraud upon the plaintiffs, depriving them of the sum of \$23,100, to which they are entitled under the contract.

Second. The second count is like the first, except that, in charging that the estimates and certificate of the engineer were a mistake so gross as to amount to a fraud, it alleges that "the engineer, at the time the said certificate and estimates were made, knew that the said 'No. 3' coal bed not only became of less thickness than four feet, as aforesaid, but entirely disappeared from the tunnel, which said conduct on the part of the engineer is a fraud upon the rights of the said plaintiffs."

The third count need not be noticed, as it was not relied on, and may be considered as out of the case. The defendant railroad company demurred to this declaration, and to each count thereof, "the demurrer being not to its form, but to its substance, and going to the merits of the case,"—in which demurrer plaintiffs joined; whereupon the circuit court, on September 3, 1892, sustained the demurrer; and to this judgment a writ of error was awarded the plaintiffs by this court. Upon a hearing of the cause by this court, the judgment of the circuit court was reversed, and the cause remanded for a trial on the merits of the case (90 Va. 523, 19 S. E. 171, *supra*), which trial was had at the September term of the circuit court, 1894, and a verdict rendered by the jury in favor of the plaintiffs for the sum of \$29,512.44, with interest from July 8, 1888, till paid, and judgment entered by the court accordingly. To this judgment a writ of error was awarded the defendant company by this court, and the case is now here for the second time.

We will first consider the effect of the decision of this court on the former appeal. This court in disposing, on the former appeal, of the demurrer to the declaration,—that is, in determining whether or not the facts alleged in the declaration, or in either count thereof, are sufficient to give plaintiffs a good cause of action,—must of necessity have construed the contract upon which the action is brought. It is true that, in or-

der that the opinion of the court may be considered as settling a question, it must appear that there was "an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties," etc. *Carroll v. Carroll*, 16 How. 275; 23 Am. & Eng. Enc. Law, p. 20, and authorities cited in note. But we have only to examine the opinion of the court (90 Va. 527, 19 S. E. 171) to find that there was "an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties," etc., viz. what is the true meaning of that clause in the contract which says: "If the coal bed should become of less thickness than four feet, exclusive of the slates and coal not usually mined in run of mine coal in adjoining collieries, this will entitle the contractor to three and one-half (\$3.50) dollars per cubic yard for the entire section of the tunnel, instead of the prices for coal and other excavation mentioned herein." And we also find that this court then construed this clause to mean that if the coal bed became of less thickness than four feet, exclusive of slates, etc., or, in fact, entirely disappeared from the tunnel for a distance of 1,200 lineal feet, equal to 13,200 cubic yards, as alleged in the declaration, or for any distance, then the plaintiffs should recover of the defendant the difference between \$1.75 per cubic yard, and \$3.50 per cubic yard for those sections of the tunnel in which the coal vein became of less thickness than four feet, etc., or from which the coal vein entirely disappeared. We further find that this decision of the court also determined (using substantially the language of the opinion) that if the engineer in charge of this work, notwithstanding the clear and explicit provision in the contract, and the acknowledged disappearance of the coal vein from the course of the tunnel, and notwithstanding that the work had been completed by plaintiffs agreeably to the specifications, and in accordance with his directions and to his satisfaction and acceptance, yet certifies, on the 8th of July, 1888, that the plaintiffs are entitled to only \$1.75 per cubic yard instead of \$3.50 per cubic yard, for that section of the tunnel from which the coal vein entirely disappeared, this conduct on the part of the engineer was either a fraud or a mistake so gross as to amount to a fraud upon plaintiffs' rights, and in either event plaintiffs were entitled to recover. It furthermore decides and determines that if the estimates made out by the engineer are not correct, because fraudulent, or because not within the terms of the contract, the tender of the release or releases provided for in the fourth clause of the contract was not necessary before plaintiffs could maintain their action for the amount due by defendant on the tunnel work or the 15 per cent. reserved till the work was completed.

We are of opinion that the construction placed upon the contract between the par-

ties on the former appeal is correct; that the court rightly decided the matters stated, and that they were "necessary to be determined to fix the rights of the parties," etc. That construction of the contract, together with the court's ruling on the points stated, became the law of this case, and it is a well-settled rule of this court that a question which has been decided upon the first appeal in any cause cannot be reviewed or reversed upon any subsequent appeal in the same cause. *Holleran v. Melsel* (recently decided by this court at Richmond) 21 S. E. 658, and the authorities cited.

This court having overruled the defendant's demurrer, the case was remanded to the circuit court for the plaintiffs to maintain the allegations in their declaration by proof; and all questions of fact were to be determined by the jury under proper instructions to be given by the court to guide them in reaching their conclusions.

The real controversy in this case may be briefly stated thus: It is contended on behalf of plaintiff in error that the true meaning of the contract between the parties is, whether the coal vein remained in the rectangle of the tunnel, as set forth in the specifications, or not, if the vein or bed of coal did not become of less thickness than four feet, exclusive of slate, etc., and defendants in error were able to follow it and make use of it in driving the "heading of the tunnel," the contract provided that they were to receive \$1.75 per cubic yard only for excavating the material from the section of the tunnel from which the coal vein entirely disappeared, and not \$3.50; second, that, by acquiescing in certain changes in the mode of doing the work under the contract, defendants in error had waived their right to claim the higher price for excavating the material from the section of the tunnel from which the coal vein disappeared entirely, if they ever had that right; third, that, by accepting and receipting for the monthly estimates certified by the railroad company's engineer, defendants in error waived their right to recover the higher price specified in the contract for excavating the material in the section of the tunnel from which the coal vein entirely disappeared; and fourth, that defendants in error could not recover in this action, because they had not tendered to the plaintiff in error the release or releases provided for in the fourth section of the contract.

On the other hand, it is contended by the defendants in error that the true meaning of the contract is that, the coal vein having disappeared entirely from the rectangle of the tunnel for 1,200 lineal feet, equal to 13,200 cubic yards, they were entitled to receive \$3.50 per cubic yard for excavating this section of the tunnel, instead of the \$1.75 paid them.

Second, that there had been no modification of the contract, or change in the mode of doing the work in the tunnel, acquiesced in by the defendants in error, which deprived them of the higher price specified in

the contract for excavating the material from that portion of the tunnel from which the coal vein entirely disappeared.

Third, that, in accepting and receipting for the monthly estimates certified by the engineer, defendants in error did not waive their right to recover the difference between \$1.75 per cubic yard for the 13,200 cubic yards of material, exclusive of slates, etc., excavated from the section of the tunnel from which the coal vein entirely disappeared, and \$3.50, as the engineer, in certifying said monthly estimates, was guilty of a fraud, or a mistake so gross as to amount to a fraud, upon the rights of defendants in error, and that they had received these monthly payments under protest, relying upon receiving the true amount due them under the final estimate to be made, as provided in the fourth clause of the contract.

Fourth, that they are not estopped from bringing this suit on the ground that they have failed to tender to plaintiff in error the release or releases provided for in the fourth clause of the contract, because the engineer, in certifying the monthly estimates and the final estimate of the work done in the tunnel, was guilty of a fraud, or of a mistake so gross as to amount to a fraud, upon the rights of the defendants in error; and, fifth, that, all claims for labor or material having been paid by contractors, and the time within which laborers and material men could acquire a lien under the statute having expired, it was unnecessary for defendants in error to tender releases, under the fourth clause of the contract, before instituting this suit.

The decision of this court on the former appeal, as we have already seen, settled all controversy over the construction of the contract in favor of the contention of the defendants in error; and, to determine whether they were entitled to recover the difference between \$1.75 per cubic yard and \$3.50 per cubic yard of material excavated from the section of the tunnel from which the coal vein entirely disappeared, it was only necessary for defendants in error to show by proof, at the trial before the jury, that the coal vein did dip out of or entirely disappear from the rectangle of the tunnel for 1,200 lineal feet, equal to 13,200 cubic yards, as alleged in the declaration. Upon proof of these facts, the burden was shifted from the defendants in error to the plaintiff in error, and the defendants in error were entitled to the verdict, under the law as established by this court, unless the plaintiff in error could make good the one or the other of the several grounds of defense heretofore enumerated. This was the crucial test as to the right of the defendants in error to a verdict by the jury; for, as we have seen, this court, on the first appeal, construed the contract according to the contention of defendants in error, and also decided that if it was shown by proof that the coal vein did entirely disappear from the section in

the rectangle of the tunnel, as alleged in the declaration, and the engineer, in face of this fact, made and certified estimates of the work only allowing defendants in error the price fixed by the contract for the work estimated in that part of the tunnel as though the coal vein continued therein, and not of less thickness than four feet, exclusive of slates, etc., this was a fraud on the part of the engineer, or a mistake so gross as to amount to a fraud, upon the rights of the defendants in error, and that they were entitled to recover; and, further, that if this should be shown by the evidence to be the case, it was not necessary, before bringing their suit, for defendants in error to tender to plaintiff in error the release or releases provided for in section 4 of the contract. The inquiry, therefore, to be made here, is whether or not the matters to be determined by the jury have, under the instructions given by the court below, been fairly and rightly submitted to them.

Exception is taken to the ruling of the trial court in refusing seven instructions asked for on behalf of plaintiff in error. The first three were properly rejected, because plainly misleading and inapplicable. They were predicated upon the erroneous assumption that a willingness on the part of the railroad company to pay to Fairfax the amount shown to be due on the final estimate certified by the engineer was the equivalent of a lawful tender of the amount, followed by bringing the money into court to make the tender good, while in point of fact no such tender was ever made.

Instruction No. 4 was properly refused, because misleading, and well calculated to convey to the minds of the jury the idea that they could not find for the plaintiffs unless the evidence was sufficient to establish intentional—that is, willful—fraud, or actual fraud, and this was not in accord with the decision of this court on the former appeal. In the opinion of the court after quoting from the case of *Condon v. Railroad Co.*, 14 Gratt. 302, as authority for his conclusion, Fauntleroy, J., says: "But, even though no fraud, mistake, or misconduct is alleged in the declaration, still it is alleged that the estimate and certificate of the engineer are not within the terms of the submission, but are in violation of the contract, and are for that reason void and inconclusive. The declaration alleges that the contract fixed the compensation of the plaintiffs, under the circumstances admitted, at \$3.50 per cubic yard, and that the estimate of the engineer fixed the compensation at \$1.75 per cubic yard. If this be true, the engineer has exceeded his authority, and abrogated the contract between the parties." This, to our mind, fairly states the law, and negatives the idea that it is necessary to inculpate the engineer in intentional, willful fraud in order to warrant the jury in finding that the estimates certified to by him were not conclusive of the rights of the plaintiffs

to recover in this suit. When the engineer's estimates are fairly made, in accordance with the manner pointed out in the contract, they are binding; and, when not fairly made, they are not binding. *Morse, Arb. 33*, and cases cited.

Instruction No. 5 was given by the court as asked for by the defendant, except that the court adopted it as its own instruction No. 8, which in no way prejudiced the defendant.

So far as proper to have been given, instruction No. 6 is covered by the instructions given by the court.

The seventh and last instruction asked for by the defendant is covered by No. 9 given by the court, with an obviously proper addition thereto.

The 10 instructions given by the court in lieu of those asked for by both parties are as follows:

"No. 1. The court instructs the jury that, if they believe from the evidence that Fairfax received from the railroad company compensation for the materials moved from the tunnel at the rate of \$1.75 per cubic yard for that portion in dispute, and that he relied on his ability to adjust the matter satisfactorily with said company, and that, under all the circumstances, he had the right, reasonably, to so rely, from his conversation with Paddock and other officers of the company, then the acceptance of such payment at \$1.75 is not to be taken as a waiver of his rights under the contract, or as acquiescing in the construction placed upon the contract by the defendant. The jury must determine from all the facts and circumstances of this case whether the plaintiff has, by his conduct, waived any of his rights under said contract, or has acquiesced in the construction placed on the contract by the defendant."

"No. 2. The court instructs the jury that, by the terms of the written contract sued upon, which are as follows: 'If the coal vein should become of a less thickness than four feet, exclusive of slates and coal not usually mined in run of mine coal in adjoining collieries, this will entitle the contractor to the price of \$3.50 per cubic yard for the entire section of the tunnel instead of the price of \$1.75 per cubic yard,'—the parties had reference to the rectangle, as shown on the blue print, nineteen feet high, above subgrade, which may have been fixed at a point not exceeding two feet below the bottom of the No. 3 coal bed, as opened at each portal; and if the jury believe from the evidence that the said coal vein became of less thickness than four feet in said rectangle, then the plaintiff is entitled to the price of \$3.50 per cubic yard for the space in which it was less than four feet thick, unless the jury believe that the parties placed a different construction upon said contract, or changed said contract by agreement. And the court further instructs the jury that, though they may believe from the evidence that, when it became apparent that the coal vein disappeared from said rect-

angle by a dip or deflection in the vein, that the plaintiff assented to a change in the mode of doing the work contemplated, by agreeing to excavate the coal bed in its entire length, to the western portal, before taking down the top of the tunnel, and that, when said agreement was made for the change in the mode of the work, if nothing was said in reference to the price of the work to be done (provided they believe such change in the mode of doing the work did not necessarily contemplate a change in the price also), then the terms mentioned in the written contract, as to the price, would prevail, and the plaintiff would be entitled to the price of \$3.50 per cubic yard for the part of the work in dispute, unless the jury believe from the evidence that the defendant so construed the contract at the time the change in the mode of the work was agreed upon, and while the work was being performed, as to entitle the plaintiff to demand and receive only the sum of \$1.75 per cubic yard for said work, and that the plaintiff, with full knowledge of the defendant's construction of the said contract, acquiesced in the said construction."

"No. 3. The court instructs the jury that, in determining the question whether or not the plaintiff acquiesced in the construction of the contract on the part of the defendant by which the defendant paid, and the plaintiff received, \$1.75 per cubic yard for the material in the section of the tunnel in dispute, they are to look to all the circumstances of the case, and the plaintiff would not be considered as acquiescing in the defendant's construction of the contract unless he has neglected to assert his own construction thereof to the defendant or its agents for such length of time as to warrant the defendant in fairly believing that he had waived or abandoned his right to demand more than \$1.75 per cubic yard."

"No. 4. The court instructs the jury to disregard all evidence of the construction put upon this contract by W. W. Coe at the time this contract was entered into, unless the jury believe that the said construction was communicated by said Coe to Mills & Fairfax, and was acquiesced in by them, or unless the said Mills & Fairfax put the same construction on said contract at said time; and, though they may believe from the evidence that, immediately prior to and about the time the contract was written and signed by the plaintiffs, the probability was discussed between W. W. Coe and the plaintiffs as to the 'petering out' of the coal vein in the mountain, yet such discussion cannot be considered by the jury as sufficient to change, modify, or add to the provisions and terms of said written contract, but only for the purpose of ascertaining the circumstance, connected with the subject-matter of the contract at the time it was made, and the object and purpose of the parties as avowed at the time they entered into the contract; but the terms of said contract are to be construed as directed by the court in instruction No. 3."

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"No. 5. If the jury believe from the evidence that the plaintiff in this case completed the tunnel through the Flat Top mountain in a workmanlike manner and substantial manner, and to the satisfaction and acceptance of the engineer of the Norfolk & Western Railroad Company, and that the tunnel was accepted by said company, then the said plaintiff is entitled to recover any sum that may be due him for said work under the contract sued on, although there was a change in the method of doing the work, which said change was ordered by the Norfolk & Western Railroad Company."

"No. 6. If the jury believe from the evidence that there was no change in the contract sued on, or no construction of it by the parties different from the construction given by the court; and if the jury further believe that the coal bed became of less thickness than four feet, exclusive of the slates and coal not usually mined in run of mine coal in adjoining collieries, in the rectangle 16 feet wide and 19 feet high, and described in the written contract, for the space of 1,200 lineal feet, which is equal to 13,200 cubic yards; and if the jury further believe that the engineer of the Norfolk & Western Railroad Company in his estimates for said work allowed the said Fairfax \$1.75 per cubic yard,—then these estimates are not in accordance with the terms of the contract sued on, but in making the said estimates the engineer committed a mistake so gross as to amount to a fraud upon the plaintiff, and neither the said monthly or final estimates are binding or conclusive upon the said plaintiff, but he is entitled to \$3.50 per cubic yard for the aforesaid 13,200 cubic yards, subject to any proper credits."

"No. 7. If the jury believe from the evidence that there was no change in the contract sued on, and no construction of it by the parties different from that placed upon it by the court; and if the jury further believe that the coal bed became of a less thickness than four feet, exclusive of the slates and coal not usually mined in run of mine coal in adjoining collieries, in the rectangle 16 feet wide and 19 feet high, described in the written contract, for the space of 1,200 lineal feet, which is equal to 13,200 cubic yards; and if the jury further believe that the engineer of the Norfolk & Western Railroad Company knew the said coal vein became of less thickness than four feet, as aforesaid, in the rectangle aforesaid, at the time of his making the monthly and final estimates, and the said engineer allowed the said Fairfax \$1.75 per cubic yard for said material in said estimates, instead of \$3.50 per cubic yard,—then these estimates are not in accordance with the terms of contract sued on, and this conduct on the part of the engineer is a fraud upon the rights of said plaintiff, and neither the said monthly or final estimates are binding and conclusive upon the said plaintiff, but he is entitled to recover \$3.50 per cubic yard for the aforesaid 13,200 cubic yards, subject to any proper credits."

"No. 8. The court further instructs the jury that, under the terms of the contract sued on in this case, the monthly estimates, in order to be valid, must be accompanied by the certificates of the chief engineer of the Norfolk & Western Railroad Company approving the same, and declaring that the work done and materials furnished as therein stated are according to the contract, and that the charges for the same are according to the contract; and, without such certificate, no payment could be demanded by the plaintiffs, and in all questions connected with such estimates, and the amounts payable thereby and thereunder, the decision of the said engineer is final and conclusive on both parties. And the court further instructs the jury that, if they believe from the evidence that the prices fixed for the excavation mentioned in the plaintiffs' declaration were fixed in the monthly estimates provided for in said contract, and that said estimates were afterwards approved by the said engineer, and his certificates appended thereto, as provided in said contract, then the prices so fixed for all the work included in said estimates must be considered by the jury as the correct prices, unless the jury further believe from the evidence that, in approving said estimates and in making his decision in reference thereto, and in giving the certificate approving the same, the said engineer was guilty of intentional fraud, or of such gross mistake as to necessarily imply bad faith on his part."

"No. 9. The court further instructs the jury that, under the terms of the contract sued on in this case, the line of road or the gradients could be changed in any manner and at any time if the chief engineer of the defendant company should consider such change necessary, and that, in case of any such change, no claim for an increase in prices of excavating or embankment on the part of the plaintiff on that account would be valid, or be required to be considered by the said engineer, unless such claim or claims were made in writing before the work on that part of the section where such alteration was made was commenced. Where this provision in the contract conflicts with the special provisions in relation to building the tunnel, the special provisions must prevail."

"No. 10. If the jury believe that the estimates provided for in the contract were proper and show the correct amounts due the plaintiffs, then, before the plaintiffs could institute suit to recover the reserved percentage, they were bound to tender to the defendant the release stipulated for in the contract; but, if the jury believe that the estimates were not proper, because fraudulent, then the tender of such release was not necessary in order to give the plaintiffs the right to sue."

We will not consider these instructions *seriatim*. We are of the opinion that they fairly cover the entire case, and properly submit the questions of fact to be determined to the jury.

The main question of fact upon which the case turned before the jury was whether or not there had been any change or modification of the contract or in doing the work in the tunnel, acquiesced in by the defendants in error, whereby they waived their right to recover the difference between \$1.75 and \$3.50 per cubic yard of the excavation in the section in the tunnel from which the coal vein entirely disappeared. It is stated by counsel for plaintiff in error, in their brief, that the facts in the case are few and undisputed, and it is also stated in the petition for the writ of error as a fact which had not been disputed that there was no change or modification made in the contract whatsoever, except the following: "That, before any work was done on the tunnel at all, the parties having ascertained that probably the coal would make a dip at a certain point in the tunnel (as it had been ascertained that the same coal bed in that region in other mines had made a dip), instead of following strictly the provision of the specifications, which read as follows: 'The work to be so prosecuted from each end as to insure that the headings meet in close proximity to the center of the tunnel, and the work of taking down the top shall closely follow that of making the coal excavation,'—the parties agreed that they should first follow the coal bed from one side of the mountain to the other, and not take down the top until after all the coal had been excavated; and the plaintiff not only acquiesced in the modification, but approved of it, and agreed to do away with certain provisions in his favor set forth in the specifications if such a modification should be made." Now, it appears from the evidence that the provisions done away with by this modification were the requirements that certain air chambers or shafts for ventilating the tunnel as the work progressed, that were to be constructed by the railroad company, might be dispensed with, the president of the company being anxious to be relieved from building them; but this was not assented to by the contractors except on the condition that the company would furnish the material to make the *brette* work in the tunnel. It is furthermore stated as a fact, in the petition of plaintiff in error, that there was no other modification whatever made, either as to prices or as to any other provision of the contract, and this statement is fully sustained by the facts.

The question as to whether defendants in error had acquiesced in the construction of the contract by which plaintiff in error paid, and he received, \$1.75 per cubic yard for excavating the material in the section of the tunnel in dispute, or had waived or abandoned his right to demand more than \$1.75 per cubic yard, was for the jury to determine upon the evidence before them, and that question was fully submitted to them under the instructions of the court. See court's instructions Nos. 1, 2, and 3, above.

The proper determination of the several points of defense involved a consideration by the jury of the whole course of dealings between the parties, and their relations to each other, and especially of the evidence bearing upon the allegations of fraud or gross mistake. These are matters peculiarly within the province of the jury to determine, and the court in its instructions properly left them the largest latitude, and invited them to explore and consider all the evidence adduced in the case before reaching a conclusion. It seems to us that the law governing the case was also fully and fairly given to the jury, to enable it correctly to weigh the evidence and decide upon the contention of the parties as to the effect of the receipts given by the defendants in error in settlement of the monthly estimates of the engineer, and also with respect to the failure of the defendants in error to tender releases, as provided for in the fourth clause of the contract. See court's instructions Nos. 6, 7, 8, 9, and 10.

Plaintiff in error relies with apparent confidence upon the case of *American Manganese Co. v. Virginia Manganese Co.* (decided by this court recently) 21 S. E. 466, as authority in point upon the question as to whether defendants in error by receipting for the monthly estimates waived their right to recover more than the \$1.75 per cubic yard for the material excavated in the section of the tunnel in dispute. The cases are wholly dissimilar. The *Manganese Case* was one of separate and independent transactions between the parties directly, running through a series of years. There was no intermediary or arbiter to whom their controversies were to be submitted, and, of course, there was no suggestion of fraud or of mistake on the part of such arbiter, as in the case here; but it was a case of a party who, through a long and uninterrupted course of dealings, with full knowledge of all the facts, acquiesced in a construction of the contract placed upon it by the other party; and, finally, there was in the *Manganese Case* no provision which is the equivalent in any respect to the fourth clause of the contract here sued on, and which postponed a final settlement until the completion of the work, and then authorized an estimate to be made of its quality, character, and value.

Exception is taken by plaintiff in error to a verbal statement made by the judge presiding at the trial, when instruction No. 8 had been given, that "this instruction must be construed along with instructions Nos. 6 and 7 given"; but as this remark of the judge could not, in our opinion, have affected the result, the exception is without merit.

Plaintiff in error having failed to make objection at the time to the matters set forth in bills of exceptions Nos. 6 and 7, they cannot be considered by this court. 4 Minor, Inst. vol. 1 (2d Ed.) 826; *Mitchell v. Com.* (Va.) 20 S. E. 892.

We need now only consider plaintiff in error's exception to the ruling of the trial court in refusing to set aside the verdict of the jury and grant a new trial on the ground that the verdict is contrary to the law and the evidence. There is no conflict, as we have seen, as to the facts proved; and, if there was, the case stands here as upon a demurrer to the evidence of defendants in error, and, applying the rule, too well settled to require citation of authority, that this court will not interfere with the verdict of the jury unless it appears that it was rendered plainly against evidence or without evidence, the verdict in this case must stand, as it is clearly sustained by the law and the evidence.

For the foregoing reasons, we are of opinion that there is no error in any of the rulings of the circuit court of Roanoke city, and its judgment is therefore affirmed.

KEITH, P. (concurring). I have deemed it proper to file a concurring opinion in the case of *Norfolk & W. R. Co. v. Mills & Fairfax*. The case of *Condon v. Railroad Co.*, 14 Grat. 302, is a memorable judgment. It settled the law in this state upon a most interesting question, and has been frequently cited with approval in the courts of other states. It was followed in the case of *James River & Kanawha Co. v. Adams*, 17 Grat. 441, and we do not question or doubt the law as thus established. But, whatever force may be attributed to the rule of stare decisis, and however respectable may be the authority upon which it rests, the principle itself is subordinate to another rule which declares that a case having been once determined in this court, every proposition of law then decided is binding upon this court whenever that case comes before it for its adjudication. In the one instance, the cases are followed as precedents; in the other, they are recognized not only as the law, but as *res adjudicata*,—that is, an adjudication of the matter in controversy. If, therefore, there should appear to be any antagonism between the decisions of this court just adverted to and the decision of this court in the first writ of error in this case, reported in 90 Va., 19 S. E., the latter has paramount and binding force upon us. In my judgment, however, there is no conflict between them. Judge Moncure, in his opinion in *James River & Kanawha Co. v. Adams*, reported at page 441 of 17 Grat., after stating that the estimates made and approved by the engineer, such as are under investigation in this case, are final and conclusive unless objected to before paid, goes on to say that it is argued that a fraudulent estimate is not conclusive, and that therefore the court would have erred in giving the instruction asked for by the defendants in that case. Without deciding whether fraud in making the estimates would avoid them at law or not, he declares that it is a sufficient answer to the argument to say that fraud will not be presumed, and that there was no evidence whatever of any such fraud before the jury. "If," said he, "the plaintiff had evidence of any such fraud, he

should have offered to introduce it, and thus have plainly raised the question. Indeed, there is no charge of fraud in the declaration, and certainly the court did not refuse to give the fourth instruction, and give another in lieu thereof, on the ground of fraud, but on wholly different and inconsistent grounds. An award is final and conclusive in equity as well as at law; and yet it may be avoided, always in equity, and sometimes at law, by proof of fraud. Such proof, when admissible, gets the award out of the way. So long as it remains in the way, it is final and conclusive. It is never *prima facie* evidence merely of the matter it decides. If evidence at all, it must be conclusive."

Whatever doubt Judge Moncure may have entertained, as to the effect of the allegation and proof of fraud, in a court of law, upon such estimates and receipts as are in evidence in this case, it is forever set at rest so far as this litigation is concerned by the unanimous judgment of this court, reported in 90 Va., 19 S. E., where the court in the most emphatic manner asserts that the particular fraud set out and described in this declaration, if proved, rendered null and void the estimates of the engineer, and obviated the necessity for the tender of a release upon the part of the defendants in error. How could it be doubted that such would be the case? There is no instrument so solemn, there is no judgment or decree so binding, but that, if fraud in its procurement be alleged and proved, it ceases to protect the wrongdoer or to obstruct the injured in the assertion of their rights. The opinion of Judge Cardwell is so clear, and, to my mind, so conclusive, both upon the law and facts of this case, that I shall not prolong this opinion, which it was perhaps unnecessary to have written at all. I do not understand that it was necessary to impute moral turpitude to the plaintiff in error, its officers or agents, but the construction of this contract claimed by the plaintiff in error seems to me to be flagrantly and obviously erroneous and unjust.

As to the disappearance of the coal vein from the section of the tunnel excavated there can be no doubt. It is not denied, or even questioned. That the defendants in error did the work which entitles them to the higher rate of compensation is beyond all controversy, and the only ground upon which it is sought to defeat their recovery is the purely technical objection that a grossly erroneous estimate made by the engineer of the plaintiff in error interposes an insurmountable obstacle to their demand. I do not say, and I do not believe, that the officers of the company were guilty of intentional, willful fraud; but I do say, without hesitation, that their conduct in this case was predicated upon a mistake so gross as to amount to, and in all respects to be equivalent to, a fraud, so far as the rights of the defendants in error are concerned.

BUCHANAN, J. (dissenting). I am unable to concur in the opinion and conclusion reached by the majority of the court in this case.

As I understand the law, the trial court erred in giving and refusing instructions to the jury to the prejudice of the defendant company, the plaintiff in error here, for which its judgment ought to be reversed.

By the third clause of the contract sued on it was agreed between the parties that it should be the duty of the chief engineer of the defendant company to make and certify monthly estimates of the work done and materials furnished, and the charges for the same, according to the contract, and without his certificate no estimate was valid and no payment could be demanded; and, in all questions connected with such estimates and the amounts payable thereunder, the decision of such engineer was final and conclusive. It is clear, from this provision of the contract, that the parties thereto considered the possibility of differences of opinion, and of disputes arising upon the execution of the contract. It is to be presumed that it was also in their minds that it was possible that the engineer might err in the performance of his duties and in the determination of the matters which were left to his decision. In order, therefore, that the interests of neither party might be placed in peril by disputes as to any of the matters covered by their agreement, or in reference to the work to be done or the compensation to be paid, it was expressly stipulated that the engineer's determination of these matters should be "final and conclusive on all parties." That such was the effect of the provision of the contract referred to is settled by the decisions of this court and of the supreme court of the United States, and by the great weight of authority in this country. *Kidwell v. Railroad Co.*, 11 Grat. 676; *Condon v. Railroad Co.*, 14 Grat. 302; *Railroad Co. v. Polly*, 14 Grat. 447; *James River & Kanawha Co. v. Adams*, 17 Grat. 441, note; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035.

There is a provision in clause 4 of the contract for a final estimate, but it is clear that this final estimate, provided for after the work was completed, did not, nor was it intended in any way to, destroy the finality or conclusiveness of the monthly estimates, which are by the express terms of the third clause declared to be "final and conclusive on all parties." It was argued in the case of *James River & Kanawha Co. v. Adams*, 17 Grat. 441, 442, referred to above, that there was a difference between the conclusiveness of the monthly estimates and the final estimate, but Judge Moncure, in delivering the opinion of the court, showed with convincing force that such monthly estimates as are provided for in the contract sued on were as final and conclusive as far as they went as the final estimate itself. He says in that

case: "Whether either are conclusive or not depends upon the contract, which may make either or both conclusive, according to the intention of the parties. Sometimes these monthly or periodical estimates are obviously designed as mere approximations, to enable the company to make safe and reasonable advancements to the contractor during the progress of the work. All that is required to the validity of such estimates, it has been held, is that they were made bona fide and with the intention of acting according to the exigency of the contract. Redf. R. R. 207; *Ranger v. Railway Co.*, 27 Eng. Law & Eq. 35-46. If evidence at all in an action for the balance due on the completion of the work, they would be prima facie; or, if conclusive, it could only be as an estoppel in connection with evidence of the assent of the parties. But, ordinarily, these monthly estimates are designed to be accurate and final, as far as they go; and sometimes the contract expressly provides that they shall be final and conclusive. Redf. R. R. 207; *Herrick v. Belknap's Estate*, 27 Vt. 673; *Barker v. Belknap's Estate*, Id. 700. The contract in this case so provides. It prescribes the same mode of proceeding in regard to the final, as in regard to the monthly, estimates, and declares both alike final and conclusive. Indeed, it directs the final estimate to be made, not of the whole work, but of all work not embraced in former estimates,—thus showing that, in effect, the final estimate is the last monthly estimate, and all the monthly estimates, as far as they go, are final estimates. It is true that these monthly estimates are not final and conclusive as to matters not embraced therein, or not considered and estimated by the engineer in making them. In this respect they are unlike the final estimate, which was intended and expressly directed to embrace 'all work not embraced in former estimates,'—so that, while a part of the work might have been omitted in former estimates because of its unfinished state or otherwise, it must of necessity be embraced in the final estimate; but, as to matters embraced in the monthly estimates, they are as conclusive as the final estimate."

These monthly estimates being final and conclusive in their character, they could only be attacked for fraud, or for a mistake so gross as to imply fraud, upon the part of the chief engineer. Whether there was such fraud or mistake is the gravamen of this action; and, without the allegation of fraud, or a mistake so gross that it necessarily implied fraud, and proof thereof, the plaintiff was not entitled to recover.

If the proof in the case showed that the engineer was guilty of such fraud or of a mistake in making up and certifying the monthly estimates, still the conduct of the plaintiff, although he was not satisfied with the determination of the engineer, was such as to conclude him from recovery in this action. In contracts where there is no provi-

sion for the arbitration or settlements of disputes and differences, as there was in this case, the rule is, if monthly statements are made by one party, upon an erroneous construction of the contract, and the other party accepts such estimates, receives payments of the amounts shown to be due him, and gives receipts for such amounts, with full knowledge of all the facts, he is concluded by such statements, payments, and receipts, and cannot go behind them.

It was said by this court in *American Manganese Co. v. Virginia Manganese Co.*, 21 S. E. 466, that: "If the defendant knew of any irregularity or had ground of complaint at the time these monthly statements, returns, and payments were made, it was the duty of the defendant to have made known and insisted upon its objections then; but if, instead of doing so, it accepted such payments, and gave receipts in full for the amounts shown to be due by such settlements and returns, it is concluded by the original amounts as fully as if formal and final settlements of accounts had been made between the parties, and the defendant cannot now go behind such settlements and receipts in full, without showing there was fraud or mistake in weighing the ore or in making returns thereof according to the method actually adopted for weighing and making such returns."

But, in the case before us, the estimates made, and upon which the parties settled, were not made by either party to the contract, but by the chief engineer of the defendant company, selected by the parties for that purpose. His determination of the work done, materials furnished, and charges therefor, were declared to be final and conclusive on all parties, by an express stipulation of the contract. In such case, if there be objections to such estimate by either party, it is the duty of such party to make his objections at once, if he intends to insist upon them. We cannot accept them, receive what appears by them to be due him, give receipts in full for such sums, and afterwards question their correctness for any cause of which he had knowledge when he accepted such payments and gave such receipts. These monthly estimates and certificates were the awards of the chief engineer, who, by agreement of the parties, had been made the arbitrator of these matters; and his determination or award was conclusive and final upon the parties, unless he was guilty of fraud, or such gross mistake as necessarily to imply fraud, in making such estimates. If such fraud or mistake existed, either party had the right to reject them and to refuse to be bound by them; but neither party could act upon them and afterwards repudiate them, if he knew at the time he acted upon them, by paying or receiving money, that the engineer, or arbitrator, was guilty of fraud, or of a mistake so gross as necessarily to imply fraud. There can be no question in this case

that the plaintiff, when he received the money shown by those monthly estimates to be due him, and gave receipts in full therefor, had full knowledge of every fact he now relies upon to show fraud or mistake. These monthly estimates, if fraudulent, or so erroneous as to imply fraud, were voidable. The plaintiff had the right either to avoid them or to confirm them. He could not take under them and deny their validity.

Mr. Pomeroy says, in discussing the ratification of voidable transactions, that: "While the party entitled to relief may either avoid the transaction or confirm it, he cannot do both. If he adopts a part of it, he adopts all. He must reject it entirely if he desires to obtain relief. Any material act done by him with full knowledge of the facts constituting the fraud, or under such circumstances that knowledge must be imputed which assumes that the act is valid, will be a ratification." 2 Pom. Eq. Jur. § 916.

Where an award, either because the arbitrators have exceeded their authority, or because all matters submitted have not been considered, or for any other reason, is voidable, the parties may expressly or impliedly ratify it. After such ratification, it can no more be objected to. 1 Am. & Eng. Enc. Law, 714.

In a note to same volume of the Encyclopedia, page 714, it is said that it was decided in *Neel v. Field*, 72 Ga. 201, that where matters in controversy between two parties were submitted to arbitration, and the party in whose favor the award was made received money and notes of other persons from the opposite party, in full settlement thereof, knowing at the time that there was a mistake in the calculation, by which the full amount of interest due him had not been allowed, he could not retain the amount received under the arbitration and also sue for the balance due by reason of the mistake. If he received the money and notes in full settlement under the award, after notice of the mistake, he must abide the settlement.

Morse, Arb. p. 530, says that where, as often occurs, an award is voidable, it is perfectly capable of being ratified, and that such ratification may be either express or implied. "It may be made by a written or verbal assent or acceptance, or it may arise from acts done by a party of such a nature as to raise a presumption of assent or acceptance, which he will thereafter be conclusively estopped to deny." *Culver v. Ashley*, 19 Pick. 300.

One of the reasons why these monthly estimates are made final and conclusive is that as the work progresses the difficulty of accurately measuring the different kinds of work done, whether in rock, coal, or clay, increases. The substances removed or covered up in the fills and the cuts or tunnels show less clearly how much of each substance they contained. The result is that it is simply impossible after a short time for

even engineers of approved skill to make estimates that are correct, and any estimate which a jury may afterwards make is at best merely conjectural. Such provisions are therefore dictated by convenience, if not by necessity, tend to do justice to both parties, and are upheld and encouraged by the courts. *Railroad Co. v. Polly*, 14 Grat., at pages 459, 460.

It is therefore the duty of the party who objects to such monthly estimates to make his objections promptly. Unless it be so made, one of the chief objects for which these monthly estimates were made wholly fails.

The chief engineer made the monthly estimates and certified them, as the work was done, beginning April 16, 1887, and continuing until June 20, 1888. Each of these estimates showed the state of accounts between the parties up to that time, the balance due the plaintiff which was then payable, and the amount reserved, as provided in the contract. When these estimates were made, from month to month, during that period, by the chief engineer, they were accepted by the parties, and settlements and payments made in accordance therewith. When each payment was made by the defendant, the plaintiff executed a receipt in full for the balance found to be due according to such monthly estimate, and such receipt was attached to the monthly statement, which showed clearly and distinctly the true state of accounts between the parties up to that date, according to the determination of the chief engineer. It is true that, during that period, the plaintiff showed some dissatisfaction with the prices that were allowed him by the chief engineer, but he never declined to accept these monthly estimates, nor to receive the amounts which they showed he was entitled to, nor to give receipts in full therefor. There is no claim that he ever made any formal protest to the engineer or the defendant company as to these monthly estimates.

He was asked these questions, among others:

"Q. When you were improperly estimated, did you make any objection to it, or did you state that you would claim the contract figures to the officers of the company; and, if so, to whom?

"A. I stated once or twice to Mr. Coe that I considered that I was entitled to \$3.50 per cubic yard for the material, when the coal vein disappeared.

"Q. When was that?

"A. During the progress of the work. That I was not being properly estimated; that I was entitled to more money than I was getting,—that is what I told Mr. Coe.

"Q. Did you have any further conversation with Mr. Coe on the subject?

"A. Not until I was informed that the last item sheet for the company had been sent into his office. Then I made an ear-

nest protest to Mr Coe that I would not receive the final estimate based upon \$1.75 per yard."

On cross-examination, he testifies as follows:

"Q. And when you went to him and complained about these things, he told you he did not think you were entitled to any more?

"A. Yes, sir."

The plaintiff had conversations, during the progress of the work, with some of the subordinate engineers of the defendant company, in which he claimed that he was not getting all that he was entitled to under his contract; but during that same period the plaintiff was, in effect, writing to the higher officials of the defendant company, every month, that these estimates were correct and satisfactory to him,—for his receipts in full for the monthly balances must be construed to have that meaning. The action of the plaintiff in accepting such estimates, receiving payments in accordance therewith, and giving receipts in full therefor, were such acts, if true, as would estop the plaintiff from going behind the monthly estimates, and the jury should have been so instructed. If this view of the law be correct, the instructions of the court given upon this point were clearly erroneous.

This court, upon the former writ of error in this case, in which the demurrer to the declaration was involved, construed the contract sued on, and by that construction we are of course bound.

The only effect of the decision, however, was to hold that, upon that construction of the contract, the allegations of each count in the declaration stated a good cause of action. But that decision did not deprive the defendant of the right to make full defense upon the merits of the case. Neither did it prevent it from showing that the parties themselves, as well as the chief engineer, had placed a different construction upon the contract from that placed upon it by this court, for the purpose of showing that the chief engineer was not guilty of fraud, or mistake which implied fraud, in making his monthly estimates, and for the purpose of showing that the plaintiff had, with full knowledge of the facts upon which he relied to show the fraud or mistake, ratified and confirmed the monthly estimates, and was therefore estopped from denying that they were valid and conclusive as to the balances due him when made.

I agree with the majority of the court that the question whether or not the chief engineer was guilty of fraud or of gross mistakes in making and certifying the monthly estimates was peculiarly within the province of the jury. It was of the utmost consequence, therefore, that the jury should be properly instructed upon this question; and, while the instruction offered by the defendant company upon this point may not be an

entirely correct statement of the law, the court ought not to have rejected it and refused to give any instruction in lieu of it. Generally, if a party offers an incorrect instruction, the court is not required to give a correct instruction in lieu of it, unless its refusal to do so would mislead the jury. But where, as in this case, the court rejects the instructions of the party and gives its own instructions in lieu of his, it is clearly its duty to instruct upon every point upon which he asks instruction, if there be evidence tending to establish the facts upon which it is based. Upon this point, I think the trial court also erred, to the prejudice of the defendant company.

I am of opinion that the judgment should be reversed, and a new trial awarded.

(97 Ga. 187)

ABNEY v. STATE.

(Supreme Court of Georgia. July 15, 1895.)

CRIMINAL TRIAL—LEADING QUESTIONS—INSTRUCTIONS ON EVIDENCE.

Under the circumstances disclosed by the record, there was no error in permitting the solicitor general to ask the witness introduced by him leading questions. Nor did the language in the charge of the court, of which complaint is made, carefully guarded as it was, amount to an expression or intimation of an opinion upon the evidence, or the effect thereof. The charge, as a whole, was full and fair, and covered all the substantial issues made in the case. The verdict was fully warranted by the evidence.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Jack Abney was convicted of manslaughter, and, his motion for a new trial having been overruled, he brings error. Affirmed.

The following is the official report:

Jack Abney, Wyley Abney, and I. P. Davis were indicted for the murder of J. L. Williams. Jack Abney was found guilty of voluntary manslaughter, and, his motion for new trial being overruled, excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in failing and refusing to instruct the jury as to the credibility of witnesses; the evidence being conflicting, and he having been requested so to do by defendant's counsel in their argument. Error in intimating an opinion to the jury as to what had been proved, namely, that this movant and Davis went to the house of deceased on the Sabbath, carried a gun, and loaded it in the presence of deceased; the court charging: "In arriving at a conclusion as to the intention of these parties, and as to what deceased ought to have thought and what he ought to have done, you should consider all the testimony in the case; the acts, the sayings, and the whole conduct of defendant, Wyley Abney, and Davis; the time they came, and the facts that it was the Sabbath, and one of

them carried a gun, and loaded it in his presence, if this was a fact; and all that was said and done, and the manner of each of them. Now, you consider all these facts. Now, I do not mean to intimate that these parties carried a gun there. I do not mean to intimate that any of the parties loaded a gun,—Jack Abney, Wyley Abney, or anybody else,—or that they used a knife, or anything else. I do not mean to intimate to you that fact, either in this charge, or to express any opinion as to what has not been proved,—either in this charge, or during the progress of the case; and, if it appears to you that I have done so, you can understand that I did not mean to do so. The determination of the facts of the case are entirely with you. I do not mean to intimate that they carried a gun there, or that they loaded a gun there, or that they did anything else. That is your province, your duty, to determine all the facts in the case. I simply called your attention to this, that you may consider all the facts, the testimony of all the witnesses, and the statement of the defendant, in arriving at what was the intention of these parties, and what was their conduct; taking all the testimony introduced in the case, together with the statement of the defendant, and weigh it all, and make up your verdict from all the testimony, and from the law which the court has given you in charge." Because the charge was upon a hypothetical statement of facts, not warranted by the evidence, and excluded, in almost every instance, the jury's consideration of every hypothesis of defendant's innocence or justification. The portion of the charge so objected to being: "If the defendant on trial, Jack Abney, together with Wyley Abney and I. P. Davis, went to the house of deceased with the intention of killing deceased, or doing him some bodily harm, and acted in such a way as to lead deceased to believe that they intended to attack him, and as to excite the fear of a reasonable man, or whatever may have been their intention in going there, if, after getting to the home of deceased, they acted so as to excite his fears, and to excite the fears of a reasonable man, and under such circumstances deceased made the first attack,—that is, if they acted in such a way as to make him believe his life was in danger, or that they were about to attack his home or his house in a riotous and tumultuous manner,—if, under such circumstances, deceased made the first attack, shooting at one of the parties, he had the right, under the law, to do this; and if he did this, and a struggle ensued between deceased and these parties, or any of them, and in such struggle deceased was killed, the killing would be murder, and all the parties engaged in any way in it would be equally guilty." Because the court failed to state in the charge, as set out above, that in order to justify deceased he must have been acting under the influence

of these fears, and not in a spirit of revenge. Because the charge, as set out last above, assumes that defendants Davis and Wyley Abney were about to attack the home or house of deceased in a riotous and tumultuous manner, when there was nothing in the testimony authorizing it, nor authorizing or requiring the charge. And because said charge was erroneous, in that the court failed to go further, and state: If, after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation, etc., of deceased could not be prevented, then he would be justifiable in the attack, etc. Because the court, in its charge to the jury, ignored and failed to charge upon one of the leading and controlling theories of the defense, to wit, that defendant, on the day of the killing, finding that his son, Wyley Abney, and I. P. Davis were contemplating going to the home of deceased, and suspecting that there might be trouble if they went there, attempted to dissuade them from going, and, failing to do so, determined to accompany them for the purpose of preserving the peace, and with that intention took the gun from I. P. Davis, and went with them to the home of deceased, and took no part in the difficulty in which deceased was killed, except to attempt to preserve and keep the peace. Error in relating again and again that portion of the charge most favorable to the state's theory, but not that part which was favorable to defendant. Because the charge, taken as a whole, is argumentative, and unfair to defendant. Error in stating, in substance, in the hearing of the jury, that counsel for the state had been entrapped by one of the witnesses, John T. Thomason, a witness for the state, whose testimony was favorable to defendant, and in allowing the solicitor general to cross-examine him, without any evidence whatever to show that the state's counsel had really been entrapped by the witness, "as appears in the evidence of said Thomason, incorporated in brief of evidence."

Bartlett & Washington, W. E. Spinks, and J. M. Moon, for plaintiff in error. W. T. Roberts, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(95 Ga. 445)

PULLMAN et al. v. ELLIS et al.

(Supreme Court of Georgia. March 2, 1895.)

CREDITORS OF CORPORATION—JOINER IN EQUITABLE PETITION—MISAPPROPRIATION OF ASSETS—LIABILITY OF CORPORATORS.

1. The creditors of an insolvent mercantile corporation, the corporators of which, having the full and absolute control of its affairs, have wrongfully misappropriated its assets, so as to put the same beyond the reach of these creditors may, though the claim of each be separate and distinct from those of all the others, unite in an equitable petition for the purpose of

subjecting these corporators to individual liability because of such misappropriation, and to this end, of obtaining an accounting by them for the assets thus misappropriated. The corporation itself is a proper party codefendant to such petition.

2. The gravamen of the plaintiffs' petition being the misappropriation complained of, and it being alleged that such misappropriation actually occurred, and was in law a fraud upon the rights of petitioners, it was not essential that the declaration should set forth distinct acts of actual fraud on the part of the corporators in making the misappropriation.

3. Averments in the petition to the effect that the alleged misappropriation occurred between the 24th of October, 1892, and the 29th of August, 1893, were sufficiently specific as against a special demurrer alleging that there were "no allegations of the time of the misappropriation."

4. The petition, alleging that the debts due the petitioners were created between the dates above mentioned, and that they bore interest from the date last named, sufficiently, for the purpose of a case like the present, set forth the time of the creation of the petitioners' claims.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Petition by John Pullman & Co. and others against John R. Ellis and others. Judgment for petitioners, and defendants bring error. Affirmed.

Dessau & Hodges, for plaintiffs in error. Hardeman, Davis & Turner and Willingham & Lane, for defendants in error.

SIMMONS, C. J. It appears from the petition that Ellis and his wife, having become heavily indebted as partners in a mercantile business, had themselves, together with a near kinsman, incorporated under the name of the John Ellis Company, and in the corporate name bought goods from the petitioners, and continued the business formerly conducted by the partnership, until they had discharged, out of the assets of the corporation, nearly all of their individual liabilities contracted as members of the partnership, and thereby rendered the corporation insolvent. The corporation then made an assignment of all its assets for the benefit of creditors, but enough was not realized from the sale of the assets to pay the preferred creditors under the assignment, and the petitioners' claims are still unpaid. The corporators, in their application for incorporation, represented that their capital stock amounted to \$25,000, all of which, they alleged, had been subscribed and paid in; but the only capital subscribed and put into the corporation was the merchandise, notes, accounts, and choses in action which belonged to the partnership. The petitioners charge that the real purpose of the corporation was to protect the separate and individual property of Ellis and his wife from the outstanding liabilities they had contracted as a partnership, the scheme being to continue the business under the corporate name until the liabilities contracted by them as partners were discharged out of the as-

sets of the corporation; and that the appropriation of the corporation assets in this manner was a fraud upon the petitioners and other creditors of the corporation, and Ellis and his wife were liable to them for the amount of the misappropriation. The amounts due by the defendants to each of the petitioners are set forth in the petition, and it is alleged that these amounts are for merchandise sold to the John Ellis Company between October 24, 1892, when the corporation was organized, and August 29, 1893, when the deed of assignment was made, and that interest is due thereon from the date last named. The petitioners pray for judgment against the defendants for the amount of their respective claims, and that defendants account for the assets of the corporation which were appropriated by Ellis and his wife in payment of their firm debts or otherwise, and for general relief, etc. The grounds of demurrer are misjoinder of parties plaintiff, improper joinder of parties defendant, want of a cause of action, insufficient allegations of fraud, insufficient allegations of the time of the creation of petitioners' debts, and no allegation of the time of the misappropriation of corporate assets.

There was clearly no misjoinder of parties plaintiff. The allegations in the petition show that all of the plaintiffs had a community of interest in the questions of law and fact involved in the controversy, and in the kind and form of relief demanded; and by their joining in one petition a multiplicity of suits could be avoided, and equal and exact justice could be done much better than if separate suits were brought by the different creditors. If the misappropriation did not amount to as much as the corporate debts, the proportion each creditor would be entitled to could not be ascertained in separate suits. Indeed, one creditor, suing alone, might recover the entire amount of the misappropriation, leaving nothing for other creditors; but, upon a joint petition by all the creditors, the court could decree a distribution among them of the amount recovered, in proportion to their respective debts. It is also clear that Ellis and his wife and the John Ellis Company were not improperly joined as parties defendant. See *Burns v. Beck*, 83 Ga. 471, 10 S. E. 121. We think the allegations of fraud were sufficient. The gravamen of the petition being the misappropriation complained of, and it being alleged that such misappropriation actually occurred, and was in law a fraud upon the rights of petitioners, it was not essential that the declaration should set forth distinct acts of actual fraud on the part of the corporators in making the misappropriation. As against a demurrer alleging that there were "no allegations of the time of the misappropriation," averments in the petition to the effect that the alleged misappropriation occurred between the 24th of October, 1892, and the 29th of August, 1893, were

sufficiently specific; and, the petition alleging that the debts due the petitioners were created between the dates above mentioned, and that they bore interest from the date last named, the time of the creation of the petitioners' claims was sufficiently set forth for the purpose of a case like the present. A good cause of action was set forth, and the court did not err in overruling the demurrer. Judgment affirmed.

(96 Ga. 284)

CARR v. STATE.

(Supreme Court of Georgia. March 18, 1895.)

HOMICIDE—DEFENSE OF INSANITY—INSTRUCTIONS.

1. The defense of insanity at the time of the perpetration of the alleged crime is included in, and made by the plea of, the general issue; and while, in the absence of a special plea setting up insanity at the time of the trial, it may not have been necessary for the court to explain to the jury the nature and purpose of such a plea, that this was done is not cause for a new trial, it appearing that the court, in this connection, also instructed the jury to the effect that the mental condition of the accused since the commission of the alleged criminal act, and at the time of the trial, might be considered, as throwing light upon the condition of his mind at the time that act was done.

2. The defense being general insanity, and there being no evidence of special dementia, or that the accused was laboring under any delusion as to the act committed, there was no error in charging: "Insanity is where there is a total or partial impairment of the intellect, and to such an extent that the person who is thus affected does not know the difference between right and wrong, as to the act that he is committing."

3. That the court undertook, in a general way, to explain to the jury the different forms and kinds of insanity, was not, of itself, an invasion of their province in passing upon the questions of fact involved in the case; and though the court's definitions may not have been sufficiently comprehensive, nor, in all respects, perfectly correct, they were not, in view of the entire charge, harmful to the accused.

4. While it may not have been appropriate for the court to inform the jury, as matter of fact, that insanity, in all its forms, was liable to become worse; that insanity of any kind was progressive in its nature; and that, while there were some exceptions, the general rule was that it progressed till it ended in complete dementia,—so doing was neither expressing an opinion as to the facts of the pending case, nor, in view of all the evidence and of the respective contentions of the parties, cause for a new trial.

5. The legal presumption being that every person is sane, and that every such person remains so until the contrary is shown, it is essential to the establishment of the distinctive defense of insanity, as such, that insanity at the time of the commission of the offense be proved by a preponderance of the evidence; and the burden of so doing rests upon the accused. If this particular defense is not thus established, the jury would not be authorized to acquit upon the same. The evidence bearing on the question of insanity should, however, be duly considered, in connection with all the other evidence, in determining whether or not, upon a view of the whole case, there was a reasonable doubt of the guilt of the accused. The mere failure of the court, in the present case, to charge as indicated in the preceding sentence,—there being no request so to do,—is not cause for a new trial; the charge upon the subject of reasonable doubt being sufficiently full and fair to

give the accused the benefit of all the evidence relating to his alleged insanity, for the purpose of casting a doubt upon his guilt.

6. The charges complained of, and which are not covered by the rulings announced in the preceding notes, if erroneous at all, contain nothing which would justify the granting of a new trial. There was no error in striking the special plea filed by the accused, nor in refusing to allow his counsel, because of such plea, to open and conclude the evidence and the argument. The newly-discovered evidence was cumulative, and would not probably change the result. The alleged irregularities and improprieties in the conduct of court and counsel were not shown to have occurred. The alleged misconduct of the jury, in reading newspaper reports of the trial, was sufficiently disproved by the affidavits of the jurors themselves, and the affidavits to the contrary made by two of them could not be received to impeach the verdict. The evidence, as a whole, fully warranted the conviction, and there is no good cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clarke, Judge.

Alex Carr, having been convicted of murder, brings error. Affirmed.

Arnold & Arnold, for plaintiff in error. J. A. Anderson, C. D. Hill, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, J. 1. It is the right of counsel conducting the defense of one charged with crime to file a special plea alleging that the accused is insane at the time of the trial; and when such a plea is filed it becomes the duty of the court to cause the issue thus made to be first tried by a special jury, and if the plea is found to be true an order should be passed committing the accused to the lunatic asylum. In a trial of this kind the merits of the accusation against the accused are not involved or passed upon. When, however, no such plea is filed, and the accused goes to trial upon the general plea of "Not guilty," he may show under that plea that he was insane at the time the alleged crime was committed, and therefore legally irresponsible for the same. The rules above stated are well established in the criminal procedure of this state, and no citation of authority in support of them need be made. At the trial of the case now under investigation, the judge undertook to state these rules to the jury. It was perfectly proper to inform them as to the right of the accused to show he was insane at the time he committed the homicide; but there was, perhaps, no occasion for explaining to them the nature and purpose of a special plea alleging insanity at the time of the trial, as no such plea had been filed. We cannot see, however, that so doing affords any reason for granting a new trial. While it is true that counsel for the accused contended he was insane at the time of the trial, they did not choose to present this special plea, and have it first determined; and although, by reason of the instructions of the court, the jury may have been made aware of his right to present such a special plea, it is

not at all probable that this operated injuriously against him, because the court very clearly and distinctly informed the jury that his mental condition since the commission of the homicide, and at the very time of the trial, might be considered by them, as throwing light upon the condition of his mind when the homicide occurred; and the question whether or not the accused was insane at the time of the trial was one with which the jury were concerned only in so far as it might throw light upon his mental condition when he took the life of the deceased.

2. The court, among other things, gave the charge quoted in the second headnote, which was but stating, in substance, the general rule laid down by this court as far back as the case of *Roberts v. State*, 3 Ga. 310, in the following language: "If a man has reason sufficient to distinguish between right and wrong, in relation to a particular act about to be committed, he is criminally responsible." The same rule was announced in *Choice v. State*, 31 Ga. 424, and has been uniformly recognized by this court, so far as we are informed, up to this date. In *Roberts' Case*, supra, it was also stated that an exception to the general rule existed where a man has sufficient reason to distinguish between right and wrong, as to a particular act about to be committed, yet, in consequence of some delusion, the will is overmastered, and there is no criminal intent. But the qualification was added that the act itself must be connected with the peculiar delusion under which the person is laboring. Judge Nisbet, in commenting upon this exception, refers to the celebrated case of *King v. Hadfield*, 27 How. St. Tr. 1281, and the great speech of Mr. Erskine, which "shed new light upon the law of insanity." In *Danforth v. State*, 75 Ga. 614, the present chief justice, who was then upon the circuit bench, after stating in his charge the general rule as above mentioned, gave the accused the benefit of an exception to the effect that he was irresponsible if the killing was done under some irresistible impulse, the result of a diseased and disordered mind, which overcame his will and took away his power of self-control, provided the act itself was connected with the peculiar delusion, if any, under which he was laboring at that time. Justice Hall, in delivering the opinion of this court, remarked, in general terms, on page 628, that the charge referred to was full, fair, and impartial, and quite as favorable to the accused as, under the law, could have been asked. In *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782, the trial judge was requested, among other things, to charge the jury as follows: "If the defendant commit an assault, knowing it to be wrong, when driven to it by an uncontrollable and irresistible impulse, arising, not from natural passion, but from an unsound condition of mind, he is not criminally responsible."

Other requests to a somewhat similar effect were also presented. This court held that there was no error in refusing to give these requests in charge, and it is stated in the opinion that the court declined to review its previous rulings on the subject presented, seeing no reason to doubt their soundness and wisdom. The facts of the *Fogarty Case* are not set forth, but a general idea of the nature of the case may be derived from the concluding sentence of the opinion, on page 468, 80 Ga., and page 782, 5 S. E., where it is stated that: "The defendant was guilty of a most outrageous and unprovoked violation of the penal laws of the state, and, being guilty, he must suffer the consequences of his unbridled passion." Presumably, therefore, there was nothing in the evidence to show that *Fogarty* acted under the influence of any delusion or irresistible impulse to commit the homicide for which he was held to be responsible in law. In the case of *Patterson v. State*, 86 Ga. 70, 12 S. E. 174, which was an indictment against the accused for an assault with intent to murder his wife, an effort was made to set up the defense that he stabbed her while acting under an insane delusion and an irresistible impulse. The trial judge, in excluding certain evidence offered for this purpose, expressed an opinion adverse to a defense of this character; but this court declined to pass upon the correctness of this opinion in the abstract, and upheld the rejection of the evidence for another reason. Whatever may be deducible from the foregoing cases, there seems to be no real necessity, in the case now under consideration, to discuss to what extent the general rule for testing insanity, above stated, may or may not be varied with reference to delusions or irresistible impulses. The defense, as we understand it, was general insanity, and not that the accused was a monomaniac, or afflicted with any particular type of insanity. There was no evidence of special dementia, nor was it sought to be shown that while the accused may, in a general way, have known the difference between right and wrong, he was, upon any particular subject, of defective mind. Certainly there was no proof authorizing the conclusion that in taking the life of *King* the accused was acting under any special delusion in connection with that act, or that in committing it he was actuated by an impulse which, from weakness of will produced by mental disease, he was utterly incapable of resisting. The evidence does show that on various occasions before the homicide the accused manifested eccentricity of mind, and did things which would hardly be expected from persons of sound common sense and of perfectly well balanced minds. It was also shown that he had certain erratic ideas and notions, which would not probably have been entertained by a thoroughly sensible and clear-headed man. But, putting all these things together, they did not amount

to more than showing that up to the time of the homicide the accused was more or less eccentric in mind, and had certain marked peculiarities of thought and conduct. They would hardly have justified the conclusion that whatever infirmity he had was insanity of any particular form, though they may have manifested a decided tendency to general dementia; and if, at the time of the trial, he was, as his counsel contended, really insane, it was but the outcome of previous indications, which had not gone to the extent of rendering him mentally irresponsible at the time of the killing. The trial judge was not requested to charge upon the subject of delusions or irresistible impulses, and would, in our opinion, have been justified in declining so to do, for the want of evidence warranting instructions upon these subjects, even if it would, in a case of a different character, have been proper to qualify the general rule we have already mentioned as being quoted in the second headnote. We therefore simply rule that in this case the instruction given was proper and right, and we do not now undertake to say whether, under different facts, it would or would not be the duty of the court to modify this instruction by stating exceptions relating to special phases of alleged mental irresponsibility.

3. The court undertook, at some length, to state and explain to the jury the different forms and kinds of insanity. The definitions given may not have been comprehensive enough to include every degree and type of this disease, and it may be that the language employed was not, in all respects, perfectly accurate. We do not, however, feel disposed to enter into a discussion of these questions; nor do we think we are able to give any better presentation of the subject than was done by our experienced and learned brother of the circuit bench. It is, at this time, only necessary to say that in telling the jury what insanity was, and in stating the different forms in which it appeared, he did not invade their province in passing upon questions of fact involved in the case on trial; nor did he, in our opinion, say, in this connection, anything which could have resulted in any harm to the accused.

4. The court gave to the jury another instruction, the nature of which is indicated in the fourth headnote. We are strongly inclined to the belief that this instruction expresses nothing but the truth, though it may not have been appropriate for the court to inform the jury that insanity, in all its forms, was liable to become worse, and that it generally ended in complete dementia. Still, it would require somewhat of a strain to hold, as was contended, that so doing was expressing an opinion as to the facts of the pending case. It was also contended that this instruction was hurtful to the accused, for an additional reason. His counsel claimed he was insane while the trial was

progressing, which the state, of course, denied. The argument here was that, if the jury were of the opinion that the accused was not insane at the trial, they would have been led by this instruction to believe he could not have been so at any previous time, because, if he ever had been, he would, according to the charge of the court, have been bound to become worse, and therefore would undoubtedly manifest decided insanity at the trial. This argument, it will be perceived, will fall to the ground, if, in point of fact, the appearance and symptoms of the accused during the trial were such as to manifest a then existing condition of insanity or imbecility; and, besides, as has already been stated, the jury were told that they could consider his then condition, as illustrative of the state of his mind at the time of the homicide; and under the charge, as a whole, the jury, who were doubtless sensible men, would never have found the accused guilty, if they had not been satisfied that, whatever his condition at the trial may have been, he was legally responsible when he shot King down in the street.

5. The propositions stated in the fifth headnote are sufficiently supported by the decision of this court in *Danforth's Case*, supra, and that of *Carter v. State*, 56 Ga. 463.

6. It would hardly be profitable to enter upon a full discussion, in detail, of all the grounds of the motion for a new trial made in this case. We have carefully examined the charges complained of, and, if erroneous at all, they contain nothing which would justify this court in granting a new trial. Indeed, the charge, as a whole, was a very excellent one. Counsel for the accused filed a special plea admitting the homicide with which he was charged, but denying his responsibility under the law, because of his alleged insanity at the time the deed was committed, and thereupon claimed the right to open and conclude the evidence and the argument. The court struck the plea, and refused to allow this privilege. Both these rulings were correct. See, again, *Danforth's Case*. There was much evidence bearing upon the alleged insanity of the accused. The newly-discovered evidence was merely cumulative upon this question. It was alleged that certain irregularities and improprieties were committed by the court and by counsel for the state during the progress of the trial. The grounds of the motion for a new trial relating to these matters were not, however, approved. The grounds alleging misconduct on the part of the jury in reading newspaper reports of the trial were sufficiently disproved by the affidavits of all the jurors. Additional affidavits made by two of the jurors were apparently in conflict with those to which they originally deposed, but these latter affidavits could not be received nor considered

for the purpose of impeaching the verdict. *Hill v. State*, 91 Ga. 153, 16 S. E. 976.

We have given the evidence in this case a very thorough examination and consideration. In our opinion, it fully warranted the jury in reaching the conclusion that at the time of the homicide the accused was not insane, and we find no reason to disturb the verdict. Upon the assumption that the accused knew what he was doing, a more deliberate, cold-blooded, and wicked murder was never, perhaps, committed within the borders of this state. In view of all the evidence, we are unwilling to take upon ourselves the responsibility of saying the verdict does not express the real truth of the case. If the unfortunate man who is doomed to death had originally a somewhat diseased mind, and, because of the advancing tendency of his mental infirmity, is now actually insane, the law, in its humanity, will avert from him the penalty of death, and commit him to the lunatic asylum. If he is not insane, he must resign himself to the fate brought upon him by his own lawless and terrible act. Judgment affirmed.

(95 Ga. 678)

ASKEW v. SILMAN.

(Supreme Court of Georgia. March 25, 1895.)

LIABILITY OF RETIRING PARTNER ON FIRM NOTE
MADE BY COPARTNER AFTER DISSOLUTION
—NOTICE OF DISSOLUTION.

1. As to one who had been a mere customer of a partnership as a purchaser of its goods, but who had never been a creditor of the partnership, actual, personal notice of the dissolution of the partnership by the withdrawal of one of its members is not indispensable to the discharge of the retiring partner from liability upon a note for the loan of money executed in the firm name after the dissolution. A customer of this kind is entitled only to such notice as should be given to "the world" of the dissolution.

2. It is a question for the jury whether or not, under all the circumstances of a given case, the party making such a loan and taking such a note is chargeable with notice of the dissolution of the firm; and in determining this question they may take into consideration the lapse of time occurring between the dissolution and the making of the note, and all the evidence showing what information was received by the lender, and illustrating his knowledge or want of knowledge, before the loan was made, as to the fact of dissolution.

3. The publication in a newspaper of local items of news inserted by the editor, and neither authorized nor signed by any member of a firm, to the effect that one of the partners had withdrawn, is not, necessarily, all that may be requisite to convey notice of dissolution, but should be given such weight as, in the opinion of the jury, it is entitled to receive.

4. The fact of the circulation in the community of a general rumor that one of the partners had retired is admissible in evidence, not as being of itself sufficient to put any particular person on notice of the dissolution of the firm, but as a circumstance proper to be considered by the jury in connection with the other evidence bearing on the question of notice.

5. If the retiring partner was not otherwise liable, the fact that the money loaned to the other members of the firm, and for which

they gave a note in the firm name, was used in paying debts contracted by the firm prior to his withdrawal, would not render him so.

(Syllabus by the Court.)

Error from city court of Jackson; W. W. Stark, Judge.

Action by Mrs. S. E. Silman against Elbert Askew and others. From a judgment for plaintiff, and an order denying a new trial, defendant Askew brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

W. I. Pike, E. C. Armstead, G. C. Thomas, and J. J. Strickland, for plaintiff in error. J. A. B. Mahaffey, E. T. Brown, and Erwin, Cobb & Woolley, for defendant in error.

SIMMONS, C. J. Mrs. Silman sued Askew and others, alleged to be members of the firm of Austin & Co., upon a promissory note signed in the firm name, and dated June 17, 1890. Askew pleaded "Not indebted"; also that he had not signed the note, nor authorized any person to do so for him, and had never ratified the signing; and further, that he was not a member of the firm when the note was signed, and was not bound by the contract; that the firm was dissolved January 11, 1888, and had ceased to do business from that date, which fact was known to the plaintiff when the note was executed. There was a verdict for the plaintiff against all the defendants sued, and Askew made a motion for a new trial, which was overruled, and he excepted.

1. The main question at issue on the trial of the case was whether there was such notice of the dissolution of the partnership as would relieve Askew from liability for the debt in question. It appeared from the evidence that the dissolution took place, as alleged in the plea, more than two years prior to the date of the note, and that the note was given by Austin, one of the copartners, without the knowledge or consent of Askew, for money borrowed by Austin in the name of the firm at the time the note was executed. Askew's withdrawal from the partnership was announced soon after the dissolution, in a newspaper published in the town in which the plaintiff resided and the firm conducted its business, the announcement appearing at different times, in the form of news items, written by the editor of the paper. The plaintiff was a subscriber to the newspaper when these notices appeared, but testified that she did not see them, and that she had no notice or knowledge of the dissolution at any time prior to the execution of the note, but supposed, when she took the note, that Askew was still a member of the firm. She had been a customer of the firm, as a purchaser of goods, during Askew's connection with it, but was not a creditor before the date of the note. The court, in certain instructions to the jury, which are complained of by the plaintiff in error, charged them, in effect, that if the plaintiff was a "customer" of the firm, she would be entitled to actual notice of the dis-

solution. We think the court erred in so charging. In order to relieve an ostensible partner from liability for debts contracted in the partnership name subsequently to his withdrawal from the firm, the dissolution must be made known "to creditors and to the world" (Code, § 1895); but it is not necessary that the notice should be actual or personal except to creditors. Although it is often said in text-books and decisions that actual notice or knowledge of the dissolution must be brought home to former "customers" of the firm, this language has reference only to creditors. See 2 Bates, Partn. § 613; 17 Am. & Eng. Enc. Law, p. 1124. A customer, in the sense in which the term was used in this case,—that is to say, one whose dealings with the partnership have been confined to the purchase of its goods,—is entitled only to such notice as should be given to "the world."

2-4. As to the notice which should be given to "the world," no inflexible rule can be laid down. Publication in a public gazette circulated in the locality in which the business of the partnership has been conducted, if such publication is fair and reasonable as to its terms and the number of times it is made, is usually sufficient notice to the world. *Ewing v. Trippe*, 73 Ga. 776; *T. Pars. Partn.* (4th Ed.) § 317, and notes. And see *Richards v. Butler*, 65 Ga. 593; *Ellison v. Sexton*, 105 N. C. 356, 11 S. E. 180. An editorial notice, not signed by any member of the firm, may be as effectual for this purpose as an advertisement purporting to issue by authority of the partners over their signature. *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336; *Young v. Tibbitts*, 32 Wis. 79. Whether this is so or not is generally a question for the jury, and the court in the present case erred in charging, as a matter of law, that such notice would not be sufficient. "It is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. Any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard,—as, by advertisement, public notice in the manner usual in the community, the withdrawal of the exterior indications of the partnership,—are proper to be considered on the question of notice." *Lovejoy v. Spafford*, 93 U. S. 430. It should be left to the jury to say whether the retired partner made a reasonable and bona fide effort to acquaint the public with the fact of his retirement, and whether, on the other hand, the creditor, with the means and opportunity afforded him, knew, or ought to have known, of the fact. Even in the absence of any showing that notice of the dissolution was given, the fact that a considerable time elapsed between the dissolution and the contracting of the debt has been deemed sufficient to render the creditor chargeable with notice. Certainly this fact would go far to show that the debt was not or ought not to have been contracted on the credit of a former partner. *T. Pars. Partn.* (4th Ed.) §§

317, 322. There is some question as to whether the jury may infer notice from general notoriety of the dissolution. See 2 Bates, Partn. § 622, and cases cited. We think, however, that the evidence excluded by the court below in this case, as to the general notoriety of Askew's withdrawal from the partnership, although such notoriety may not of itself have been sufficient to charge the plaintiff with notice of the fact, ought to have been allowed to go to the jury, to be considered by them for what it was worth, in connection with the other evidence bearing on the question of notice.

5. If the money for which the note was given was borrowed, and the note given without Askew's knowledge or consent, and without subsequent ratification on his part, and if he was not liable on other grounds, the fact that the money was used in paying debts contracted by the firm prior to his withdrawal therefrom would not render him liable; and the court below erred in charging the jury as it did on this subject. Judgment reversed.

(96 Ga. 233)

PHILLIPS v. STATE.

(Supreme Court of Georgia. March 25, 1895.)

FORGERY—INSTRUCTIONS.

On the trial of an indictment alleging that the accused forged a certain order, purporting to be signed by A., and addressed to B., with intent to defraud A., and uttered the same with intent to defraud B., it was error to charge the jury that, if they believed from the evidence the accused "did pass this order with intent to defraud" either A. or O., it would be their duty to find him guilty.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clarke, Judge.

Jim Phillips was convicted of forgery, and brings error. Reversed.

F. R. Walker, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

LUMPKIN, J. The indictment charged that Phillips forged an order in the name of G. B. Everett & Co. upon E. P. Burnes, agent, without alleging whose agent he was. It was also charged in the indictment that the forging was done with the intent to defraud Everett & Co., and that the forged order was uttered and published as true with intent to defraud Burnes. It appeared from the evidence that Burnes was the agent of the Western & Atlantic Railroad Company. The accused was convicted, and filed a motion for a new trial, containing the general grounds that the verdict was contrary to law and the evidence, and also alleging that the court erred in charging that if the jury believed from the evidence that the accused "did pass this order with intent to defraud either G. B. Everett & Co., or the Western & Atlantic Railroad," it would be their duty to find him guilty. We think this charge was erroneous. Not only does the indict-

ment fail to allege an intent to defraud the railroad company, but it does not even mention or allude to the company, in the remotest terms. The charge complained of, therefore, presented to the jury for determination a question in no wise involved in the accusation against the prisoner. The judge very probably considered the agent of the railroad company and the company itself substantially the same person, and must have entertained the opinion that an intention to defraud the agent would be tantamount to an intention to defraud the company. This is, however, by no means true. The agent of a corporation, and the corporation itself, are entirely distinct persons, and an alleged intention to defraud one of them cannot be sustained by proof showing an intention to defraud the other. Judgment reversed.

(95 Ga. 723)

BAGWELL v. MORTON.

(Supreme Court of Georgia. April 1, 1895.)

WRONGFUL ATTACHMENT—STRIKING OUT DEFENSE.

1. It being a question vital to the defense of the action brought in the present case whether or not a partnership had existed between the plaintiff and defendant, and there being in one of the defendant's pleas certain allegations upon which he relied as alleging, in substance, the existence of such partnership, while it is not now decided that these allegations can be properly construed as so doing, yet, as they seem to have been treated in the trial court as sufficient for the purpose indicated, this court will deal with them accordingly.

2. Thus regarding the allegations mentioned, it was error to strike other portions of the plea, in which the defendant set out certain payments he had made in behalf of the alleged partnership, and other facts entitling him to relief against the plaintiff as a former partner.

3. If the partnership in fact existed, the defendant was entitled to plead and prove any and all facts showing liability to him on the part of the plaintiff growing out of that relationship. If there was no partnership, the contrary would be true.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by S. J. Morton against R. B. Bagwell. Plaintiff had judgment, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

R. M. W. Glenn and Payne & Walker, for plaintiff in error. Copeland & Jackson, for defendant in error.

SIMMONS, C. J. Morton filed his petition against Bagwell, alleging that, while he (plaintiff) was absent from the state, the defendant, fraudulently and without notice to him, obtained an attachment against him, and had the same levied upon his property, and that the property was sold to innocent purchasers. He prayed that the judgment be set aside, that Bagwell be enjoined from

collecting it, and that he recover from Bagwell damages as set out, etc. The defendant pleaded the general issue; also: In March, 1887, he and Morton entered into a verbal contract, by the terms of which he was to furnish Morton with a stock of goods of \$753.88, and a sufficient additional sum to make up \$1,000, for the purpose of running a mercantile business at Crawfish Springs, Ga. Morton was to take charge of the business, attend to it, and retain for his service one-half of the net profits. The remaining half was to be paid to defendant, and when Morton ceased to do the business defendant was to be repaid his \$1,000 and one-half of said profits. It was expressly agreed between them that no debts were to be created in market for goods, but all goods should be paid for as bought. Defendant fully complied with his part of the contract by turning over to Morton said stock of goods and making cash payments to make the sum of \$1,000, and plaintiff went into possession of the same under this contract in March, 1887, and continued to run the business until March 15, 1888, when he left the country, leaving a small stock and the land sold under the attachment levy, without settling with defendant, as he had agreed to do. Defendant invoiced the stock, and found it to invoice, including all character of goods, \$947 [and the following amount due in market, and demanded to be settled, viz. (here follows a list of creditors, and the amount due each, the total amounting to \$463.21). Defendant shows that said parties holding said demands threatened to close the business run by said plaintiff as aforesaid, unless these amounts were settled. Defendant shows that said plaintiff owned no property at the time, except property sold and about \$25 of other property and \$947 stock of goods. Plaintiff was indebted as aforesaid, and, plaintiff being wholly insolvent in fact and in law, from said stock of goods and said tract of land sold at that date, worth about \$100, he would have to secure himself therefrom for the \$1,000 advanced and one-half of net profits, and the further sum of \$125, which plaintiff owed to defendant. Defendant shows said property being inadequate, and said plaintiff insolvent, and having left the state, he, by threats of closing the business out by the said creditors of said Morton, to cause litigation and probable loss to defendant, did pay to the aforesaid creditors the sum of \$463.21. Defendant shows that after the payment of said indebtedness aforesaid it reduced the amount of the net stock down to \$484, leaving plaintiff owing to defendant the sum of \$740, and, after deducting the sum of \$153, received on account due, leaves a balance of \$587, besides the half interest in the profits of business. Defendant shows that said Morton received from said business the following sums (setting out different items, aggregating \$503.98), which plain-

tiff never accounted for]. Plaintiff was indebted to defendant as alleged in defendant's original petition, and the same has never been paid. That part of the plea which is inclosed in brackets was disallowed by the court. The defendant further pleaded: He paid for plaintiff \$403.21 of debts due by plaintiff to the parties named above, and pleads a set-off of any amount plaintiff might be allowed. This was also disallowed by the court.

The ground upon which Bagwell sought to hold Morton liable for the payments claimed to have been made by him (Bagwell) to third persons was that, as to the persons to whom the payments were made, they were both liable as partners, and, having discharged the liability to these persons himself, he was entitled to have recourse against Morton. The allegations relied upon to show the existence of the partnership were contained in that part of the plea which was not stricken. Under these allegations, it is uncertain whether the contract between Bagwell and Morton was one of partnership, or merely one of hiring. One part of the plea indicates that the contract was one of hiring, for it says that Morton was to receive half of the profits "for his service." Other features of the contract would seem to indicate that it was one of partnership; it being agreed that no debts were to be created for goods, but all goods should be paid for as bought, and that Morton was to run the business and have charge of it. See *Perry v. Butt*, 14 Ga. 699; *Powell v. Moore*, 79 Ga. 525, 4 S. E. 383, and cases cited; *Fougner v. Bank*, 141 Ill. 124, 30 N. E. 442; *T. Pars. Partn.* (4th Ed.) §§ 69, 70, and cases cited; 17 Am. & Eng. Enc. Law, "Partnership," pp. 831 et seq., 841, 845. It is not now necessary, however, to decide whether these allegations can be properly construed as alleging the existence of a partnership, or not. Inasmuch as they appear to have been treated in the trial court as sufficient for that purpose, we deal with them accordingly. See *Aultman v. Mayson*, 83 Ga. 218, 9 S. E. 536. Thus regarding the allegations referred to, we think it was error to strike other portions of the plea, in which the defendant set out the payments claimed to have been made by him in behalf of the alleged partnership, and other facts entitling him to relief against the plaintiff as a former partner. If there was a partnership, he was entitled to plead and prove any and all facts showing liability to him on the part of the plaintiff growing out of that relationship. Of course, if there was no partnership, and Bagwell voluntarily paid Morton's debts when he (Bagwell) was not responsible for them, and had made no contract with Morton to do so, he cannot set them up against Morton in this action. Judgment reversed.

ATKINSON, J., not presiding

(95 Ga. 730)

VANCE v. GAMBLE.

(Supreme Court of Georgia. April 1, 1895.)

NEW TRIAL—DISCRETION OF COURT.

1. Where the plaintiff offered in evidence a deed essential to the making out of his case, and a special issue as to the genuineness of such deed was made up and tried under section 2712 of the Code, which resulted in a verdict finding that the deed was a forgery, it was the right of the plaintiff to move for a new trial of this issue, and within the power and jurisdiction of the court to grant a new trial thereon, although the main case had proceeded to trial and the plaintiff had been nonsuited. In the present case there was no error in granting a new trial.

2. Whether granting the new trial would of itself have the effect to set aside the judgment of nonsuit and reinstate the main case or not, this court, in the exercise of the power conferred upon it by section 4284 of the Code, so directs.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by W. L. Gamble, administrator, against John Vance. From the judgment rendered, defendant brings error. Brought forward from the last term, under Code, §§ 4271a-4271c. Affirmed.

Copeland & Jackson, for plaintiff in error. Lumpkin & Shattuck, for defendant in error.

SIMMONS, C. J. Gamble, as administrator, filed his equitable petition against Vance, alleging that a certain tract of land belonged to the estate of his intestate, and seeking to enjoin the defendant from trespass and waste thereon. The plaintiff claimed title under a deed to the land purporting to have been made to his intestate by one Sanford January 7, 1852, and recorded February 2, 1892. The defendant filed an affidavit that the deed was a forgery, and the court required an issue as to the genuineness of the deed to be tried separately, as provided by section 2712 of the Code. The jury, upon the trial of this issue, found that the deed was a forgery, and the court then proceeded with the trial of the main case, and, after hearing the evidence for the plaintiff, granted a nonsuit, whereupon the plaintiff made a motion for a new trial. The motion for a new trial was upon the grounds that the verdict was contrary to law, evidence, etc., but did not complain of the nonsuit. The court granted a new trial and set aside the verdict of forgery, and to this judgment the defendant excepted.

1. It was contended on the part of the plaintiff in error that, the issue of forgery being merely a collateral issue, and the main case having been adjudicated against the plaintiff by a nonsuit, there was nothing on which to predicate a motion for a new trial. This contention is answered by section 3712 of the Code, which declares that: "The several superior courts of this state shall have power to correct errors and grant new trials in any cause or collateral issue depending in

any of said superior courts," etc. This being the first grant of a new trial, this court will not interfere with the discretion of the trial judge.

2. Whether granting a new trial would of itself have the effect to set aside the judgment of nonsuit and reinstate the main case or not is not decided. This court has the right to direct that the case be reinstated (see Code, § 4284; *Railroad Co. v. Kent*, 91 Ga. 693, 18 S. E. 850, and cases cited), and it is so ordered. Judgment affirmed, with direction.

ATKINSON, J., not presiding.

(97 Ga. 231)

REYNOLDS v. RANDALL.

(Supreme Court of Georgia. July 15, 1895.)

ENFORCEMENT OF MECHANIC'S LIEN—AMENDMENT OF PLEADINGS.

1. Where, in a suit to foreclose the statutory lien of a mechanic and material man upon real estate, the character of the indebtedness is clearly and distinctly set forth, it is competent for the court to allow an amendment praying a common-law judgment, and such a judgment may be recovered though the claim of lien should fail. *Dunning v. Stovall*, 30 Ga. 44.

2. The evidence supports the finding of the court upon the questions of fact.

(Syllabus by the Court.)

Error from city court of Dekalb county; H. C. Jones, Judge.

Action by H. G. Randall against J. O. Reynolds to foreclose a lien. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

The account was attached to the declaration, which, as originally brought, claimed an indebtedness of \$100, and sought to foreclose a lien therefor in favor of plaintiff, as a contractor and material man. By amendment he prayed that if the lien was barred, or deficient, he might recover a common-law judgment on the account. Such judgment was rendered in his favor by the judge presiding, without a jury. Defendant excepted, alleging that the court erred in finding against his pleas of set-off and recoupment, and in holding the amendment sufficient on which to base the general judgment therein prayed for; and that the finding was contrary to law and evidence, the weight of evidence, justice, and equity. The account sued on shows, on the debit side, a series of charges, beginning January 1, 1893, and ending September 29, 1893, amounting to \$484.82; and, on the credit side, a balance due defendant, as per settlement on that date, payments of cash on account of house, and credits for a number of hours' labor, all amounting to \$402.56. The account attached to the plea of set-off consists of a series of charges for a number of hours' work as a mechanic, beginning September 26, 1892, amounting, up to December 20, 1892, to \$109.

36, immediately followed by charges for work in January, February, and March, 1893, amounting to \$70.62, which last charges appear as credits on plaintiff's account. Defendant's account then shows credits of sundry amounts of cash paid in October and November, 1892, amounting to \$38.50, and a credit of \$30 paid in January, 1893, which last item appears as a charge on the debit side of plaintiff's account. Plaintiff introduced his books of account, showing a footing up of his charges against defendant at the close of the year 1892, amounting to \$338.06, credited with the sum of \$370.55, with the entry: "Settled to date, Dec'r 31, 1892. Bal. due J. O. R., \$32.49." Plaintiff testified that the account, as sued on, was correct, just, due, and unpaid, and was a transcript from his books. He introduced a witness who testified that he had had some dealings with plaintiff, and had found his accounts correct. Plaintiff further testified that he contracted with defendant to build the house in question for \$375, not \$300; that defendant was his employé, built the house himself, was present at all times while the work was being done, accepted and moved into the house in the first part of 1893, making no complaint in any way until payment of the account sued on was demanded; that the house was painted in December, 1892, immediately after it was put up; that the weather-boarding was of new hard heart wood, and would not take or keep paint so readily as sap wood, which was why the paint did not stay on any better; that he informed defendant that it was a bad time to do painting, on account of the weather, and that he could not do a good job of painting then, but defendant insisted that the work be done at once; that each of the items of the account, which were disputed by defendant, were just and proper, etc. The testimony for defendant was: He was the foreman for plaintiff, who was a contractor for building houses, etc., and made all the calculations for him about procuring material for building. Plaintiff knew nothing about such matters. He was no part of a mechanic. Defendant mentioned to him that he wished to build a house of two rooms for himself, and plaintiff told him to make a calculation of the amount it would cost to furnish the material and do the work, which defendant did, and found that all could be done for \$300, and plaintiff agreed to put up the house and paint it for that sum. This was the contract. Defendant was to and did work on the house as an employé. It was completed, and defendant moved into it, on December 22, 1892. The paint put upon it was worthless, and so unskillfully put on that it is peeling and falling off, and is no protection. New paint would not stick on this coat; and, to repaint the house, this old paint would have to be scraped off, at great trouble, and at a cost of \$45 or \$50. In addition to the overcharge of \$75 on the contract price of the house,

numerous specified items charged on the account of plaintiff, amounting to over \$30, are unjust and improper, some of them being for material which defendant did not get. Plaintiff is indebted to him as set out in his plea of set-off, and the account attached thereto is true and correct, and unpaid. Plaintiff did no work on the house. The work was done by hired men. Defendant made no complaint regarding the paint or material used until plaintiff demanded payment, which was several months after defendant moved in and occupied the premises. He was corroborated by his wife and other witnesses as to the contract price of the house, the paint, and certain of the disputed items of the account sued on.

J. N. Glenn and Thos. H. Meacham, for plaintiff in error. W. W. Morrison, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(96 Ga. 305)

HELLER et al. v. DE LEON.

(Supreme Court of Georgia. July 15, 1895.)

NEW TRIAL—FILING BRIEF OF EVIDENCE.

Although the judge of the trial court has the power to grant a reasonable time beyond the close of the term within which to prepare and file a brief of evidence to be used upon the hearing of a motion for a new trial, it is the duty of the movant in such a case within a reasonable time to submit for approval a brief of evidence so prepared; and if this be not done until such a time has elapsed as renders it impossible for the judge to approve it, because of an inability to recollect the evidence as introduced at the trial, the motion, when it is reached, may be dismissed as incomplete because of the absence of an approved brief of evidence.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Perry M. De Leon against Heller, Hirsch & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

The following is the official report:

The case was tried and a verdict rendered on April 25, 1892, which was the last day of the February term of the city court of Savannah. On that day defendants filed a motion for a new trial, and an order was granted giving leave to file a brief of the evidence at any time during the next May term. On May 24th a brief of the oral evidence was filed, with the agreement of plaintiff's counsel indorsed thereon that the original documentary evidence could be used at the hearing of the motion. A brief of the documentary evidence was afterwards filed within the time allowed by the order. Said briefs were not handed to the judge for revision and approval before they were filed, as the judge recollected, though defendants' counsel stated that they called the judge's attention to the briefs. At the July term, 1892, an order was granted that

the motion for new trial might be heard in vacation, on notice by either side, in time for the case to come to the next term of the supreme court. Neither side gave notice, and the case stood over to the November term. One of defendants' counsel stated that he inquired of the judge, during the November term, whether he had approved the brief of evidence, and the judge replied that he had not, but would act on the brief when the argument for a new trial was had. The judge had no recollection of this conversation. The case was not called by either side until the February term, 1894, when plaintiff's counsel moved to dismiss the motion for new trial on the grounds (1) that the brief of evidence had not been approved; and (2) that the brief filed was not a brief of the evidence. Defendants' counsel moved to amend the brief of the evidence by adding thereto a transcript of the judge's notes of the testimony, which was allowed. In sustaining the motion to dismiss, the judge stated that he was unable to approve the brief of evidence as amended; that, while he recognized portions of the testimony as being the same as given on the trial, he was certain that much that bore on the merits of the case was lacking, and the lapse of time was too great to enable him to supply it from recollection, the only existing memoranda being notes taken by the judge for his own use in preparing the charge, and not intending to be a report of the testimony. On the same day that the motion to dismiss was sustained, defendant's counsel filed a written motion to set aside the order of dismissal as improvidently and illegally granted. This written motion was served on plaintiff's counsel, who filed an answer thereto, and the same was heard on September 5, 1894, when it was denied, and the judgment theretofore rendered was ordered to stand as the judgment of the court. To this ruling defendants excepted.

Norwood & Cronk, for plaintiffs in error. Charlton, Mackall & Anderson, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 234)

SILVER v. HULL.

(Supreme Court of Georgia. July 15, 1895.)

JUDGMENT BY DEFAULT—VACATING.

Under the facts appearing in the record the court committed no error in refusing to vacate the judgment complained of on any of the grounds taken in the motion.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

J. M. Hull sued Mark Silver on an open account for \$327.50 for medical services rendered. Judgment for plaintiff. Defendant brings error. Affirmed.

(94 Ga. 732)

The following is the official report:

The action was brought to the August term, 1891, of the city court of Richmond county, and the defendant was served by the sheriff leaving a copy of the petition and process at his residence. Defendant handed these papers to C. H. Cohen, who had been and was his regular attorney, for the purpose of making defense to the suit, but was informed by Cohen that on account of his personal relation with plaintiff he preferred not to represent defendant in this case. Thereupon defendant gave the papers to Henry Glebner, an attorney at law, with the request that he represent him. By order of the court it was advertised that on November 2, 1891, the opening day of the November term, cases in order for trial at that term would be assigned. It was the practice of the court to assign for trial on the opening day of each term all litigated cases, and on that day to render judgments without a jury in all cases wherein such judgments could legally be rendered. The present case was not assigned on that day, but it was called for assignment, and, no one being present for the plaintiff, Glebner was about to take steps looking to a dismissal, when Cohen told him to let the case pass over for the term, as he (Cohen) was conferring with Baxter, the plaintiff's counsel, and expected Baxter would dismiss the suit of his own motion, because Baxter said he only wanted documentary proof to show that the account was barred by the statute of limitations. Upon that information the case was passed, so far as defendant was concerned, and Glebner felt no necessity, under the circumstances, to give it any further attention; but on December 15, 1891, after the juries were discharged for the term, plaintiff, without notice to defendant or his counsel, entered up judgment for the amount sued for. This was not known to defendant or his counsel until about a week afterwards; whereupon a motion was made to set aside the judgment upon the foregoing facts, and for the further reason that defendant had meritorious defenses, one of which was that the account attached to the declaration had no date at all, and the suit was in fact for services rendered over four years previously, and was therefore barred by the statute of limitations; and the other was that defendant had already paid full value for the services sued for and he expected to be able to establish these facts on the trial. He offered to pay all costs necessary to open the default. The court overruled the motion to set aside the judgment, and defendant excepted.

C. H. Cohen, Salem Dutcher, and P. J. Sullivan, for plaintiff in error. E. B. Baxter, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

WALLACE v. GEORGIA, C. & N. RY. CO.

(Supreme Court of Georgia. June 18, 1894.)

CONSTITUTIONAL LAW—COMPELLING CORPORATIONS TO ASSIGN REASONS FOR DISCHARGE OF EMPLOYEES.

1. The public, whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employes and their late employers, designed, not for public, but for private, information as to the reasons for discharges, and as to the import and authorship of all complaints or communications which produced or suggested them. A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employes, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void, and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law.

2. It follows from the foregoing that the act of October 21, 1891, entitled "An act to require certain corporations to give to their discharged employes or agents the causes of their removal or discharge, when discharged or removed," is unconstitutional, and that an action founded thereon for the recovery of \$5,000 as penalty or arbitrary damages fixed by the statute for noncompliance with its mandate cannot be supported.

(Syllabus by the Court.)

Error from city court of Atlanta; Van Epps, Judge.

Action by one Wallace against the Georgia, Carolina & Northern Railway Company. From a judgment dismissing the action, plaintiff brings error. Affirmed.

The following is the official report:

The statute is found in Acts 1890-91, vol. 1, p. 188. The declaration was dismissed on demurrer. It alleges that after the company, by contract made on July 9, 1892, had employed the plaintiff as its chief car inspector, and while he was performing his duties as such on August 12, 1892, the company discharged him. On August 18th he made a written request of the company to give him a specific statement in writing of the reasons which had caused his discharge, and, if the same had been induced in whole or in part by any complaint or communication made to the company, to inform him of the nature and substance of such communication or complaint, and when and by whom it was made. This written request was signed by him, and on the same day was served upon the company, being delivered to the local agent representing the company at its office and place of doing business in Fulton county,

by the sheriff of that county. Afterwards the plaintiff waited for more than 20 days, within which time the defendant should have delivered the written statement, as requested to the plaintiff, or left it, addressed to him, with the county clerk; but the defendant failed and refused to give the information as requested in writing and as required by law, whereby it became liable to him in the sum of \$5,000, etc.

John G. Walker and John C. Reed, for plaintiff. Erwin & Cobb and Joseph B. Cumming, for defendant.

PER CURIAM. Judgment affirmed.

(96 Ga. 734)

WESTERN & A. R. CO. v. ESSLINGER.

(Supreme Court of Georgia. April 8, 1895.)

DEATH OF EMPLOYEE—PROXIMATE CAUSE.

If there was negligence on the part of the railroad company in leaving a portion of its track in such condition as to render coupling cars unsafe at that point, yet, as it affirmatively appeared from the plaintiff's evidence, which was the only evidence showing how and when her husband was killed, that this negligence, if it existed, did not cause or contribute to his death, and the evidence as a whole showing that in all other respects the company was free from negligence, the verdict was unwarranted, and therefore contrary to law. Atkinson, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Lillie A. Esslinger against the Western & Atlantic Railroad Company. Plaintiff had judgment, and defendant brings error. Brought forward from the last term, under Code §§ 4271a-4271c. Reversed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Maddox & Starr, for defendant in error.

SIMMONS, C. J. The plaintiff brought her action for damages for the homicide of her husband, who was killed while coupling cars on the defendant's railroad. Three allegations of negligence were made in the declaration: (1) That the cars were moved back too fast; (2) that there was a spike running through the brake beam, which was dangerous to a coupler; and (3) that the ground where the coupling was to be made was dangerous. As to the first and second grounds, there was no evidence to support them. The main contention was over the third ground. It appears that at the place where the homicide occurred there was a street crossing, and the planks of the crossing, between the rails of the defendant's track, were from one and a half to three inches thick. The ends of the planks were not beveled, and the dirt seems to have been washed away from them, making it about three inches from the top of the planks to the ground. The deceased undertook to couple the train to a car which was

standing on the track at this point, and under which the planks extended for about six feet. The theory of the plaintiff was that the momentum with which the train came back against this car forced the car beyond the point where the ends of the plank were, while the deceased was between the cars, and that the "step off" at the ends of the plank caused him to lose his footing and fall, and before he could extricate himself the cars passed over him, killing him. The only evidence by which plaintiff sought to sustain this theory consisted of the opinions of experts and others who did not see the occurrence in question, but thought it might have happened in that manner. These opinions, however, were contradicted by the evidence of the only witness who saw the deceased at the time he was injured. This witness was introduced by the plaintiff, and testified as follows: "As [the deceased] went in to make the coupling, just as the cars hit, his lamp fell out, and I heard him holloa 'Oh Lordy.'" The deceased was then from four to six feet from the end of the plank. According to the evidence of this witness, the injury must have happened at the time the lamp fell and the deceased cried out; and, if this was so, it was impossible for the injury to have been occasioned by his stepping off the end of the plank, for he had not arrived at that point. It is true, the evidence shows that when the cars stopped he was found on the ground some five or six feet beyond the end of the plank, but it appears that the cars had caught his clothing and dragged him there. It appearing, therefore, from the only evidence showing how and when the plaintiff's husband was killed, that, even if the railroad company was negligent in respect to the condition of the ground at the end of the plank, this did not cause or contribute to his death, and the evidence as a whole showing that in all other respects the company was free from fault, the verdict was unwarranted, and therefore contrary to law. Judgment reversed.

ATKINSON, J., dissenting.

(96 Ga. 749)

REESE v. SHELL.

(Supreme Court of Georgia. April 8, 1895.)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.

The evidence in this case does not support the verdict. Giving to that which was introduced for the claimant its most favorable interpretation in her behalf, it is impossible to escape the conclusion that the conveyance to her was the result of a purpose on the part of her husband and herself to defraud his creditors, and consequently the jury were not warranted in finding the property not subject to the plaintiff's execution.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

To property levied on at the suit of Oscar Reese against one Shell, F. E. Shell inter-

posed a claim of ownership. From a judgment for claimant, plaintiff brings error. Brought forward from the last term under Code, §§ 4271a-4271c. Reversed.

Adamson & Jackson, Head & Head, and Oscar Reese, for plaintiff in error. McBride & Craven, for defendant in error.

SIMMONS, C. J. Shell bought a house and lot from Head for \$750, paying a part of the purchase money, and taking from Head a bond for title to the premises. After he had been in possession of the property for a considerable length of time, and had paid all of the purchase money except about \$125, he married, and, having paid the remainder of the purchase money, caused a deed to the property to be made by Head to his wife, the consideration expressed in the deed being \$700. Shell was then insolvent. He continued in possession of the property in his own right until after suit had been brought, and until within a few days before judgment was rendered against him upon a debt which he had contracted prior to the making of the deed. An execution founded on this judgment was levied upon the property, and a claim was interposed by his wife. In addition to the facts above recited, it appeared in evidence on the trial of the claim case that, at the time the conveyance was made, Shell told the vendor to keep quiet about it, and the deed was withheld from record until after the judgment in question had been rendered. The claimant's testimony as to why the deed was made to her was contradictory. When first introduced as a witness, she testified that her husband had the title conveyed to her as security for money she had loaned him to finish paying for the property amounting to about \$125; but she subsequently took the stand again, and testified that the transaction was not a loan, and the deed was not intended to secure her for the money advanced, but that she had purchased the premises from her husband, and the deed was for an absolute sale. The husband testified that the market value of the property was between \$500 and \$600, and the original vendor that it was worth \$750, the price he had been paid for it.

The evidence did not warrant a verdict in favor of the claimant. Transactions between husband and wife to the prejudice of the husband's creditors are to be scanned closely, and their bona fides must be clearly established. In this case the badges of fraud are numerous, and there can be no question that in having the deed made to his wife the husband was perpetrating a fraud upon his creditors. It was not denied that he was then insolvent, and, according to his own statement, the property was worth several times the amount claimed to have been advanced by his wife. The wife, though she claimed to be ignorant of

the value of the land, knew that the money advanced by her was merely a part of the price paid to the original vendor, and that the conveyance was to a large extent voluntary. The burden was upon her to show clearly that she acted in good faith, and that she was not only ignorant of but had no grounds for reasonable suspicion as to the husband's fraudulent intent. We think she failed to do this. Taking all the evidence into consideration, we cannot escape the conclusion that the conveyance to the wife was the result of a common intent on the part of both husband and wife to defeat his creditors. A new trial should be granted, and it is so ordered. See Code, § 1952, and citations; Kelly v. Simmons, 73 Ga. 716; Booher v. Worrill, 57 Ga. 235; Brown v. Houser, 61 Ga. 631. Judgment reversed.

ATKINSON, J., not presiding.

(95 Ga. 753)

RICH v. TURNBULL.

(Supreme Court of Georgia. April 15, 1895.)

NONSUIT—SUFFICIENCY OF EVIDENCE.

The evidence introduced for the plaintiff was sufficient to carry the case to the jury upon the issues involved, and it was therefore error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by C. C. Rich against Ellen C. Turnbull. Judgment of nonsuit, and plaintiff brings error. Brought forward from last term. Code, §§ 4271a-4271c. Reversed.

J. W. Ewing and J. Branham, for plaintiff in error. W. T. Turnbull and W. W. Brookes, for defendant in error.

SIMMONS, C. J. Under the facts disclosed by the record, we think the court erred in granting a nonsuit. The case turns largely upon whether the owners of the property, in 1867, submitted to arbitration their dispute concerning the lot and easement in question, and upon what were the terms of the award, and whether Sloan was a party thereto. On these points the evidence, it is true, was not very definite, but there was enough to require the submission of the case to the jury. If the parties submitted the matter to arbitration, and there was an award that the Gammons were not to extend the building which they had commenced to erect over the whole 30 feet called for in their deed, but should only cover 26 feet on Broad street, and that Sloan should have only a life estate in the easement of the 4 feet in dispute, and this was agreed to and acted upon by the parties, they would be bound thereby, although the award was not of record, and had not been made the judgment of the superior court; and the persons holding under Sloan would be as much bound by it as he was. There was evidence showing that there was

such an award, and that the Gammons did act upon it, and erected their building upon 26 feet, when their deed gave them 30 feet. The evidence also tends to show that Sloan was a party to the arbitration, and was present and participated in the hearing before the arbitrators. The credibility of the witnesses, and their recollection of transactions which occurred more than a quarter of a century ago, were matters to be passed upon by the jury, and not by the court. Judgment reversed.

ATKINSON, J., not presiding.

(96 Ga. 796)

BOYLES v. BANK OF GEORGIA.

(Supreme Court of Georgia. July 8, 1895.)

CONSTABLE—FAILURE TO EXECUTE DISTRESS WARRANT.

A distress warrant, duly issued, and placed in the hands of an officer to be executed, can be arrested only by the counter affidavit and bond for the eventual condemnation money prescribed by section 4083 of the Code; and, if no such affidavit and bond be filed by the defendant, the officer cannot, in resistance to a rule, justify or excuse a failure to make the money by showing that he inadvertently took, without affidavit, a bond other than that prescribed by law; nor does the return of such a bond make an issue for trial between the plaintiff and the defendant in the distress warrant. *Huckaby v. Brooks*, 75 Ga. 678; *Reeves v. Parish*, 4 S. E. 768, 80 Ga. 222.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Petition by the Bank of the State of Georgia for a rule absolute against Charles Boyles, constable. Rule absolute granted, and defendant brings error. Affirmed.

The following is the official report:

The petition alleged: On November 10, 1893, petitioner sued out a distress warrant before E. H. Orr, justice of the peace of Fulton county, against Singer & Miller, claiming \$45 as rent then due and unpaid from Singer & Miller, and caused the warrant to be put in the hands of Boyles, then and now a lawful constable, with instructions to levy on and sell enough property of Singer & Miller to make the \$45 and costs, and have the same ready to render to petitioner as in the warrant directed. Boyles made the levy under the warrant on November 11, 1893, on certain property mentioned, belonging to Singer & Miller. When the levy was made, Singer & Miller filed no affidavit denying that they owed the whole or any part of the sum claimed, and gave no replevy bond as is required in such cases. It was then the duty of Boyles to proceed to advertise and sell enough of the property so levied on to make petitioner's debt, as he was directed to do, and should have done, under the warrant, but which he wholly failed and refused to do. On the contrary, he took from Singer & Miller, at the time of making the levy, a forthcoming bond, which was unlawful, and

has wholly failed and refused to do his duty as an officer,—make the advertisement and sale, and make the money, and account to petitioner therefor.

Boyles answered: Singer & Miller did not file a counter affidavit and replevy bond at once, but, laboring under a misapprehension of the facts, they filed an appeal bond instead. At the time of the levy, respondent was informed that they had a good defense to the warrant, and would appear and defend the case. Believing that they were acting in good faith in the premises, he took at that time a forthcoming bond for the goods levied on, the surety on which was perfectly solvent. He did advertise the property for sale as provided by law. The case of the bank against Singer & Miller was called by the justice on the regular court day,—the fourth Monday in November, 1893,—before the hour at which constable sales commenced on that day, and was set by the justice for trial Monday, December 11, 1893. On November 29, 1893, Singer & Miller, supposing that a judgment had been entered against them, filed the appeal bond as aforesaid, and paid the costs in the case, which were afterwards returned to them. On December 4, 1893, they filed a counter affidavit, and gave a replevy bond as required by law, the security thereon being accepted by the justice, and being amply able to respond to any judgment that might have been rendered in the case. The case was called again on the regular court day of said court,—the fourth Monday in December, 1893,—and was again set for trial on Wednesday, January 10, 1894; and at said time—defendants appearing, and there being no appearance for plaintiff—the case was dismissed for want of prosecution. Plaintiff had due notice of the time of said trial. Respondent, as well as the attorneys for Singer & Miller, notified the attorney for plaintiff, on several occasions, that they would try the issue joined on the distress warrant and counter affidavit at any time designated by said attorney; but he declared he would not try the case, but proposed to hold respondent liable for the amount named in the distress warrant. There has been no judgment of any court that Singer & Miller owe plaintiff for rent \$45, or any other sum; but, on the contrary, there has been a judgment dismissing said warrant and the levy thereunder, the legal effect of which is that no such indebtedness exists.

There were put in evidence: The distress warrant, returnable November 27, 1893, with levy thereon by Boyles November 11, 1893. Also a forthcoming bond for the property levied on, dated November 11, 1893, and approved by Boyles. Also an appeal bond in the case of the bank against Singer & Miller, dated November 28, 1893, not marked as approved, and indorsed in pencil, "Filed November 29, '93." Also affidavit by one of the firm of Singer & Miller that the distress warrant was unjust, without authority of

law, and that Singer & Miller were not indebted to plaintiff the amount of said claim, nor any part of it. The affidavit was executed December 4, 1893, and filed the same day with the justice. Also a bond for the eventual condemnation money, in terms of the statute, approved by the justice, executed December 4, 1893, and filed with the justice the same day; the bond being signed by Singer & Miller as principals, and by others as sureties.

Edgar H. Orr, for plaintiff in error. L. P. Skeen, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 798)

GOULD v. PALMER et al.

(Supreme Court of Georgia. July 8, 1895.)

LIMITATIONS—RUNNING OF STATUTE—NEGLECT OF DUTY BY ATTORNEY.

It is not the special damage or injury resulting from the unskillfulness of an attorney at law in the representation of his client's interests, but the breach of the duty imposed by the contract of employment, which gives a right of action for damages sustained. The statute of limitations in such a case runs, therefore, from the date of the breach of duty, and not from the time when the extent of the resulting injury is ascertained. The action in the present case not having been brought within four years from the date of the breach of duty, and nothing being alleged which in the meantime suspended its operation, the court properly dismissed the plaintiff's declaration. *Crawford v. Gauden*, 33 Ga. 173; *Lilly v. Boyd*, 72 Ga. 83; *Weeks*, Attys. § 320; 1 *Wood*, Lim. § 122.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by E. F. Gould against Palmer & Read as a firm and Charles A. Read as an individual. Dismissed, and plaintiff brings error. Affirmed.

The following is the official report:

On demurrer the declaration was dismissed on the grounds that it was barred by the statute of limitations, and that it set forth no cause of action. It alleges the following: For some months prior to June 6, 1894, Palmer & Read had been plaintiff's attorneys in various matters. Palmer's liability herein arises solely from his partnership with Read, as he neither had knowledge nor actively participated in any of the acts and omissions for which this suit is brought; but all such acts and omissions were by Read. In April and May, 1890, plaintiff had in his office building in Atlanta a tenant by the name of Mrs. S. C. Hall, who ran a studio; and, having some difficulty about rent, he employed defendants as attorneys at law to represent his side of the rent question against her. This employment involved the use of such means on their part as were proper to collect the rent. Pending this dispute, Mrs. Hall left the building, and between that time and the 5th of June, 1890, a correspondence en-

sued between plaintiff and Mrs. Hall, and John A. Wimpy, the attorney for her and her husband, in which she set up a claim for damages against plaintiff. During this correspondence defendants were employed as plaintiff's attorneys to shape said correspondence, and to advise, protect, and generally represent plaintiff in said claim, whether the same was ever brought to suit or not; and in consideration of his undertaking to pay them a reasonable fee they undertook to represent him, assuming to bring to the discharge of these duties reasonable skill, care, and diligence. On June 5, 1890, Mrs. Hall's claim culminated in a suit against plaintiff in the city court of Atlanta for \$5,000 damages. Defendants' previous employment as his attorneys would have embraced the matter of defending this suit without further agreement, but on June 6, 1890, an article appeared in the Atlanta Constitution newspaper, giving some prominence to the filing of the suit, and plaintiff on the same day called on defendants as his attorneys (they always acting through Read), and asked their advice about the matter, and as to whether, in the proper conduct of the defense, a reply should be written to the newspaper article, to prevent the public from becoming prejudiced against his side of the case. Said suit was unfounded in law, and was demurrable; and, whether the motives which inspired the suit were good or bad, the material facts therein alleged could have been successfully disproved by him, and the proper place to defend the case was in the courthouse. It was the duty of defendants to confine their attention to the proper defense thereof upon the law and facts only. Plaintiff is not a lawyer, is inexperienced in law, especially in the question of how to manage such a case as Mrs. Hall's; and he relied absolutely and implicitly on defendants to guide him safely through it. On said day he asked their advice as to whether it was necessary to write a reply to the newspaper article. He showed them a rough draft of a card written by himself, which, in substance, was a mere denial of the allegations in Mrs. Hall's petition, and a request to the public to defer judgment until the trial in court. Defendants were acquainted with all the facts, having been in the case as attorneys from the beginning of the rent trouble. Plaintiff asked their advice as to whether it was proper to publish any card at all, and, if so, stating that he desired to keep out of any further trouble, and to keep clear of the law of libel, of which he was ignorant; and he placed the matter entirely in defendants' hands as attorneys, as to whether that or any card should go into the papers. They examined his card (which was exceedingly temperate, and contained nothing libelous), laid it aside, and then and there advised plaintiff that, in the proper conduct of the case, and to prevent the public from becoming prejudiced, it was necessary for him to write a card, and that they would

write a proper card, signing his name thereto. Again he warned them not to write anything that would get him into further trouble, and stated that he relied upon them to keep him clear of the law of libel, and placed the whole matter in their hands as attorneys, relying on their exercising reasonable skill, care, and diligence. Accordingly they prepared and had published in the Atlanta Constitution of June 7, 1890, a card with his name, signed thereto, which he had never seen before it was published, to wit: "Atlanta, Ga., June 6th, 1890. Editors Constitution: In this morning's issue of your paper you have published what purports to be a very sensational damage suit, in which Mrs. Selma Cole Hall is plaintiff and I am the defendant. Now, I do not wish to fight this matter in the newspapers, but since her published allegations reflects so strongly upon my private character, I do think it but justice to myself to state here that each and every allegation of her complaint is absolutely false in fact, mischievous in character, and founded upon an utter failure to extort money from me by the process of blackmail. Some weeks ago I ejected Mrs. Selma Hall and her husband from my building at No. 10 Decatur street, for failure to pay the rent due me, and I am now suing her husband for the same rent. Since this ejection Mrs. Hall's husband has written me several letters, threatening to accuse me of various crimes if I did not pay them money. These letters, together with several of similar import from their attorney, one John A. Wimpy, have been in the hands of my lawyer, Mr. Chas. A. Read, for several days, under whose advice I refused to take the money earned by me in honest toil, and contribute it to the necessities of such wretched creatures as Mrs. Selma Hall and her husband and this Wimpy. I have only been prevented from prosecuting these parties criminally for sending me such threatening letters by the instinctive desire that a gentleman feels to keep himself out of public controversy with those who have nothing to lose, either in character or purse. But since their itching palms and aching voids seem only capable of being comfortably filled by public notoriety, as the next best substitute for public plunder, I shall leave no stone unturned to assert my legal rights, and in the assertion thereof I will no doubt be able to teach these vamps that the laws of Georgia were made to protect honest men in the enjoyment of their well-earned riches from the mendacious allegations of blackmailing suits, and the perjured testimony necessary to maintain them. E. F. Gould." The publication of said charge was a gross want of skill and care on the part of defendants. The facts stated therein and language were entirely those of defendants. The card, particularly in the epithets, was grossly libelous; and that no degree of proof could sustain some of the charges should have been known to every lawyer of ordinary skill and diligence. Defendants

wrote the card knowing the statements therein were incapable of substantiation. Had defendants exercised ordinary care, they would have known that Mrs. Hall was standing on all her legal rights, and that she would allow no legal opportunity to pass to obtain any advantage over plaintiff. As a result of defendants' conduct (which result was probable, and would have been foreseen by them in the exercise of ordinary skill), Mrs. Hall, on June 16, 1890, filed against plaintiff a suit for \$25,000 damages, based on the publication by defendants, which she alleged to be false and defamatory. On the same day, and on the next, suits against plaintiff were filed by her husband, T. F. Hall, and by her attorney, John A. Wimpy. The original suit of Mrs. Hall which led to the writing of the card has been dismissed, demonstrating that it could never have resulted in a recovery. Under defendants' advice (they having been retained as plaintiff's counsel in the three subsequent suits), plaintiff interposed defenses thereto, which all the way through were managed and controlled by defendants, who advised him that neither of the Halls nor Wimpy could ever recover. On account of this advice he put up the best defense he could to the card written by defendants, being compelled to recognize it as his own, because of their agency in writing it. Had it not been for their advice (they having his entire confidence and he relying implicitly on them), said suits could and would have been settled up within a month after they were brought, for a much less sum than they subsequently cost plaintiff. On April 20, 1894, Mrs. Hall's suit resulted in a verdict for \$1,500 and costs, which, under defendant's advice, plaintiff has paid, together with \$250 court costs. A few days thereafter, under their advice, he was compelled to settle Wimpy's case for \$500. In defense of said suits he has necessarily paid \$1,400 attorney's fees, \$600 of which went to defendants. In the necessary preparation and conduct of his defense under defendants' advice, he expended \$600 for cost and fees, taking depositions, traveling expenses of witnesses, and employment of detectives. All the foregoing damages were the proximate, necessary, and direct result of defendants' want of skill and care in writing said card, and were incurred and sustained under their advice. This suit has not been brought sooner for the following reasons: (a) Defendants, occupying a confidential relation towards plaintiff, and being his trusted advisers, upon whom he implicitly relied, advised him to litigate said cases; that there was no libel and could be no recovery; and not until the verdict against him did he know there was any liability, or that the card was libelous. (b) The claims of the Halls and Wimpy were for unliquidated damages, and not until the verdict was liability or amount definitely fixed, the matter resting with the enlightened conscience of the jury; and not until the verdict could plaintiff's damages be fixed with

sufficient definiteness to sue, and not until said verdict was defendants' tort completed. The demurrers filed by defendants set up, in addition to the grounds upon which the judgment of the court below was based, misjoinder of parties defendant, ratification by plaintiff of the writing of the card in question, failure to disclose when the \$600 was paid to defendants, failure to set forth an itemized statement of the amounts expended for taking depositions, traveling expenses, and employment of detectives, and failure to set out the "rough draft of a card" written by plaintiff.

Arnold & Arnold, for plaintiff in error.
Glenn, Slaton & Phillips and Palmer & Read, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 800)

RODGERS v. BAKER.

(Supreme Court of Georgia. July 8, 1895.)

HOMESTEAD—WAIVER OF EXEMPTION—EFFECT—
VALIDITY OF EXECUTION SALE.

A homestead which has been regularly set apart can neither be waived nor renounced by the head of the family so as to authorize a levy upon and sale of the property so set apart under an execution issued upon a judgment rendered against him, and if, pending the existence of the homestead, such property be levied upon under such an execution, and sold, the sale is void, and a purchaser thereat acquires no title, even though the judgment upon which the execution issued is based upon a promissory note containing a stipulation in which the head of the family does solemnly "waive and renounce" the benefit of the homestead.

(Syllabus by the Court.)

Error from superior court, Fulton county;
J. H. Lumpkin, Judge.

Action by Robert L. Rodgers against J. T. Baker. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Rodgers sued T. J. Baker for certain land in Fulton county. The cause was submitted to the judge below for decision on the law and facts. He rendered judgment in favor of defendant, to which ruling plaintiff excepted. The following facts were agreed upon: Oliver Baker was the owner of and in possession of the land sued for, for some 30 years before the trial. In March, 1873, he applied for and obtained a homestead under the constitution of 1868, the land sued for being embraced therein. Green and Isom obtained a judgment against Oliver Baker on May 22, 1881, in a justice court, on a debt which arose in 1879 on a homestead-waiver note. Execution issuing from this judgment was levied on the property sued for, September 25, 1891. The property was advertised and sold by the sheriff of Fulton county, bought by Rodgers, and the sheriff's deed made to him. The sheriff dispossessed defendant of the land sued for; it having no house on it, but being cultivated

by defendant. After defendant was evicted, the land being vacant, he went back in possession, and has remained in possession up to the present time. On April 14, 1888, Oliver Baker deeded the land sued for to Henry Starnes, as trustee for W. D. Starnes, with power to sell the same at any time, publicly or privately, without an order of court. Defendant bought the land from Starnes, trustee, on September 11, 1889, paying therefor value received. Defendant was never notified by the sheriff of the levy, but heard that the land had been levied on. Defendant made no claim to the property when it was advertised and sold, nor was any claim interposed by the beneficiaries of the homestead, nor by Oliver Baker. Defendant is a son of Oliver Baker, and has been of age some years. Oliver Baker and wife are still living, and the children are all of age, the youngest becoming of age in 1893. Oliver Baker has two single daughters living with him, both of age. It further appeared: The execution was kept alive by proper entries, and was recorded on the general execution docket in July, 1890. The sheriff's deed was regular, was dated November 3, 1891, and was recorded November 17, 1891. The advertisement for sale was legally made. The deed from Baker to Starnes was recorded August 20, 1891. The homestead was granted for the benefit of the wife and children of Oliver Baker. The deed from Starnes, trustee, to defendant, was recorded September 11, 1889.

Robt. L. Rodgers, for plaintiff in error.
Dorsey, Brewster & Howell, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 808)

GOODRICH v. ATLANTA NAT. BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. July 8, 1895.)

PLEADING—WHAT ADMISSIBLE UNDER GENERAL
ISSUE—BUILDING ASSOCIATIONS—USURY—COVER-
TURE AS A DISABILITY—ACTION ON BOND—AT-
TORNEY'S FEES.

1. That an action is prematurely brought is a defense which is not available under the plea of the general issue. Such an issue must be presented either by plea in abatement to the writ or by motion for nonsuit; but, if the fact appear on the face of the record, it may be made by demurrer.

2. The pleas alleging usury, and which were stricken, on motion, by the court, containing no averments of fact which take the present out of that class of cases in which, according to the rulings of this court, contracts purely mutual between the members of building and loan associations, where each member takes an interest in the several contributions to a general fund, are held not to be usurious, were therefore properly stricken.

3. As a general rule, coverture, according to the principles declared by this court in the cases of *Ilays v. Jordan*, 11 S. E. 833, 85 Ga. 741, and *Scofield v. Jones*, 11 S. E. 1032, 85 Ga. 816, no longer operates as a limitation upon the power of a married woman in this state to

make contracts, whether she be possessed at the time of a separate estate or otherwise, and she may make any contract into which she is not prohibited to enter by positive law.

4. Where, to an action upon a bond given to secure the payment of a sum certain, and other items to be thereafter incurred, but which could not be stated at the time the bond was given, which bond contains a stipulation for the payment of attorney's fees, the defendant files a plea of the general issue, and upon the trial the jury find for him as to some of the items charged, his plea is, in contemplation of law, sustained, and the plaintiff, under the act of July 22, 1891 (Acts 1890-91, vol. 1, p. 221), is not entitled to judgment for attorney's fees. Direction is accordingly given that the attorney's fees allowed by the verdict be written off, and the judgment stand otherwise affirmed, with costs against the defendant in error.

(Syllabus by the Court.)

Error from superior court, Dekalb county; R. H. Clark, Judge.

Action by the Atlanta National Building & Loan Association against Mrs. M. E. Goodrich on a bond. There was a judgment for plaintiff, and from an order overruling defendant's motion for new trial she brings error. Affirmed.

The following is the official report:

On July 16, 1892, the Atlanta National Building & Loan Association, alleging itself to be a corporation under the laws of Georgia, brought suit against Mrs. Goodrich for \$1,169.44. Attached to the declaration is a deed from defendant to plaintiff, dated August 25, 1891, reciting that the party of the first part, according to the charter and by-laws of the association, has procured an advance of \$1,000 from the same, and has executed her bond therefor, of even date therewith, conditioned to be void if she shall pay to the association, as long as it shall continue to exist, or as provided in its by-laws, the sum of \$5 monthly installments due on 10 shares of stock held by her in said association, on which said advance was procured, and the further sum of \$4.25 monthly as interest and premium on said advance. In consideration of the same, and to secure payment of the debt, she sells and conveys absolutely to the association certain described land, with warranty of title. It is the meaning and purpose of this conveyance to invest the association with the absolute title to the property, and to give it power to sell the same, according to sections 1969, 1970, of the Code, on failure of the party of the first part to pay the installments and interest and premiums mentioned in her bond for three successive months, as required by the bond and by the charter and by-laws of the association, and thereby secure to it the repayment of said advance, or of such sum as, under its charter and by-laws, it would be entitled to recover by suit on the bond, as well as all cost of collection, and 10 per cent. attorney's fees incurred by the association in enforcing its rights thereunder, etc. The bond recites that defendant is bound to the association in the sum of \$2,000, conditioned as follows: Whereas, she has procured an advance of \$1,000 on 10 shares

of stock which she holds in the association under the by-laws thereof, should she pay to the association so long as it shall continue to exist, or as may be provided in the by-laws, the sum of \$5 monthly installments due on the stock on which the advance was procured, and the further sum of \$4.25 monthly as interest and premium on said advance, and keep the buildings on the property insured for the benefit of the association, and pay all taxes and assessments, etc., the obligation to be void, otherwise of full effect. With the bond was a written transfer from defendant to plaintiff of the 10 shares of stock mentioned in the bond and deed, with agreement to pay the interest and installments thereon according to the terms of the bond. Also attached to the declaration is an account in favor of the association against defendant, dated July 15, 1892. The first three items of the account are installments on 10 shares of stock for January, 1892, \$5; interest and premium on loan for January, 1892, \$8.50; fine for non-payment of same, \$1. The same three items are set forth for each month following up to and including July, 1892, making an aggregate of \$101.50, to which is added \$1,000 advanced or loaned, and \$110.50 attorney's fees. From the total of these sums is deducted \$42.21 as the value of the 10 shares of stock borrowed on, leaving a balance of \$1,169.44. Defendant pleaded the general issue, and filed two special pleas, which were stricken on motion. The plaintiff introduced in evidence the deed, bond, transfer of stock, and account already mentioned, and a printed copy of the by-laws of the association, identified by the secretary thereof. Among these by-laws were the following: "The association shall have a common seal with the words, 'Atlanta National Building & Loan Association, Atlanta, Georgia,' inscribed thereon." "Stock in this association shall be nonforfeitable; but, if any stockholder is six months in arrears in payment of monthly dues, his stock shall be sold to the highest bidder by the board of directors at any monthly meeting of the board at the office of the association, after mailing him notice thereof to his last known address at least twenty days previous to such meeting. From such sale all expenses, dues, and fines accrued thereon shall first be paid, and the balance, if any, paid to the holder of said stock. If it does not bring enough to pay such expenses, dues, and fines, the stock shall be bid in by the directors and canceled, and the amount standing to the credit of such shares in the loan fund shall be divided among the other shares in good standing." "The charges for loans shall be six per cent. per annum on the amount loaned, and the fixed premiums of 35 cents per month per \$100 in class A, and 50 cents per month per \$100 in classes B and C, or such other premiums as the plans and tables which may be hereafter promulgated shall show. Interest and premium shall be payable in monthly installments on the first Saturday in each month, as

when dues are paid." "Any borrower who shall fail to pay his installments of dues, interest, and premiums, or either of them, for the period of three successive months, shall be liable for the immediate foreclosure of his security; and it shall be the duty of the general attorney, upon receipt of notice of such delinquency from the secretary, to proceed without delay to enforce the payment of the whole indebtedness, unless otherwise ordered by the board of directors." The secretary of the association testified that defendant obtained from plaintiff an advance or loan of \$1,000, and received that sum without discount or deduction. At the time of filing of this suit she was in default in the payment of the monthly installments, interest, and premiums for seven months, as indicated in the account mentioned. This account is true and correct, was due at the time suit was brought, and is wholly unpaid. There is a discrepancy in the item of monthly interest and premium as charged in the account and that expressed in the bond. That in the account is the correct sum, according to the by-laws, with which defendant should be charged. A mistake was made in drawing the bond, which should have stated \$8.50 for monthly installments and premiums, instead of \$4.25. Defendant has paid in all to the association \$54, of which \$20 was installments of shares of stock for the months of September, October, November, and December, 1891. The other \$34 was for interest and premiums, and it paid those items, if computed according to the stipulation in the bond, through the month of March, or to April 1, 1892. Defendant paid \$13.50 for attorney's fees, and cost of procuring abstract of title to the land, to the attorney of the association. He receives a salary from it. The value of the 10 shares of stock at the time suit was brought was \$42.21, allowing credit for the defaulting installments charged in the account.

The jury found for the plaintiff \$1,029.54 principal, interest from August 1, 1892, at 7 per cent., and \$107.17 attorney's fees; and defendant's motion for a new trial was overruled. The grounds of the motion were as follows: (1-3) Verdict contrary to law and evidence. (4) Error in striking the special plea of usury, as follows: "The defendant pleads that the interest amounts to more than 7 per cent. per annum on the loan made, to wit, 11 $\frac{1}{5}$ to 12 $\frac{1}{2}$ per cent. per annum. On August 25, 1891, defendant borrowed of plaintiff \$1,000, and, the lawful rate of interest being 7 per cent., the contract required and defendant was thereby to pay 12 $\frac{1}{2}$ per cent. in interest, contrary to the law. Defendant pleads that the scheme by which she borrowed the money was a scheme to avoid the usury laws of this state, and the contract usurious. And the usury specified is that the plaintiff charged between 11 and 12 $\frac{1}{2}$ per cent. per annum as interest on the sum borrowed; that the said plaintiff did reserve and take, and did contract to reserve and

take, directly and indirectly, a greater sum for the use of the money borrowed than the lawful interest, and the same is so included in the contract sued on in the case. The sum upon which it, the usury, was to be paid, is \$1,000. The contract was made 25th August, 1891, the interest payable monthly at an unlawful rate of interest, to wit, 12 $\frac{1}{2}$ per cent., and the usury is the same at said rate of interest on the said principal sum." (5) Error in striking the special plea that plaintiff has no legal existence, and no right to contract or be contracted with, and no right to maintain the suit, nor to commence to exercise privileges conferred by its charter, for the reason that 10 per cent. of its capital stock was not paid in to its treasurer. And, further, that defendant is a married woman, and as such was not a free trader, and had no right to subscribe to and take stock in the association and to make the contract sued on. (6) Refusal to rule out the by-laws on defendant's motion on the ground that the by-laws offered were a mere copy, and not the original by-laws adopted by the association, and were not under its seal. (7) Refusal to charge that plaintiff could not recover without the introduction of its charter. (8) Refusal to charge that, to enable plaintiff to recover for the item of \$1,000 charged in the account, it must be shown that said item was due. (9) Refusal to charge that "there is an item or claim in the deed, bond, or transfer of stock admitted in evidence which shows when the said sum of \$1,000 shall become due and payable, and in the absence thereof plaintiff cannot recover for the item aforesaid." (10) Refusal to charge as follows: "The contention of the defendant in this case is that the plaintiff had no right to sue at the time the suit was brought. She says that the plaintiff could only sue at the expiration of three months from the date of her default in the payment of the monthly installments on the stock and in the payment of the premiums and interest on the loan of \$1,000 made in the case. She says that there must be a default in the payment of the premiums and interest for the full period of three months before suit can be brought for anything in the case. And she says that in September, 1892, she paid \$20 for installments on stock, and \$34 for premiums and interest. She says that the plaintiff gave her credit for payments for four months, counting installments on stock \$5 per month, and premiums and interest at \$8.50 per month, whereas the contract shows that the monthly payment of premium and interest is \$4.25, and that she is entitled to credit for \$34 so paid for eight months instead of four months; that plaintiff has credited her for September, October, November, and December for said \$34 at \$8.50, whereas she is entitled to credit for eight months, to wit, for September, October, November, December, January, February, March, and April, because, at \$4.25 per month on said

premiums and interest, \$34 would pay for eight months, and having paid to April, 1892, she is only due from that date; and as the suit was brought 16th of July, 1892, that three months had not elapsed, and therefore plaintiff sued before the said three months had expired; and that she was not in default for the full period of three months at the time suit was brought, and therefore the suit was prematurely commenced. If you believe that the contention of defendant, as stated by the court, is true, then you should find for the defendant, because the plaintiff cannot sue until the defendant has made default in the payment of the interest for the period of three successive months. If the defendant in this case has paid her full interest and premiums to April, 1892, and her installments to January 1, 1892, then the plaintiff should proceed to sell the shares in the stock as provided by by-law 21, and the proceeds applied to the expenses, dues, and fines, and the balance, if any, to the holder of the stock, or applied to the loan; and, if it does not bring enough to pay such expenses, dues, and fines, the stock shall be bid in by the directors and canceled, and the amount standing to the credit of such share in the loan fund shall be divided among the other shares in good standing, as profit." (11) Refusal to charge: "The following persons cannot generally make a valid contract: Married women and others named in section 2720 of the Code." (12) Refusal to charge: "The contracts of a married woman are generally void. A married woman cannot go into partnership with any person. If she is in partnership at her marriage, then the partnership is dissolved by the 'feme sole.' A married woman cannot become a member of an association such as claimed by the plaintiff in the case. A married woman cannot bind her separate estate by entering into the association as a member thereof, and she cannot, therefore, be held to account for dues and fines on the shares of said stock." (13) Refusal to charge: "The defendant pleads the general issue in this case; and if that plea has been sustained, or any part of it, then the plaintiff cannot recover counsel fees." (14) Refusal to charge: "You have the evidence before you, and the court cannot express or intimate what has or has not been proven. You must be satisfied from the evidence that the plaintiff has proven its claim in this case against the defendant. It is contended and insisted by the defendant that the plaintiff is not entitled to recover, under the evidence, \$1,000 money advanced or loaned by the plaintiff to the defendant, and that the only amount that the plaintiff can recover is the monthly interest and installments mentioned in the bond. If you are satisfied from the evidence that plaintiff is not entitled to recover the \$1,000 loaned or advanced, for the reason [that] it has failed to prove the amount which is not due, then you will find for the defendant on that ques-

tion, but will find such amounts of monthly payments, if the evidence shows only one due, and the amount." (15) "Because the court charged the jury that if the defendant filed a plea of general issue in the case, which was attached to the declaration, then the defendant would be liable for 10 per cent. on the principal and interest for attorney's fees in the case; that the plea made an issue, and if the jury believed that the plea of the general issue was filed, as stated therein, then the defendant would be liable for attorney's fees in the case, provided she failed to sustain her plea, and it would be their duty to find for the plaintiff the 10 per cent. on the principal and interest as attorney's fees; that the plea formed an issue in the case when it was brought out by plaintiff's witness that the monthly interest and premiums charged in the account varied from that stated in the bond. Counsel for plaintiff announced that it was a mistake in drawing the bond, of which he was then apprised, and asked no recovery except for the amount named in the bond."

Thos. W. Latham, for plaintiff in error.
Malcolm Johnston, for defendant in error.

PER CURIAM. Judgment affirmed, with direction.

LUMPKIN, J., not presiding.

(97 Ga. 295)

MALLOY v. PORT ROYAL & W. C. RY. CO.
(Supreme Court of Georgia. July 8, 1895.)

INJURY TO RAILROAD EMPLOYEE—PLEADING.

A declaration filed by an employé of a railroad company to recover damages for injuries inflicted upon him in consequence of the negligence of a coemployé, which states the nature of the employment, the character of the work in which they were engaged, the extent of the injuries, and the amount of the damages, and likewise the circumstances under which he was injured,—the latter being stated with such particularity as to show that he was himself free from fault, and was injured solely because of the negligence of his fellow servants,—sets forth substantially a cause of action, and a dismissal upon demurrer was erroneous.

(Syllabus by the Court.)

Error from city court, Richmond county;
W. F. Eve, Judge.

Action by Robert Malloy against the Port Royal & Western Carolina Railway Company. From an order sustaining a demurrer to the complaint, plaintiff brings error. Reversed.

The following is the substance of the official report:

The declaration alleged that plaintiff was employed by the railroad company as a section hand to work on the line of the road, in building and repairing tracks, bridges, and trestles used and necessary in the running of the trains of the company. It became his duty, in company with others, to line the trestle, the track on and about the trestle being out of line; and, in the course

of straightening it, it became necessary to line the trestle by placing, at the bottom, or near the supports or benches, of the trestle, blocks to serve as props or fulcrums, against which a lever or long pole was placed in order to prize forward or upward, as required. For the safety of those engaged in prizing, it became necessary that the block or fulcrum should be securely placed, and so arranged that it should not slip. Plaintiff was engaged in another part of the work, awaiting the fixing of the block, when he was called to assist in the prizing; and in compliance therewith, and in the due course of his duty, he went to the place where the prizing was to be done, and, relying on the safe and secure placing and fixing of the prop, with the other employes he took hold of the long and heavy pole used as a lever, and in the line of his duty began, with all proper care and diligence, to pull thereon for the purpose of prizing the bench of the trestle; and without fault on his part, and by the mere fault, negligence, and carelessness of the company and its agents, of which the plaintiff had no notice, the block or fulcrum was insecurely, improperly, loosely, and negligently placed, by reason whereof it slipped, and the pole was violently forced and slipped, throwing plaintiff upon the ground, and falling with great force across the small of his back, thereby inflicting great and permanent injuries, described. The suit was against the Port Royal & Western Carolina Railway Company, alleged to be a consolidation of the Augusta & Knoxville Railroad Company with the Port Royal & Western Carolina Railway Company, which consolidation was ratified by act approved September 21, 1887, as to so much of the road as lay in this state, the act declaring the same to be a Georgia corporation, and that the consolidated company should be liable to creditors ex delicto to the same extent as if the liability had been incurred by the consolidated company; and the injury occurred on September 12, 1887, while plaintiff was employed by the Augusta & Knoxville Railroad, now the Port Royal & Western Carolina Railway Company.

J. R. Lamar and M. P. Foster, for plaintiff in error. Ganahl & Ganahl, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, J., not presiding.

(97 Ga. 199)

MCGHEE v. STATE.

(Supreme Court of Georgia. July 8, 1895.)

FALSE PRETENSES—MISREPRESENTATIONS BY MORTGAGOR—BURDEN OF PROOF—SUFFICIENCY OF EVIDENCE.

1. Where a debtor executes to two creditors separate mortgages to secure debts due to them respectively, and it appears that in procuring the credit to secure which the last mortgage was executed he represented to the mortgagee

that the property mortgaged was unincumbered, such misrepresentation cannot be made the basis of a prosecution for cheating and swindling, under section 4587 of the Code, unless it be shown that in consequence thereof the second mortgagee has been in fact defrauded, and that in extending the credit upon the faith of such misrepresentation he has sustained a loss.

2. In such a case the burden is upon the state, not only to establish the misrepresentation made and credit given, but likewise a loss; and where the evidence shows that the mortgaged property has neither been sold nor appropriated to the extinguishment of the senior mortgage, there is no such evidence of a loss by the junior mortgagee as will sustain a conviction of the debtor. Especially is this true where the evidence shows that the mortgaged property exceeds in value the aggregate indebtedness represented in both the mortgages, and it does not appear that the senior mortgage is being either claimed against the mortgagor or enforced against the mortgaged property.

(Syllabus by the Court.)

Error from city court of Monroe county; J. B. Williamson, Judge.

J. W. McGhee was convicted of swindling, and brings error. Reversed.

The following is the official report:

McGhee was tried in the city court of Monroe county upon an accusation charging that on February 13, 1895, in Monroe county, he unlawfully and falsely represented to R. B. Stephens, of the firm of Stephens & Ensign, that at the time he executed and delivered a mortgage to that firm on a red cow, three years old, a bay mare pony eight years old, and a white-painted buggy, there were no other liens upon said property, when he knew there were other liens upon it, and by said false representations obtained a credit from said firm, and thereby defrauded said firm of rent on Frank Smith amounting to \$17.17. Further, that defendant, on the — day of —, 1895, in Monroe county, unlawfully, after having executed and delivered to said firm a mortgage upon said property, sold or otherwise disposed of the same, without their consent. Indictment and trial by jury were waived by defendant. The judge below dismissed the second count in the accusation, and found defendant guilty of the accusation contained in the first count. Defendant excepts, and alleges that this ruling was contrary to law, evidence, etc. Further, that, in order to complete the offense of cheating and swindling, it is necessary that the creditor or party from whom credit is obtained or valuable goods received, should be defrauded, and such fraudulent transaction must necessarily result in a loss. This ground has not been laid, inasmuch as the creditor swore that he had foreclosed the mortgage, and had had the property levied upon, but that it had not yet been sold; and it is not within his knowledge whether the proceeds of the sale will be sufficient to pay off both the mortgages or not; hence no one can say whether he is defrauded or not, until said sale is consummated, and the proper credit made on the execution by the officer. Further, that a fraudulent representation is not indictable unless calculated to

deceive a person of ordinary prudence and discretion, and, though the representation made by defendant was false, it was within the power of the creditor to ascertain from the records of the county whether the defendant's statement was correct or false, inasmuch as the means of detection were at hand, as the senior mortgage was upon record; and by his failure to employ or exercise such discretion in an effort to detect the fraud the defendant is not guilty of the offense of cheating and swindling.

Upon the trial, Stephens swore he received from defendant a mortgage for \$22.70 on the property described in the accusation. The mortgage stated that the property was unincumbered, and not subject to homestead and trust funds. (The mortgage was dated February 13, 1895, and recorded February 16, 1895.) Defendant stated expressly that the property was unincumbered, and upon the faith of this representation Stephens, for the firm of Stephens & Ensign, of which he is a member, canceled the debt against one Smith, defendant's brother-in-law, for rent, who was at that time proceeding against the property of defendant by attachment, and at the time of the execution of the mortgage had the same under levy. Stephens & Ensign have not been paid the amount of the mortgage, but it has been foreclosed, and the property mentioned therein is now in the hands of the officer under foreclosure. It has not been sold, but it is to be sold. The prosecutor, Stephens, has gone to considerable expense in finding defendant and the property. He has foreclosed the mortgage, and furnished a horse to the levying officer. He has spent about \$11 in getting defendant and finding the property. Up to the present time he has paid out nothing in such pursuit. The property mortgaged, if sold, might pay his mortgage, but would not pay off it and the Ashworth mortgage. This was his opinion; he had no personal knowledge of the value of the property. Ashworth testified defendant executed him a mortgage note for \$19.45, covering certain property (one Brewster spring buggy gear, body black; also one red cow, three years old, named "Dolly"; also one black mare pony about ten years old. The mortgage was dated January 31, 1895, and recorded the same day (on the day named therein). Since his arrest, defendant has told witness that he had disposed of the property named in this mortgage, and that the reason he did so was because the mortgages given both parties were due on October 1, 1895 (the mortgage note to Stephens & Ensign appears to have been due one day after date, and that to Ashworth on October 1, 1895), and that he expected to pay them off before that time; that the value of the horse mortgaged was from \$15 to \$20, and that of the buggy \$19.45, at the time he sold it, in January. Henry Tison testified he bought a black horse from defendant, and paid \$7 for it. The horse was more black than dark bay. The purchase

was made in Monroe county. John Abernatha testified that he bought a black-bodied buggy, with running gear painted white, for which he gave a silver watch, which buggy was worth \$12 to \$15; that the horse sold Tison was more black than dark bay; that he did not think the defendant had any other horse and buggy, never saw him with any other, and lived not far from him; and that the trade was made in Monroe county. R. S. Britt testified that the cow was worth \$12 or \$15; that he would not have the horse, but did not know what it was worth; that he had not seen defendant with any other horse or cow since January, 1895; that he had seen the buggy named in the Stephens mortgage; that it was white running gear, with black body; and that he did not know how many horses defendant had; lived close to him, and never saw any other than this one in his place. J. W. Jackson testified that he bought a red cow from defendant, which filled the description in the mortgage, and its value was \$10. Lewis Carson testified that he had bought a horse from Tison which was black, and for which he paid about \$3. Bought cow in Monroe county. No evidence was introduced by defendant, but he stated Stephens asked him to give some security for the balance due by defendant for back rent of the mill which he rented from Stephens last year. He told Stephens he had nothing to secure him with except the property named in the mortgage, and that there was already a mortgage upon it. He understood the time of payment was to be October 1, 1895. Upon this statement Stephens & Ensign accepted the mortgage. No misrepresentation was made by him, and he had paid the balance of the rent, except the above amount, and considered himself as the debtor. Did not know he was releasing Smith by such mortgage, but thought it was only a transfer of the debt from an open account to a mortgage note.

Persons & Persons, for plaintiff in error.
O. H. B. Bloodworth, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

LUMPKIN, J., not presiding.

(97 Ga. 228)

FORD v. SCRUGGS.

(Supreme Court of Georgia. July 15, 1895.)

ACTION ON NOTE—LIABILITY OF SURETY—FAILURE TO SUE PRINCIPAL.

No error of law was committed upon the trial, and all questions, both of law and fact, having been submitted to the judge, without the intervention of a jury, and his finding being supported by the evidence, there is no reason which will justify setting aside the judgment rendered by him.

(Syllabus by the Court.)

Error from city court of Dekalb county:
H. C. Jones, Judge.

Action by J. W. Scruggs against O. P. Ford and others. The action was dismissed as to all but Ford. From a judge-

ment for plaintiff, defendant Ford brings error. Affirmed.

The following is the official report:

On December 12, 1893, Scruggs brought suit on a note signed by Holmes, Rawlins, and Ford, dated December 7, 1880, due November 1, 1881, for \$100 principal, with interest at 8 per cent. from maturity, containing a waiver of homestead. The return of the sheriff showed that Holmes and Rawlins were not to be found in the county. Ford pleaded that he was only security on the note; that, without his knowledge or consent, plaintiff had contracted for and received from Holmes, the principal, more than lawful interest, to wit, 20 per cent. per annum; that plaintiff had failed to notify defendant that the note was unpaid until about May or June, 1893; that defendant notified plaintiff immediately to make his money out of Holmes, and notified him as many as four times from then up to November, 1893, the last time pointing out cotton, horses, mules, cows, and hogs belonging to Holmes, telling plaintiff that Holmes was preparing to move to Florida; that plaintiff promised to make his money out of Holmes, but failed and refused to make any effort to collect it, although he stated to defendant that he knew Holmes was going to move to Florida,—for which reasons defendant pleads release. Further, that he notified plaintiff that Holmes had cotton in his yard sufficient to satisfy the debt, and plaintiff promised that he would proceed at once to make his money out of Holmes, relying upon which promise, defendant gave the matter no further attention, and that by reason of these promises he never proceeded to protect himself as he would otherwise have done, and has been damaged to the extent of said indebtedness. Defendant moved to dismiss the case because no cause of action was set out in the declaration, the note being barred by the statute of limitations, as appeared by the copy declared on; also for want of service on Holmes and Rawlins. The motion was overruled, and the case directed to proceed against Ford alone. Plaintiff offered in evidence the original note, to which defendant objected on the grounds: (1) That the note offered did not correspond with the copy in the declaration, the copy having no L. S. after either of the signers' names, and showing no credit, while the note offered in evidence showed an L. S. after each signer's name, and bore two credits,—one, for interest to November 1, 1883; the other, for interest to November 1, 1884. (2) That plaintiff had not proved the execution of the note by the subscribing witness, nor accounted for his absence. The note, both original and copy declared on, contained the words, "Witness my hand and seal." Plaintiff amended the declaration by setting forth a true copy of the note as offered in evidence, except the credits, which amendment was objected to; but the court

allowed it, and overruled the objection to the evidence offered. Ford testified: "I signed a note with Holmes and Rawlins for \$100, about the time the note sued on bears date, but only as security; knew nothing of the contract, except as shown by the note. Plaintiff knew I was security when I signed it. Holmes was principal. I received none of the money borrowed, or any benefit from it. I had no notice that the note was not paid at maturity until about May or June, 1893. Went to plaintiff at once, on notice that the note was still unpaid, and notified him to make his money out of Holmes. Went to see plaintiff three or four times. The last time I went to plaintiff's house in September or October, 1893, and told him that Holmes had eight bales of cotton in his yard; had horses, mules, cows, and hogs, and was arranging to move to Florida. Plaintiff said he knew Holmes was speaking of going to Florida, and that he would make his money out of him. I left believing he would make Holmes pay the debt as he promised. I would have made an effort to secure myself, and collect the same out of Holmes before he moved to Florida, but for my reliance on plaintiff's promise that he would attend to it, but plaintiff took no steps to make the same. Nothing was said at the time of signing the note about who was security or principal; but I know that plaintiff knew I was security, and required my signature before he would let Holmes have the money. The notices I gave plaintiff to make his money on the note, and the promises he made to me, were both verbal." Plaintiff testified: "The reason I did not bring suit sooner was that the note, with interest, was more than \$100, and I could not sue in justice's court. I brought suit at the first chance after Ford came and told me to sue. It is true, he came to me in the fall of 1893, and told me to make my money out of Holmes; that Holmes had cotton, etc.,—and I told Ford I was doing all I could, and would try to get the money. I considered all of the parties equally liable on the note. In addition to this note, I took, at the time I let Holmes have the \$100, a note for \$12, for the first year's interest, which Holmes paid several years ago, and also paid the interest as entered on the original note up to November 1, 1884, at eight per cent. I have not collected but eight per cent. since the first year." The case having been submitted to the judge without a jury, he rendered judgment for plaintiff against defendant, Ford, for \$100 principal, and \$89.18 interest to September 25, 1894. To this judgment, and to each of the rulings before stated, defendant excepted.

Spealrs & Arnold and Spealrs & Smith, for plaintiff in error. W. M. Morrison, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(96 Ga. 35)

STUCK v. SOUTHERN STEEL & ALUMINUM ALLOY CO.

(Supreme Court of Georgia. April 8, 1895.)

MISJOINDER OF CAUSES.

The plaintiff's petition alleging several distinct and independent causes of action against separate and distinct parties, and praying for relief in different forms severally against each of them, and these causes of action not being so connected with or dependent upon each other as to make a joinder of them in one and the same action necessary or proper, the court was right in sustaining the demurrer to the petition.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Bill by George Stuck against the Southern Steel & Aluminum Alloy Company and others. Demurrer to the bill sustained, and plaintiff brings error. Affirmed.

The following is the official report:

The petition of Stuck, as amended, was demurred to, and the demurrer sustained, to which ruling Stuck excepted. It is stated in the bill of exceptions that no intimation or suggestion was made by the court as to any amendment by which the dismissal of the petition could be prevented. The petition alleged: On July 22, 1892, Stuck and Hartfeld, citizens and residents of Newport, Ky., in contemplation of and preliminary to forming a corporation, to be known as the "Southern Steel & Aluminum Alloy Company of Newport, Ky.," and taking out articles or charter of incorporation under the laws of Kentucky, entered into an agreement as follows: "In consideration of a dollar, by each to the other paid, and of the agreements mutually to be kept and performed, it is agreed that, upon the formation and organization of the Southern Steel & Aluminum Alloy Company of Newport, Ky., Hartfeld will convey to said company the sole and exclusive right to manufacture aluminum alloy composites and weldable castings of the metal known as 'schmelddbar-engus,' in Alabama, Georgia, and Tennessee, and to sell and dispose of said products in any market. Stuck agrees to procure a suitable lot in Rome, Ga., erect on it a suitable building, and provide the necessary power in said business; and Hartfeld agrees to furnish to said company one 20-ton water-jacketed smelting furnace complete,—all of said property to be the sole and exclusive property of said company, and all of said articles to be furnished by said parties at cost price, and without profits to them. When the price of the articles has been determined, the difference in value shall be paid to the party expending the highest amount of the money on his part to be expended in the said purchase. Stuck is to devote his entire time and attention to said business, and is to be the president of the corporation. Hartfeld agrees to go in person to Rome, erect the furnace in a good workman-like manner, so

that it will produce the desired result, and fully instruct Stuck as to the mode and manner of [manufacturing] said composites and metal, the instructions and knowledge of manufacturing said articles to be for the sole and exclusive use and benefit of said corporation, and not to be communicated by Stuck to any person. Stuck shall have the right to employ all suitable labor necessary for the proper conduct of said business. No stock belonging to Stuck, Hartfeld, or Blakeley shall be sold, without offer first having been made to the company and refused by it. No more than half the amount of capital stock shall be issued until ordered by a board of directors of the company. Hartfeld and Stuck agree to pay into the treasury of the company, when ready for active operation, \$1,000 each, as a working capital. The settlement between the parties as to the indebtedness which may be found from one to the other shall be made, and the difference settled between them, before beginning active operation. Hartfeld agrees not to sell any of such composite or metal during the continuance of said corporation in Tennessee, Georgia, and Alabama, but is to turn over the same to said corporation." On July 22, 1892, in contemplation of this agreement, publication was made, and other formalities gone through with, as required by law, the publication, under the Kentucky law, being the charter or articles of incorporation of said company. Said articles were set forth in the petition, together with the certificate of the clerk of the county court of Campbell county, Ky. In addition to general corporate powers, the articles provide, so far as seems here material to be stated: "The general nature of the business to be transacted shall be the production, manufacture, and sale of aluminum and aluminum alloy composites and weldable castings. The principal place of business shall be Newport, Ky., but branch offices may be established wherever the business of the corporation may require. The capital stock shall be \$100,000, divided into 1,000 shares, of the par value of \$100 each, to be paid up in money or property of its market value when subscribed for, as may be agreed upon between the corporation and the subscribers, and all stock issued to be fully paid up and nonassessable. The corporation shall begin its corporate existence July 23, 1892, and continue 25 years. Its affairs shall be conducted by a board of three directors, elected July 23, 1892, and the same day annually thereafter. Its officers shall be a president, secretary, and treasurer, and such others as may be deemed necessary to be elected annually. Stuck and Hartfeld shall organize the company, and exercise all the powers of a board of directors, until the same shall be chosen, as provided herein. The highest amount of indebtedness or liability to which the corporation shall at any time subject itself shall not exceed one-fourth the amount of its capital

stock. No stockholder shall sell, convey, or transfer any part of his stock without first offering it to the company for purchase. The private property of the incorporators and stockholders shall be exempt from liability for all indebtedness of the corporation." On July 23, 1892, the corporation was duly organized, and by-laws were adopted. These by-laws are set forth in the petition. At said meeting the capital stock was subscribed, 250 shares of which were issued to Stuck, 225 to Hartfeld, and 25 to Blakely, the last-named stock being issued to Blakely, by direction of Hartfeld, out of that which otherwise would have been issued to Hartfeld,—Hartfeld and petitioner being alone interested in the corporation,—solely to make Blakely eligible as a director in the company. The board of directors elected at the meeting were Stuck, Hartfeld, and Blakely; and the board at once organized, by the election of Stuck as president, Hartfeld as superintendent, and Blakely as secretary. No treasurer was then elected, nor has one been since elected.

In compliance with the agreement of July 22d, Stuck came to Rome, purchased a suitable lot, erected thereon a suitable building, and purchased and provided the necessary power, in the way of machinery, for the location and operating the smelting furnace and business. The lot purchased by Stuck was described in the petition. He took title to it in his own name, but at once had prepared a deed thereto from him to the company, to be delivered whenever Hartfeld should have complied with his undertaking in the agreement of July 22d; and Stuck now stands ready to deliver said deed to the company whenever the court shall so direct. This land was bought by him out of his own funds September 19, 1892, for \$720.75. In the erection of the necessary buildings, and in the purchase and placing of the machinery and power, as provided in the agreement of July 22d, he expended \$2,215.16 out of his own private funds. About November 23, 1892, the furnace which Hartfeld had agreed to furnish was shipped by him to Rome, Stuck paying freight and other bills connected therewith for Hartfeld, at Hartfeld's special instance and request, amounting to \$185.83, which has never been repaid to Stuck. All the articles and things furnished by Stuck were so furnished at the actual cost price thereof, according to said agreement; but Hartfeld billed the furnace at a sum largely in excess of its cost to him, and insisted and still insists that, in the accounting between him and Stuck, under said agreement, Hartfeld should be credited with \$2,450, when in fact, the furnace cost Hartfeld not exceeding \$925. Although Stuck had paid out, before active operations began, a sum largely in excess of what had been paid out by Hartfeld, he was never able to effect any settlement with Hartfeld, as provided in the agreement. He has never been able to get from Hartfeld

a statement of the actual cost of the furnace, or of anything else furnished by Hartfeld. Prior to beginning operations of the plant, Stuck had expended \$2,935.91 under said agreement, while Hartfeld had expended less than \$1,200, and there is now due to Stuck from Hartfeld under said agreement \$867.96. Hartfeld has never conveyed to the company the sole and exclusive right to manufacture said composite and weldable castings of said metal in Alabama, Georgia, and Tennessee, and dispose of said products in any market. Stuck has devoted his entire time and attention to the business of the company, without having received any remuneration therefor. His services have been valuable, and he should be allowed a reasonable sum therefor from July 23, 1892, to September 2, 1893, when the company ceased operations. Under said agreement, Hartfeld was to come to Rome and erect a furnace, as provided, and to fully instruct Stuck in the manner of operating it and in the manner of producing said composite and metal, the manner of operating the furnace and producing the composite and metal being secrets known only, if there are such secrets, to Hartfeld. While Hartfeld did come to Rome and erect the furnace, and pretended to communicate to Stuck the secret of the manner of manufacturing the composite, he never even pretended to communicate to Stuck the secret of the manufacture of the metal; and, as to the metal or composition known as aluminum alloy composite, the secret of the manner of manufacture was so imperfectly communicated that the product was never satisfactory to the purchasers of it, and large amounts of it have been thrown back upon the company as worthless, the purchasers in great number of instances refusing to pay for it; nor was the smelting furnace so erected as to produce the desired results, Hartfeld himself having admitted to Stuck that such was the case. As president of the company, Stuck has made repeated demands upon Hartfeld that he put the furnace in such condition, and give Stuck such instruction, that a salable article of aluminum alloy composite can be made by the company, and that Stuck be also instructed as to how to manufacture said metal; but Hartfeld has failed, and still fails and refuses, to comply with any of said demands, notwithstanding that a communication of such knowledge is a large part of the capital of the company, and prerequisite to a successful operation of its plant at Rome. Said plant, consisting of the realty and machinery above mentioned, is the only visible or tangible assets of the company, the company not operating otherwise or elsewhere. When the company was ready, or thought to be ready, for active operation, on February 1, 1893, Stuck had already expended, for material, etc., necessary to the carrying on of its business, \$801.40 above what was agreed and contemplated to be furnished by him in procuring the lot, erecting the building, and pro-

viding the power, under said agreement of July 22d; and the company now owes him \$934.40; but Hartfeld, when the \$1,000 (to be paid in for working capital as provided in the agreement) was demanded of him, refused to pay it into the treasury, or to the company, or to Stuck, as president, or to pay any sum, saying that Stuck and he would do away with that clause in said agreement, leaving the company without any working capital, except what had been before furnished by Stuck. On December 14, 1892, before active operations had been begun by the company, Blakely borrowed of Stuck \$50, giving his note therefor, and, to secure its payment, pledged to Stuck, with the consent of Hartfeld, the certificate for the 25 shares of stock before mentioned; and Blakely failing to pay the note, the certificate was by Stuck legally sold, after due notice, and, after being offered to the company, was bought in by Stuck, and is now his property. This sale took place October 3, 1893, since which time the whole of the stock issued has been in the name of and belongs to Stuck and Hartfeld. The company owns no tangible property outside of Floyd county, Ga., and all its assets are there except the debt due it by Hartfeld, by Hartfeld Refining Company, and certain other debts for composites, the purchasers of which have declined to pay, alleging as a reason that the articles so sold were worthless. Hartfeld refuses, as above alleged, to instruct Stuck or the company how to manufacture the composite or metal, so that the company has no future prospect of making money, is without a business, and can do nothing. Stuck does not know whether there is any real value to the composition known as aluminum alloy composite, or that it can be made from bauxite or other raw material; but Hartfeld has never, so far as he knows, been able to produce any composition from bauxite that the trade regarded as of any value; and, as soon as Stuck ascertained the worthlessness of the product known as aluminum alloy composite, the company ceased to manufacture it; and of a large amount sold, under flaming advertisements prepared by Hartfeld, its real or pretended discoverer, only \$2,410.68 has been or can be collected. Hartfeld resides in Kentucky, is insolvent, has no property in Georgia subject to the jurisdiction of the court, except the interest he owns in the company, and has repeatedly tried to have the stock held by him transferred to his wife, in violation of his agreement and the by-laws of the company. On September 2, 1893, Stuck sued out an attachment against the company for \$—, and, on the same day, an attachment against Hartfeld, both being returnable as stated in the petition, the first of which was levied on a certain boiler, two steam pumps, an engine, the furnace, and other things mentioned; and the attachments were also levied upon the realty before described, the attachment against Hartfeld being at the same time levied on all

the right, interest, etc., of Hartfeld in said property. The declarations in attachment have been filed in both these suits, and there has been appearance by attorneys in each, but no written defense filed. J. M. Stewart has sued the company in the city court of Floyd county for \$212.50, and it has also been sued in a magistrate's court of the county by the Coal City Mining Company for \$33.15. The company is indebted to Illinois Fluor Spar & Lead Company of Chicago, Ill., for a car load of fluor spar, \$120, and suit therefor is threatened. It owes other small debts, all likely to be sued, besides taxes for 1893, which Stuck will have to pay out of his private funds, to prevent a sale of its property. It is insolvent, and sale of its property will be necessary for payment of its indebtedness. Its machinery and other property are idle and unprotected, and liable to be destroyed or stolen, there being no funds on hand to pay for insurance or for a guard. Its assets are liable to be wasted and disposed of, and will be wholly insufficient to meet its liabilities,—especially so if fl. fa.'s are allowed to be levied thereon, and piecemeal sales made.

The petition prayed that Stewart and the Coal City Mining Company be restrained from levying any fl. fa. they may obtain against the company, upon its property; that an auditor be appointed to ascertain and report the indebtedness of the company, the indebtedness of Hartfeld to Stuck, and the indebtedness of Hartfeld to the company; that a receiver be appointed for the property of the company; that petitioner may have a decree against the company and its property, and against Hartfeld and his interest in the property, for the amounts respectively due him, and against Hartfeld and his interest in the property for the amount found due by Hartfeld to the company; that petitioner be allowed to file this petition as an original petition, and in aid of his attachment suits; and that the rights, etc., of all parties be determined hereunder; for general relief; and for process against the company, Hartfeld, Stewart, and the Coal City Mining Company. By amendment, Stuck alleged: Before the agreement of July 22, 1892, Hartfeld, in order to induce Stuck to enter into said agreement, showed Stuck pretended testimonials and indorsements, with reference to and of such composite and metal, of which Hartfeld claimed to be the inventor and to alone know how to manufacture it. It was upon the faith and credit of these that Stuck signed said agreement, became a stockholder in the company, and invested his money therein. The amendment set forth what these alleged testimonials and indorsements pretended to show, and alleged that many of the names attached thereto did not exist, were used without authority, or were clumsy forgeries, and that these testimonials were inventions of Hartfeld. Hartfeld and his methods, as well as said composite, has been denounced as a fraud by a number

of journals of the country. He has operated his fraudulent scheme under various names, and on July 22, 1892, was operating under the name of "Hartfeld Furnace & Refining Company of Newport, Ky.," which is a small concern, with little if any capital; and it and Hartfeld are, to all intents and purposes, the same. Hartfeld has no property in Georgia subject to levy and sale. Stuck's services as president, as before mentioned, are worth not less than \$125 per month from July 23, 1892, to September 1, 1893, and Stuck asks judgment against the defendant company therefor. Said defendant company owned the exclusive right to manufacture, sell, use, and erect, in Alabama, Georgia, and Tennessee, the Hartfeld water-jacketed smelting furnace, patented March 23, 1868, though Hartfeld has sold to S. W. Devine, of Chattanooga, Tenn., one of said furnaces (and it is now in operation at Blue Springs, Tenn.) for \$950, for which Hartfeld is indebted to said company, said sale having been made by him within the past seven months. Hartfeld has, in Alabama, Tennessee, and Georgia, attempted to make other sales of said furnace, and has either sold or attempted to sell one to A. R. Bryan of Atlanta, Ga.; and petitioner prayed that the receiver appointed by the court be required to bring suit for the purchase price of any and all of said furnaces that may have been sold by Hartfeld in said three states. Hartfeld is indebted to the company \$300 for profits on Ureka furnaces sold by said company, for which either Hartfeld or his mask, the Hartfeld Furnace & Refining Company, have collected; and petitioner prays that Hartfeld and his said company be held liable to the Southern, etc., Alloy Company in the accounting before the auditor. In all sales and representations made by petitioner with reference to said composite, he was governed entirely by the representations thereof made by Hartfeld to him. Petitioner prayed that Hartfeld be enjoined from disposing of his said patent in Tennessee, Alabama, and Georgia, which is the only asset of any material value outside of said plant. No money was ever paid in by any of the stockholders in the Southern, etc., Alloy Company, and the only money ever paid into the company was that paid in by petitioner in running its business. The Southern, etc., Alloy Company and Hartfeld demurred on the following grounds: "First. Said petition is multifarious, in that it seeks to set up and establish a claim between George A. Stuck, the plaintiff, and C. L. Hartfeld, under a contract made and entered into between themselves, with which the Southern Steel & Aluminum Alloy Company has no connection or interest whatever, and, at the same time, it seeks to set up and establish a claim of indebtedness between the plaintiff, George A. Stuck, and the Southern Steel & Aluminum Alloy Company, with which the defendant, C. L. Hartfeld, has no

connection or interest, individually, whatever. Second. Because plaintiff seeks to set up and maintain rights in behalf of the company, the Southern Steel & Aluminum Alloy Company, without alleging facts sufficient to authorize him, individually or as a stockholder, to bring such action. He does not allege or show that the corporation the Southern Steel & Aluminum Alloy Company, or its proper officers, have ever refused to bring suit in behalf of the company for the recovery and maintenance of the claims and rights of the company against said C. L. Hartfeld, as is set out in the plaintiff's declaration, nor that demand has been made for the bringing of such action. The company is made a party defendant to an action seeking to establish the company's rights, without alleging or showing reasons why the company is not a party plaintiff. Third. Because the plaintiff shows by his petition that he has already brought, in the proper court and in the proper manner, an attachment which is altogether sufficient to establish any rights he may have [in the] suit against said C. L. Hartfeld. The petition also shows that the plaintiff has already brought, in the proper manner and in the proper court, an attachment suit against the corporation, the Southern Steel & Aluminum Alloy Company, to recover any claim or demand that he may have against the company; and there is no necessity shown in plaintiff's petition why an additional suit should be brought, joining said Hartfeld and said company as defendants in the same cause." The demurrer was amended by the addition of the following grounds: (1) That the plaintiff, in his attitude as creditor, shows no lien in his favor against the property of the defendant company, nor that he has an unsatisfied judgment with an execution returned nulla bona; (2) that the petition shows by its statement of fact that the defendant company is solvent.

J. W. Ewing, W. W. Vandiver, and C. A. Thornwell, for plaintiff in error. A. R. Bryan, Dean & Dean, and Halstead Smith & Son, for defendant in error.

SIMMONS, C. J. The equitable petition of Stuck against the Southern Steel & Aluminum Alloy Company, and against Hartfeld, Stewart, and the Coal City Mining Company, was demurred to, and the demurrer sustained, and to this ruling plaintiff excepted. The petition and the demurrer are set out in substance in the reporter's statement. Briefly stated, the main allegations of the petition are that the defendant Hartfeld is indebted to the plaintiff a certain sum by reason of the failure and refusal of Hartfeld to carry out a contract which he had made with the plaintiff; that Hartfeld is also indebted to the Southern Steel & Aluminum Alloy Company a certain sum, which he refuses to pay, said indebtedness arising out of contracts between Hartfeld and the corporation; and that said corporation is in-

debted to the plaintiff a certain sum for services rendered the corporation by the plaintiff, which sum it refuses to pay; that suits have been brought against said corporation by Stewart and the Coal City Mining Company, and that other parties to whom it is indebted threaten suit against it; that said corporation and Hartfeld are both insolvent; that the plaintiff has brought suit in the proper court against them separately, for the amounts claimed in the petition to be due from each of them; that said suits were brought on attachments, under which the plaintiff holds the property of defendants, and that the suits are still pending. The petition prays that Stewart and the Coal City Mining Company be restrained from levying any *fi. fa.* they may obtain against the company, upon its property; that an auditor be appointed to ascertain and report the indebtedness of the company, the indebtedness of Hartfeld to the plaintiff, and the indebtedness of Hartfeld to the company; that a receiver be appointed for the property of the company; that the plaintiff may have a decree against the company and its property, and against Hartfeld and his interest in the property, for the amounts respectively due the plaintiff, and against Hartfeld and his interest in the property for the amount found due by Hartfeld to the company; that the plaintiff be allowed to file this petition as an original petition, and in aid of his attachment suits, and that the rights of all parties be determined thereunder; and for general relief. By amendment, it was prayed that the receiver appointed by the court be required to bring suit for the price of certain furnaces sold by Hartfeld, and that Hartfeld be enjoined from disposing of his interest in a certain patent right. This petition is clearly multifarious. It alleges distinct and independent causes of action against separate and distinct parties, and prays for relief in different forms against each of the defendants; and these causes of action are not so connected as to make a joinder of them in one and the same action necessary or proper. The court therefore did not err in sustaining the demurrer. See Story, Eq. Pl. § 271; Marshall v. Kendrick, 12 Ga. 61; Stephens v. Whitehead, 75 Ga. 298. Judgment affirmed.

(45 S. C. 1)

COTHRAN v. KNIGHT et al.

(Supreme Court of South Carolina. Sept. 8, 1895.)

REFLEVIN—DAMAGES—EVIDENCE—APPEAL—EXCEPTIONS BY RESPONDENT.

1. It is proper to refuse to permit a witness to testify as to how much he considered himself damaged by the taking of certain cotton, where he is not interrogated as to the facts on which he bases his opinion.

2. In an action of claim and delivery, one who was not a subscribing witness to the return bond may testify as to its execution, for

the purpose of showing an admission by defendant that he had taken the property from plaintiff, and that the property was taken from defendant under said claim and delivery proceedings.

3. Respondent's exceptions to the ruling of the court will not be considered on appeal where he failed to give notice to appellant that he desired to sustain the judgment appealed from upon other grounds than those upon which it is rested by the trial court, and failed to state the additional grounds upon which he proposed to rely.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.

Action by J. R. Cothran against J. E. Knight and another for the recovery of certain personal property, and damages for the alleged unlawful detention thereof. There was order of nonsuit, from which plaintiff appeals. Reversed.

Jos. A. McCullough and Geo. W. Dillard, for appellant. Earle & Money, for respondents.

GARY, J. This action was commenced on the 29th November, 1893, by service of the summons and complaint on the defendants. The action was for the recovery of personal property, and damages for the alleged unlawful detention of the same. The immediate delivery of the said property was demanded. The necessary bond and affidavit were served, and possession of the property was accordingly taken by plaintiff. The defendants answered, and claimed a return of the property, and, for that purpose, executed, and filed with the sheriff, the necessary undertaking. The cause came on for trial before his honor, Ernest Gary, presiding judge, and a jury. Upon the close of plaintiff's testimony the presiding judge, on motion of defendants' attorneys, granted an order of nonsuit, from which the plaintiff has appealed to this court.

After the reading of the complaint the defendants' attorneys interposed an oral demurrer (which was afterwards reduced to writing, as required by the rule of court), upon the ground that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was overruled. The defendants excepted to the ruling of the circuit judge in overruling the demurrer on several grounds, stated in the case, but did not give written notice to the attorney of the appellant that they desired to sustain the judgment appealed from upon other grounds than those upon which it is rested by the circuit judge, and stating the additional grounds upon which they proposed to rely.

Appellant's first exception, alleging error on the part of the presiding judge, is as follows: "(1) In refusing to allow the plaintiff to testify in answer to the question, 'How much do you consider, now, outside of the value of the cotton, have you been actually damaged by reason of the taking of this cotton?'—said question being relevant and responsive to the allegations of the complaint." The witness

was not interrogated as to the facts upon which he based his opinion, although the case was one in which they could be reproduced and made palpable, in the concrete, to the jury. *Seibles v. Blackwell*, 1 McM. 56; *Jones v. Fuller*, 19 S. C. 66. This exception is therefore overruled.

The second exception, alleging error on the part of the presiding judge, is as follows: "In not allowing plaintiff to prove the bond of the defendant J. E. Knight for the return of the property described in the complaint by the witness J. D. Gilreath, the said witness having seen the same executed and delivered, though not a subscribing witness to the same, (1) because said bond was not directly in issue, but was only sought to be used for the purpose of showing admission on the part of Knight that he had taken the property described in the complaint from the possession of the plaintiff; that said property was taken from him (Knight) under said claim and delivery proceedings, and, upon executing said bond as required by law, return or possession of same was demanded." This ruling of the presiding judge was erroneous, for two reasons: (1) Because the instrument of writing was only offered to prove a collateral circumstance, and parol evidence of the contents of the writing was admissible for that purpose. *Lowry v. Pinson*, 2 Bailey, 323. (2) Because the instrument of writing was not one of those which the law requires should be attested by a subscribing witness, and therefore it was necessary that the subscribing witness should prove its execution before it could be offered in evidence. *McGowan v. Reid*, 27 S. C. 262, 3 S. E. 337.

Having reached the conclusion that the order of nonsuit should be set aside, we think it would be best for this court not to pass upon the sufficiency of the facts set forth in the appellant's third exception to carry the case to the jury. This court declines to consider the exceptions of the defendants, for the reason hereinbefore stated. It is the judgment of this court that the order of nonsuit be reversed.

(41 S. C. 484)

MARSHALL et al. v. CREEL.

(Supreme Court of South Carolina. Sept. 3, 1895.)

REVIEW ON APPEAL—FINDINGS BY COURT—ASSIGNMENTS OF ERROR—FORECLOSURE—DECREE.

1. Findings of fact by the court will not be disturbed unless without evidence to sustain them, or clearly against its weight.

2. An exception requiring a review of all the evidence is too general to be considered.

3. The provision in a judgment decreeing foreclosure of a mortgage on land directing the master, if plaintiff became the purchaser, to make title to him "on payment of the costs and disbursements," is proper.

Appeal from common pleas circuit court of Colleton county; Ernest Gary, Judge.

Action by S. R. Marshall & Co., assignees, against Allen Creel, for foreclosure of a mort-

gage. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. B. Gruber, for appellant. F. G. Behre, for respondents.

McIVER, C. J. The plaintiffs brought this action for the foreclosure of a mortgage of real estate, given to secure the payment of a bond conditioned for the payment of the sum of \$176, which was given by defendant to one James S. Simmons, and by him assigned to one S. G. Pierce, and by said Pierce to the plaintiffs. The only defense relied upon was payment, not to plaintiffs, but to the first assignee, Pierce. The testimony was taken by the master under an order of the court, and by him reported to the court, and upon the testimony so taken the case was heard by his honor Judge Ernest Gary, who rendered his decree finding that there was due on the bond by the defendant the sum of \$216, and accordingly he rendered judgment of foreclosure. From that judgment defendant appeals, upon the following grounds: "(1) For that the presiding judge was in error in not holding that the mortgage debt had been paid in full; (2) for that the presiding judge was in error in finding that there was \$216 due on the bond and mortgage sued on; (3) for that the presiding judge was in error in not dismissing the plaintiffs' action, and ordering the bond and mortgage sued on canceled; (4) that the presiding judge was in error in adjudging and decreeing 'that should the plaintiffs, or either or any of them, become the purchaser, that the master do make title to him or them upon the payment of the costs and disbursements.'"

It is very manifest that the first three grounds are entirely too general to call for any consideration at the hands of this court. They might, for all practical purposes, be embraced in a single exception,—because the circuit judge erred in not sustaining the defense of payment set up by the answer; and surely such an exception would not be entitled to be considered by this court. No specific error is pointed out, and these exceptions would involve the necessity of retrying the case upon the testimony upon which it was heard by the circuit judge, and this certainly is not to be expected of an appellate tribunal. But, in addition to this, all these grounds turn entirely upon questions of fact; and, under the well-settled rule of this court, the conclusions of fact reached by the circuit judge will not be disturbed unless without any testimony to sustain them, or manifestly against the weight of the testimony. This we certainly cannot say in this case. There were no credits indorsed upon the bond or mortgage, and no evidence of any specific payments thereon; for, although defendant spoke of having receipts which were in the hands of his own counsel, yet no such receipts were produced or accounted for, and no statement of the amount or dates of any of them. Indeed, the whole testimony rested upon the loose statements of the

witness Pierce, who had assigned the bond and mortgage to plaintiffs, which, if true, showed that he had committed a fraud upon the plaintiffs in assigning to them a bond which was substantially paid. What the seizure of the defendant's mule by other creditors, Brown & Co., had to do with this case, it is difficult to see. We are unable to perceive any error on the part of the circuit judge in the conclusions which he reached on the question of payment.

As to the fourth ground of appeal, we are unable to discover any error of law therein complained of, and none has been pointed out in the agreement. The provision in the judgment which is here assailed is not an uncommon one. If the plaintiffs, who are entitled to the proceeds of the sale, after payment of costs and expenses, become the purchasers of the land, why should they go through the useless form of paying the money with one hand, and receiving it back with the other? If it be said that the error was in making this provision apply to a purchase made by any or either of the plaintiffs, still we are unable to perceive the error, for any or either of the plaintiffs would be entitled to receive and receipt for the money; and that was manifestly what was meant by this provision in the order of the sale.

The judgment of the court is that the judgment of the circuit court be affirmed.

(44 S. C. 442)

GIDEON v. ENOREE MANUF'G CO.

(Supreme Court of South Carolina. Aug. 19, 1895.)

MASTER AND SERVANT—INJURY TO EMPLOYE—RISKS OF EMPLOYMENT.

In an action by an employé for personal injuries, it appeared that plaintiff, a weaver, had her finger caught while fanning the loom, to clean it, while the machinery was in motion. It was the custom in all mills to fan the looms without stopping the machinery, as it saved time, and the breeze made by the motion of the machinery aided in freeing the lint, and no injury had been known to result, except in a single case in another mill, the circumstances of which were not shown. The fanning was sometimes done more than twice a day. *Held*, that there was no evidence of negligence on defendant's part.

Appeal from common pleas circuit court of Spartanburg county; Fraser, Judge.

Action by Cora Gideon against the Enoree Manufacturing Company for personal injuries. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Stanyarne Wilson, for appellant. Nicholls & Jones, for respondent.

McIVER, C. J. This was an action to recover damages sustained by the plaintiff while working as a weaver in the mill of the defendant company. The immediate cause of the injury received by the plaintiff was the fact that her finger was caught in the machinery while fanning off the loom in order

to keep it clean and clear of lint. This fanning was required to be done while the machinery was running, for the reasons—One, to save time; and the other, that the breeze raised by the rapid motion of the machinery aided in freeing the machine from lint. The only negligence alleged against the defendant was in requiring the machinery to be fanned while in motion, instead of stopping it for that purpose. There is no doubt that the plaintiff knew of this requirement, and, after such knowledge, continued in the employment of the company; and, according to the testimony, after she had recovered from the injury complained of, she voluntarily returned to the employment of the defendant company. Indeed, the testimony on the part of the plaintiff shows that the universal practice in other mills in that section of country was to have the machinery fanned while running, and not to stop them for that purpose; and there is no evidence tending to show that such a practice was regarded as dangerous, but rather the contrary, as the testimony shows that no injury had ever resulted from such practice, except, perhaps, in a single instance, occurring in another mill, where a person was injured by fanning the machinery while in motion; but the circumstances attending that injury do not appear. Of course, the management of machinery of all kinds is always attended with more or less danger, but when it appears from the testimony, as it does in this case, that the weavers were required to fan off the machinery, "sometimes over twice a day," and no disaster of this kind had ever previously occurred in the mill, it would be going very far indeed to hold that the requirement to fan the machinery while in motion constituted any evidence of negligence; especially when it is remembered that the reasons for this requirement were really in the interest of the operatives, as time saved and good and clean work secured benefited such of them as worked, not by the day, but by the piece, as this plaintiff said she did. We agree, therefore, that there was no evidence of negligence on the part of the defendant in this case, and there was no error in granting the nonsuit. The judgment of this court is that the judgment of the circuit court be affirmed.

GARY, J., concurs. POPE, J., did not hear this case.

(44 S. C. 473)

**AMERICAN FREEHOLD LAND MORTGAGE CO. OF LONDON, Limited,
v. FELDER et al.**

(Supreme Court of South Carolina. Sept. 3, 1895.)

NOTICE TO AGENT—WHEN BINDING ON PRINCIPAL—FINDING AS TO NOTICE—WHEN DISTURBED—MORTGAGE OF WIFE'S LAND—VALIDITY.

1. Where it is the duty of a local agent of a mortgage company to prepare abstracts of title, and superintend the execution of all papers relating to loans by such company, and also to

pass on the validity of the security, notice to him that money borrowed and secured by mortgage on land belonging to a wife is not for her use is notice to such company.

2. In an action to foreclose a mortgage given by a wife and her husband on her land to secure money borrowed of plaintiff through a local agent, the husband testified that he made a verbal application to such agent for the money, and told him that he wanted to borrow it, and would give a mortgage on his wife's land. The agent testified that he did not think he applied to him for the loan, and that the first time he saw such husband about the loan was when the papers were executed. The written application was signed by both the wife and husband, her name being signed first. *Held*, that a finding that plaintiff's agent had notice that the money borrowed was not for the use of the wife would not be disturbed.

3. It appeared that the check for the money was delivered to the husband; that it was indorsed by plaintiff's local agent to the wife, who indorsed it to enable her husband to get the money for his own use, which he did; and that the money did not go into the wife's hands at all. *Held*, that the mortgage given by the wife was void.

Appeal from common pleas circuit court of Barnwell county; I. D. Witherspoon, Judge.

Action by the American Freehold Land Mortgage Company of London, Limited, against Bessie C. Felder, N. Z. Felder (her husband), and Jane S. Counts, to foreclose a mortgage executed to plaintiff by Bessie C. Felder and husband. From a decree declaring the mortgage void, and ordering it canceled, and a judgment in favor of plaintiff against defendant N. Z. Felder for the amount due on the notes secured by such mortgage, plaintiff appeals. Affirmed.

The decree of Judge Witherspoon is as follows:

"This is an action by plaintiff to foreclose a mortgage of real estate executed September 10, 1884, to plaintiff by the defendant Bessie C. Felder, a married woman. The defendant Bessie C. Felder and her husband, the defendant N. Z. Felder, allege in their answer that the money secured by the mortgage was borrowed from plaintiff for the use of N. Z. Felder, the husband, that it had no reference to the separate estate of Bessie C. Felder, and that plaintiff, at the time of the loan, had notice that N. Z. Felder, the husband, was borrowing the money for his own use. The defendant Jane S. Counts has gone into possession of a portion of the premises embraced in plaintiff's mortgage since the execution of said mortgage. The case was heard upon the pleadings, the testimony taken and reported by the master, and upon the argument of counsel. It appears that John B. Palmer & Son, of Columbia, represented the plaintiff in loaning money in this state, secured by mortgage of real estate. Robert Aldrich, Esq., represented Palmer & Son, as their local agent, at Barnwell, S. C. On the 20th of June, 1884, Hutson & Co., of Aiken, S. C., forwarded to Palmer & Son, at Columbia, the written application of the defendants Bessie C. Felder and N. Z. Felder, signed in the order named, for a loan of \$500, to be secured by a mort-

gage of the real estate of Bessie C. Felder. Bessie C. Felder is represented in said application as the borrower. In a letter accompanying said application to Palmer & Son for their consideration, Hutson & Co. represented Bessie C. Felder as the applicant for the loan, and they recommended the loan as a first-class risk. On the 10th September, 1884, Bessie C. Felder and N. Z. Felder, in the order named, signed four notes, of \$125 each, payable to plaintiff in one, two, three, and four years, with interest at the rate of ten per cent., payable semiannually. On the same day, Bessie C. Felder executed and delivered to the plaintiff the mortgage of her real estate, as stated in the complaint. Two of the notes secured by the mortgage, with interest to November 1, 1890, have been paid; and the allegation of the complaint that the other two notes are due and owing to plaintiff, with interest from November 1, 1890, is not denied.

"It is admitted that the notes signed by Bessie C. Felder and N. Z. Felder, and the mortgage executed by Bessie C. Felder, are in the handwriting of Robert Aldrich, Esq. The amount loaned by plaintiff was transmitted by Palmer & Son by drafts payable to the order of Robert Aldrich, attorney, and by him made payable to the order of Bessie C. Felder. The name of Mrs. Bessie C. Felder is indorsed on each of said drafts. Bessie C. Felder testifies that her husband, N. Z. Felder, negotiated for the loan; that she had no communication, directly or indirectly, with plaintiff, or with any of plaintiff's agents, with reference to the loan; that her husband used the money received from plaintiff for his own use; and that she did not receive any portion of the money. She admits that she knew that her land was being mortgaged for her husband's use. There is no controversy as to the fact that the defendant Bessie C. Felder was at the date of the execution of the mortgage, and that she is now, the wife of the defendant N. Z. Felder, or as to the execution of the notes and mortgage as alleged in the complaint. There is no doubt about the loan being negotiated by N. Z. Felder with the knowledge and approbation of his wife, Bessie C. Felder. The main point of controversy is whether N. Z. Felder, the husband, did notify Robert Aldrich, Esq., as plaintiff's agent, pending the negotiations for the loan, that the money was being borrowed for his use upon the security of his wife's real estate, and, if so, whether such notice invalidates the mortgage and notes referred to in the complaint, so far as they affect the liability of Bessie C. Felder. N. Z. Felder testifies that he made a verbal application to Col. Aldrich, at Barnwell, for the loan; that he told Col. Aldrich at the time that he wanted to borrow \$500, and that he would give him a mortgage on his wife's estate. Col. Aldrich will not deny the statement of N. Z. Felder that he applied to him for the loan, but does not

think that he did. According to his distinct recollection, the first time he saw Mr. Felder about the loan was when the papers were executed. The testimony of N. Z. Felder as to the notice given Col. Aldrich is positive. Col. Aldrich, in his testimony, does not deny that Mr. Felder told him that he was borrowing the money for his own use, and would give a mortgage on his wife's estate. He evidently does not think so, but his want of recollection is not sufficient to overcome the otherwise uncontradicted statement of N. Z. Felder on this point. According to the testimony as found by the master, I must find, as matter of fact, that N. Z. Felder did notify Col. Aldrich, before the papers were executed, that he was borrowing the money for his own use, and would secure the loan by a mortgage of his wife's real estate. According to the uncontradicted testimony of Bessie C. Felder and N. Z. Felder, I must also find, as matter of fact, that the money borrowed from the plaintiff by N. Z. Felder was used for his own benefit. Was the notice to Robert Aldrich as to the purpose of the loan notice to the plaintiff? Col. Aldrich was the local agent of John B. Palmer & Son at Barnwell, who represented plaintiff in making loans in this state, secured by mortgage. Col. Aldrich drew the notes and mortgage referred to in the complaint. He superintended the execution of the papers signed by Bessie C. Felder and N. Z. Felder. The draft by John B. Palmer & Son, representing the amount loaned, was made payable to his order, and by him indorsed payable to the order of Bessie C. Felder; and under the authority of the cases of *Salinas v. Turner*, 33 S. C. 231, 11 S. E. 702, and *Bates v. Mortgage Co.*, 37 S. C. 88, 16 S. E. 883, I must conclude that notice to Col. Aldrich of the purpose of the loan was notice to the plaintiff. The plaintiff having had notice that the money about to be borrowed on the security of the wife's separate estate was to be used by the husband for his own purposes, and it appearing that the money borrowed was so used, I conclude that the mortgage executed by the defendant Bessie C. Felder is null and void, and that she is not liable on the note executed by her, secured by said mortgage. I find, as matter of fact, that on the 1st day of January, 1895, there was due by the defendant N. Z. Felder to the plaintiff, on the note referred to in plaintiff's complaint, the sum of three hundred and sixty-seven dollars and fifty-one cents. I conclude, as matter of law, that the defendant Bessie C. Felder is not liable either upon the notes or upon the mortgage referred to in the plaintiff's complaint. I further conclude, as matter of law, that the plaintiff is entitled to enter up judgment and to issue execution against the defendant N. Z. Felder for the sum of three hundred and sixty-seven dollars and fifty-one cents, the balance found to be due by him, referred to in the complaint, with interest thereon from

the 1st day of January, 1895, and it is so ordered. It is further ordered that the clerk of court do cancel the mortgage executed by Bessie C. Felder, as null and void. The plaintiff and the defendant N. Z. Felder will each pay one-half of the costs of this action."

Plaintiff's exceptions are as follows: "The plaintiff herein excepts to the decree and order for judgment of his honor, Judge L. D. Witherspoon, bearing date 1st January, A. D. 1895, as follows: (1) That his honor erred, as it is respectfully submitted, in finding, as a matter of fact, 'that N. Z. Felder did notify Col. Aldrich, before the papers were executed, that he was borrowing the money for his own use, and would secure the loan by a mortgage of his wife's real estate,' and should have found that said N. Z. Felder's testimony is shown to have been totally incorrect, in this: He testified that he made the application for the loan to Aldrich, when the proof is that the application was made through Hutson & Co., of Aiken. He testified that the application was a verbal one, when the proof is it was in writing, and his testimony in cross-examination shows that his recollection of the entire transaction was unreliable. (2) That his honor erred, as it is respectfully submitted, in finding as follows: 'The testimony of N. Z. Felder as to the notice given Col. Aldrich is positive. Col. Aldrich, in his testimony, does not deny that Mr. Felder told him that he was borrowing the money for his own use, and would give a mortgage on his wife's real estate,'—and should have found that, while Aldrich did not use the word 'deny,' yet the uncontradicted documentary evidence in the case proves Felder's testimony that he applied to Aldrich for the loans, and then told him he was borrowing the money for his own use, to be untrue, as he did not make the application for the loan through Aldrich, but through Hutson & Co., of Aiken. (3) That his honor erred, as it is respectfully submitted, in finding that 'Aldrich was the local agent of John B. Palmer & Son at Barnwell, who represented the plaintiff in making loans in this state,' and concluding therefrom that notice to Aldrich was notice to plaintiff, and should have found, as the supreme court decided in the case *Caughman v. Smith*, 5 S. E. 363,—in a case exactly like this,—as follows: 'It is true, the relation which G. occupied was rather a peculiar one, and, in some sense, he seems to have acted for the company; but we do not think that his acts, under the circumstances, were such as to establish an agency or an attorneyship, of a character which would make his knowledge of all matters affecting the company the knowledge of the company.' (4) That his honor erred, as a matter of law, as it is respectfully submitted, in holding that the authorities of *Salinas v. Turner*, 33 S. C. 231, 11 S. E. 702, and *Bates v. Mortgage Co.*, 37 S. C. 88, 16 S. E. 883, are con-

clusive of this case, when the facts of these cases are totally different, in their essential features, from the facts of this case. (5) That his honor erred, as a matter of law, as it is respectfully submitted, in concluding 'that the mortgage executed by the defendant Bessie C. Felder is null and void, and that she is not liable on the note executed by her, secured by said mortgage,' and should have held that the note and mortgage executed by her are valid contracts, and decreed foreclosure in the usual form. (6) That said decree is otherwise contrary to law and evidence."

R. W. Shand and Robt. Aldrich, for appellant. Patterson & Holman and A. M. Boozer, for respondents.

GARY, J. The facts connected with this case are fully stated in the decree of his honor, Judge Witherspoon, which, together with appellant's exceptions, will be incorporated in the report of the case. The exceptions raise practically but three questions: (1) Was Col. Aldrich the agent of the mortgagee, so as to charge the mortgagee with notice given to Col. Aldrich? (2) Did Col. Aldrich have notice that the money borrowed was not for the use of the mortgagor, a married woman? (3) Was the mortgage executed and delivered by Mrs. Bessie C. Felder null and void?

It appears from the testimony of Col. Aldrich that he was the plaintiff's local attorney for Barnwell county, whose duty it was to prepare abstracts of title, and superintend the execution of all papers relating to loans by the plaintiff in that county. Any facts which came to his knowledge while acting as such attorney, and which showed that a mortgage by the defendant Mrs. Bessie C. Felder would be null and void, would be notice to the mortgagee. It was the duty of Col. Aldrich, as local attorney, to pass upon the validity of the security; and it is manifest that information received by him showing that the mortgage would be invalid would be within the scope of such agency, and therefore binding upon his principal. *Salinas v. Turner*, 33 S. C. 231, 11 S. E. 702; *Bates v. Mortgage Co.*, 37 S. C. 88, 16 S. E. 883. The first of the foregoing questions is therefore answered in the affirmative.

We proceed next to a consideration of the second question. The circuit judge decided that Col. Aldrich had such notice, and, under the well-settled rule of this court, this finding is binding on us, unless it is unsupported by testimony or clearly against the weight of the evidence. Our duty in this respect is more restricted than that of the circuit judge, who is not bound, in arriving at his conclusion, to conform to such rule. In this case we feel bound to adopt the finding of the circuit judge on this question of fact, without any intimation as to what might have been our conclusion if it had been presented to us as an original question. This second question must also be answered in the affirmative.

We will now proceed to consider the third question. It must be remembered that the money did not go into the hands of Mrs. Bessie C. Felder, and that her indorsement of the check was for the purpose of enabling her husband to get the money, as originally contemplated, for his own use. N. Z. Felder testifies that when the money was sent in a check to Bamberg, to close up the loan, the check was delivered to him. In the case of *Salinas v. Turner*, supra, the court says: "Now, it has been held by this court, in several cases recently decided, that while a married woman may borrow money for her own use, etc., and secure the same by a valid mortgage, yet that she cannot do this for the benefit of her husband, provided the lender has knowledge of such intended use. This has been so recently and so plainly decided that we do not deem it necessary here to examine into the reason and foundation of this proposition. We think it sufficient simply to refer to the cases. *Tribble v. Poore*, 30 S. C. 97, 8 S. E. 541; *Gwynn v. Gwynn*, 31 S. C. 482, 10 S. E. 221; *Greig v. Smith*, 29 S. C. 429, 7 S. E. 610; and *Goodglon v. Vaughn*, 32 S. C. 499, 11 S. E. 351. If these cases have not established this proposition beyond controversy or doubt, we do not know how a legal proposition could be established; certainly not by the decisions of a court of last resort." The case of *Pelzer v. Durham*, 37 S. C. 355, 16 S. E. 46, decides that when the money is borrowed for the use of the husband, and this fact is known to the mortgagee, the mortgage is null and void, even when the money is placed to the wife's credit on the mortgagee's books, and drawn out on her drafts, mostly in favor of the husband, and none of it used by the wife. The many cases on this subject can be harmonized by bearing in mind the distinction in the cases where the money is actually borrowed by the wife, although the mortgagee may have knowledge that the wife intends to dispose of it in such a manner as will be no benefit to her separate estate, and the cases where the mortgagee knows that the money is not to go into the possession of the wife, and become part of her separate estate. The third question must be answered in the affirmative. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 444)

BROCK et al. v. SOUTHERN RY. CO. et al.
(Supreme Court of South Carolina. Sept. 3, 1895.)

INTERPLEADER — WHEN ALLOWED — TIME OF APPLICATION.

1. In an action for possession of cotton it appeared that plaintiffs delivered it to the defendant railway company for shipment to its co-defendant, in whose name the bills of lading were made out; that said codefendant refused to honor drafts, with bills of lading attached, for the price of the cotton, or to assign them to plaintiffs, who had them in their possession;

that the railway company disclaimed title except its lien for freight, and averred that "as the papers stand" neither plaintiffs nor its codefendant were entitled to possession. Held that, under the reformed procedure, an order granting the railway company remedy by interpleader was proper.

2. An application for an order of interpleader made at the first term after an action is commenced shows due diligence.

3. Code, § 143, providing for interpleader, applies only when the claimant is not a party to the action.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Action by L. A. & T. H. Brock against the Southern Railway Company and J. F. Burgiss. From an order granting the defendant railway company remedy by interpleader, plaintiffs appeal. Affirmed.

Plaintiffs appealed on the following grounds: "(1) Because his honor erred in ordering 'that the plaintiffs and the defendant Jas. F. Burgiss litigate between themselves the right to the possession of the property claimed in the complaint, and that the defendant Southern Railway Company be discharged from liability to either of said parties, upon its delivering [of the property] described in the complaint, or its value, to P. D. Gilreath, sheriff, who is hereby appointed receiver of the same,' upon the ground that this being motion for order of interpleader, in action already brought and pending, under section 143 of the Code, the defendant Southern Railway Company could not avail itself of said motion except 'before answer, upon affidavit that a person not a party to the action makes a demand for the same debt, or property,' which was not the case here. (2) It appearing from the pleadings that the defendant Southern Railway Company was in possession of the property described in the complaint, and to which plaintiffs alleged they were entitled to the possession, before and at the time of the commencement of their action, and that defendant Southern Railway Company had full knowledge of all the facts alleged by plaintiffs before action brought, and with said knowledge refused to deliver said property to plaintiffs, thereby forcing them to bring this action, and it further appearing from the answer of said defendant that the title of plaintiffs to said property, as well as their right of possession thereto, was denied, it is submitted his honor erred in granting defendant's motion, thereby depriving plaintiffs of their right of trial by jury upon the issues presented. (3) This being a motion for interpleader, in action already brought, and to which both the Southern Railway Company and Jas. F. Burgiss were defendants, it is respectfully submitted that the facts alleged in the affidavits of the Southern Railway Company were not sufficient to entitle it to the relief prayed for, in that said affidavits did not allege that the action was pending, and issue had not been joined; that a person not a party to the action had made a demand against it for the same prop-

erty,—and the order of his honor, Judge Watts, was therefore without warrant or authority of law. (4) Because the Southern Railway Company had an adequate remedy at law against the consequences of the alleged conflicting claims to the property in dispute. (5) Because the defendant Southern Railway Company was not ignorant of the rights of the claimants to this property. (6) Because the defendant Southern Railway Company did not use due diligence in making this application, it appearing that it waited until after issue joined, and just a short time before the case was called for hearing upon its merits."

Jos. A. McCullough, for appellants. J. S. Cothern, for respondents.

McIVER, C. J. The plaintiffs brought this action to recover the possession of 10 bales of cotton in the possession of the Southern Railway Company, and damages for the detention thereof, to which the defendant James F. Burgiss was made a party, as claiming some interest in the said cotton. Omitting the allegations of the partnership character of the plaintiffs, and the corporate character of the defendant company, the allegations of the complaint may be stated substantially as follows: (3) That the plaintiffs were the owners of, and entitled to the immediate possession of, the said 10 bales of cotton. (a) That plaintiffs, previous to the time stated, agreed with the defendant Burgiss to pay for what cotton his agent purchased in the town of Honea Path, and that he, Burgiss, would pay the plaintiffs the amount advanced, with express charges, and a quarter of 1 per cent. on the money advanced. Plaintiffs were to draw on the said Burgiss, with bill of lading attached, for the amount advanced, with the expenses aforesaid. Burgiss agreed to honor said drafts, and upon payment thereof he would be entitled to the possession of the bill of lading and the cotton, and not otherwise. (b) That, in pursuance of said arrangement, plaintiffs, on or about the 9th day of February, 1894, furnished to the agent of said Burgiss the money necessary to pay for said cotton, which was delivered to the predecessor of the defendant company at Honea Path, for shipment to Greenville, where it was carried, and is now there in the possession of defendant company; the bill of lading for said cotton having been made out in the name of said Burgiss, at his special request. (c) That plaintiffs, on the 9th of February, 1894, drew on said Burgiss for the amount advanced by them, and the expenses aforesaid, with the bill of lading attached, which draft was duly protested for nonpayment, and returned to plaintiffs, together with the bill of lading, which are now in the possession of plaintiffs. (d) Since that time plaintiffs have demanded of Burgiss that he indorse the bill of lading, which he refused to do; and have offered to turn over to said Burgiss the bill

of lading if he would pay to them the amount above specified, which he has likewise refused to do. Plaintiffs are also informed and believe that said Burgiss has forbidden the delivery of said cotton by defendant company to the plaintiffs, "claiming now some interest therein," which claim plaintiffs allege is unfounded; and said Burgiss has also notified defendant company that if they deliver said cotton to plaintiffs, without his indorsement on the bill of lading, he will hold said company responsible therefor. (4) That on said 4th day of July, 1894, and previous thereto, "plaintiffs, having put the defendant Southern Railway Company in possession of all the facts herein stated, demanded of said defendant the possession of said 10 bales of cotton, presenting therefor the original bill of lading, and making them a tender of all charges ~~for~~ transportation, and other expenses incurred on account of said cotton, but they refused and still refuse to deliver the same to the plaintiffs." Wherefore judgment was demanded: (1) That defendant Burgiss be required to indorse the bill of lading, and do such other acts as may be necessary to enable plaintiffs to get possession of the said cotton. (2) For the possession of said cotton and damages for the detention. (3) For costs, and for such other relief as to the court may seem proper.

The Southern Railway Company, by its answer, admits the allegations contained in paragraphs 1, 2, and 4 of the complaint; denies the allegations that plaintiffs have sustained any damage by reason of any unlawful acts of this defendant; and, as to the allegations contained in the third paragraph of the complaint, this defendant says that it has not knowledge or information sufficient to form a belief as to the truth of such allegations, and demands strict proof of the same, "except that it admits to be true the statements contained in the last 13 lines of subdivision B, and the last 8 lines of subdivision D, with the exception of the statement, 'Which claim plaintiffs allege is entirely unfounded.'" These admissions, we suppose, relate to the shipment of the cotton at Honea Path, the making out the bill of lading in the name of Burgiss, the transportation of the cotton to Greenville, where it now is in the depot of defendant company, and the fact that said Burgiss had forbid the delivery of the cotton to plaintiffs without his indorsement of the bill of lading. We must, however, take occasion to say that this mode of pleading is very objectionable, as the reference to certain lines of a given paragraph in a complaint most probably relates to the lines of the manuscript copy, which do not correspond with the printed copy which alone is before us. But as these admissions in the answer, under the view which we take of the case, are not material, we only refer to this objectionable mode of pleading for the purpose of preventing any repetition of it.

By way of defense this defendant makes

the following allegations, substantially: (1) That the cotton was delivered to the agent of its predecessor, at Honea Path, for shipment, "consigned to James F. Burgiss, order notify Pelham Mills, Greenville, S. C., and issued therefor a regular bill of lading, which is now, as plaintiffs allege, in their possession." (2) That said cotton is now stored in defendant's depot at Greenville, S. C. (3) "That this defendant has been notified by both the plaintiffs and the defendant J. F. Burgiss not to deliver said cotton to the other of said parties; that it has no means of determining the conflicting interests of said parties, and submits to the court that it should not be compelled so to do; that it has had no interest in the cotton whatever, except the lien for freight that was due thereon, and said lien had been discharged by the plaintiffs' tender of freight and charges as alleged; and denies that it withholds possession of said cotton from either of said parties for any other reason than that it should not, at its peril, be the arbiter of their disputes." (4) "That said defendant is ready, at any time, to deliver said cotton to whomever of said parties the court shall determine is entitled thereto." (5) "That defendant submits to the court that neither of said parties, as the papers stand, is entitled to the possession of said cotton, and that it should not be mulcted in costs or damages when this state of affairs has arisen, not from any fault of this defendant, but from the mistake or negligence of the plaintiffs, or of the defendant J. F. Burgiss."

The defendant Burgiss also answered, raising certain issues with the plaintiffs, which, not being pertinent to the appeal, need not be stated.

At the first term of the court after this action was commenced, a motion was made by the Southern Railway Company, before his honor, Judge Watts, after due notice, based upon certain affidavits annexed, for an order of interpleader requiring the plaintiffs and defendant Burgiss to litigate between themselves the right to the possession of the property in dispute, and discharging the defendant company from all liability to either party on its delivering the property or its value to such person as the court may direct. One of these affidavits was made by the resident agent of defendant company at Greenville, in which, after stating the facts set up in that defendant's answer, which need not be repeated here, he expressly denies all collusion between the defendant company and either of the other parties. There was another affidavit of one of the attorneys for defendant company that he had offered to deliver the cotton to plaintiffs upon their executing a bond indemnifying defendant company against the claims of defendant Burgiss, which offer was declined. It was admitted at the hearing of the motion that the attorney for plaintiffs had exhibited to the attorney for defendant company a paper purporting to

be a notice of protest (of the draft, we presume) containing these words: "Party paid more for cotton than he was authorized to do." After hearing these papers and argument of counsel his honor granted the following order: "It is ordered that said motion be granted. Further ordered that the plaintiffs and the defendant J. F. Burgiss litigate between themselves the right to the possession of the property claimed in the complaint, and that the defendant Southern Railway Company be discharged from liability to either of said parties upon its delivery [of the property] described in the complaint, or its value, to P. D. Gilreath, sheriff, who is hereby appointed receiver of the same, to hold until this suit is determined." From this order plaintiffs appeal, upon six grounds, set out in the record, which will not be repeated here, but which should be incorporated in the report of this case.

The first and third grounds may be considered together, as they both involve the point that there was error in granting the order of interpleader, because not authorized by the provisions of section 143 of the Code. The second paragraph of that section—which is the only part of it that relates to the subject of interpleader—reads as follows: "A defendant against whom an action is pending upon a contract, or for specific real or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion by him, makes against a demand for the same debt or property upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party on his depositing in court the amount of the debt or delivering the property, or its value, to such person as the court may direct; and the court may in its discretion make the order." It is very obvious, from the terms of that section, that it applies only to a case where the other claimant is "not a party to the action," and cannot be applied to a case like the present, where both claimants are already parties to the action. It is very manifest that if it should be held that a defendant could only avail himself of the remedy by interpleader in the mode prescribed by this section it would be in the power of a plaintiff to deprive the defendant of such remedy by making the rival claimant a party to the action, as was done in the present case. This, surely, cannot be permitted, for, as is said in 3 Pom. Eq. Jur. § 1329, in speaking of these special statutory provisions: "It is universally held that these statutes do not at all limit nor affect the equitable jurisdiction by suit; they merely furnish another special, cumulative, and concurrent remedy. The ordinary style of these statutes does not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitute for the equitable remedy by suit,

in the kinds of actions to which it applies, and is governed by the same rules." Now, prior to the abolition of the court of equity, and the establishment of the reformed procedure by the Code, a defendant who was sued in a case like the present, if he desired to avail himself of the remedy by interpleader, would have been compelled to file a bill of interpleader against both of the rival claimants, making the necessary allegations, and with proper prayer for relief; but, since the change in the procedure wrought by the Code, a separate action is not only unnecessary, but improper, as the same result may be obtained by answer. For example, under the former system of pleading, if an action to recover possession of real estate was brought against a person in possession who desired to protect himself by some equitable defense, he would have been compelled to file his bill in equity to enjoin the action at law until his equitable rights could be determined by the court of equity. Now, however, under the reformed procedure, such a course is not necessary, as it is well settled that a person may set up equitable as well as legal defenses by his answer. Here the defendant company has, by its answer, claimed the remedy by interpleader, just as it would formerly have done by a bill in equity; and the only question is whether it has shown itself entitled to such remedy. It seems to us that the pleadings, together with the affidavits, upon which the motion was based, clearly make out a case for interpleader. Indeed, the allegations in the complaint itself show that the defendant company rightfully acquired the possession of the property in dispute, which it retains only because there are rival claimants to said property. The bill of lading, which is at least prima facie evidence of the right to receive the property, was made out in the name of one of the claimants, and it is now in the possession of the other claimants, without indorsement, and one of the prayers of the complaint is that the person (the defendant Burgiss) in whose name the bill of lading was made out may "be required to indorse the bill of lading for said cotton, and do such other acts as may be necessary to enable plaintiffs to get possession of said cotton." If there ever was a case for interpleader clearly made out, it seems to us this is one. The undisputed facts are that the defendant company is in possession, rightfully acquired, of certain property to which it makes no claim whatever, and on the contrary avers its readiness to deliver the property to the rightful owner, as to which the defendant company is in honest doubt, owing to the antagonistic claims of its codefendant and the plaintiffs, which it has no means of determining; and that defendant is not acting in collusion with either of said claimants.

We will next consider exceptions 2 and 5, which both make the point that, as the de-

defendant company "had full knowledge of all the facts alleged by plaintiffs before action brought," the defendant company had no right to the remedy by interpleader. In the first place, we do not think that it appears from the pleadings (and there is no evidence upon the subject) that the defendant had "full knowledge of all the facts alleged by the plaintiffs before action brought," for there is no admission of the facts alleged as to the terms of the arrangement between the plaintiffs and Burgiss for the purchase of the cotton which might throw light upon the relative rights of those parties. But even if defendant company had been informed by plaintiffs of all these facts, and was at the same time informed that these facts were disputed by Burgiss, as the pleadings show, what means had the defendant company of determining such dispute? That presents just such a case as calls for the remedy of interpleader. The second branch of exception 2 is based upon the assumption, unfounded, as we think, that defendant company, in its answer, denied the title of the plaintiffs as well as their right to the possession of the property in dispute. The only foundation which is claimed for this assumption is the following language in the fifth subdivision of paragraph 4 of the answer: "The defendant submits to the court that neither of said parties, as the parties stand, is entitled to the possession of said cotton." In view of the patent fact that this defendant, in its answer, expressly disavowed any claim to said cotton, and averred its readiness to deliver the same to its rightful owner, it seems to us that the language just quoted cannot properly be construed as a denial of the claim of the plaintiffs. At most, it was only an averment of what the plaintiffs in their complaint impliedly admit,—that neither of the parties, as the papers stand, is entitled to the possession of the cotton,—which manifestly means no more than this, that as the bill of lading was made out in the name of one of the claimants, and the same was in the possession of the other without indorsement, neither of the parties, as the papers stand, was entitled to demand possession, and that such language cannot properly be construed as a denial of the rights of either. Exceptions 2 and 5 are overruled.

Exception 4 makes the point that the defendant company had an adequate remedy at law against the consequences of the alleged conflicting claims to the property in dispute. What that remedy is we are at a loss to conceive; and none has been suggested which seems to us adequate and proper. This exception is overruled.

It only remains to consider the sixth exception, which makes the point that defendant, having failed to use due diligence in making the application for the order of interpleader, has forfeited its right to such remedy. We do not see any evidence of a

want of diligence on the part of the defendant company. The application was made at the first term after the action was commenced, and we do not see how it could have been made sooner. This exception must also be overruled.

The judgment of this court is that the order appealed from be affirmed.

(44 S. C. 470)

STATE ex rel. GIBBES v. MORRISON,
Sheriff.

(Supreme Court of South Carolina. Sept. 3, 1896.)

TAX SALE — REFUSAL OF SHERIFF TO PUT PURCHASER IN POSSESSION.

1. A sheriff is not excused from putting the purchaser at a tax sale in possession, as required by Act 1887 (19 St. 862) and amendments, merely because the deed to the purchaser, which describes the land by metes and bounds, erroneously states the parish in which it is situate, and the number of acres in it.

2. Nor is refusal to put the purchaser in possession excused by the fact that, owing to the irregularities in the description of the land in the sale, the sheriff readvertised it, and, when offered for sale under such readvertisement, a person offered to pay any claim of the state against the land, at least where the person was one who intruded himself into possession without title, after the tax had been put on the land under the abandoned lands act of 1889 (20 St. 347).

3. Even if the provision in the tax law allowing the owner of land, possession of which has been acquired under a tax, two years in which to sue for recovery thereof, be construed to be two years from the time of the sale, rather than two years from the time possession is given the purchaser, the sheriff will be compelled to put the purchaser in possession, though action therefor is brought more than two years after sale, the purchaser having promptly proceeded by rule on the sheriff to require him to give possession, and the two years having expired before judgment declaring that not the proper remedy, and the purchaser having stipulated that, if put in possession, he will waive all benefits of the two-years limitation.

Appeal from common pleas circuit court of Berkeley county; Norton, Judge.

Application of J. G. Gibbes for mandamus to J. B. Morrison, as sheriff of Berkeley county. Application denied, and relator appeals. Reversed.

The decree refusing the application was as follows: "On the 10th of November, 1891, respondent, as sheriff as aforesaid, made his deed to James G. Gibbes for a tract of land described as 400 acres, more or less, on St. James Goose Creek, in said county, bounded north by lands of Philip Porcher or F. L. Connor, south by William Horibeck and Hannah Clark, east by Adam Cross, west by Emily Winningham, assessed for taxation for the fiscal year 1889, under 'An act in relation to forfeited lands, delinquent lands and collection of taxes' (Act 1887; 19 St. 862) and acts amendatory thereof, which deed was duly recorded 20th November, 1891. One Winningham, claiming to be the owner and in possession of the land now claimed by the relator to have been sold and conveyed to him, refused to give up the posses-

sion to relator, and thereupon the relator called upon respondent, as sheriff, to put him in possession, but respondent refused to do so. On the 10th October, 1892, relator procured from Judge Fraser a rule to show cause why he should not be so put in possession of the land described in said deed. On the 13th of December, 1892, Judge Fraser, without deciding relator's rights, discharged the rule, on the ground that it was not the proper remedy, and without prejudice to any other proceeding relator might institute. This judgment was on appeal affirmed by the supreme court on the 26th June, 1893. 17 S. E. 803. On the 31st January, 1893, relator procured from Judge Aldrich the alternative writ of mandamus now under consideration. Respondent made return thereto on the 15th of February, 1893, that the attorney general had advised relator that respondent ought under a new execution, properly describing the land, to take possession of, advertise, sell, make deed to, and put the purchaser in possession of it; that, acting under this advice, respondent readvertised the property, inserting 'St. Johns Berkeley Parish' for the 'Goose Creek Parish'; that, upon the day appointed for the resale, counsel for one Winningham appeared, exhibited plat covering the land as now advertised, and offered to pay any claim that the state might have against it. Thereupon the sale was stopped. Respondent further says that he never levied on the land claimed by Winningham, and that Winningham now occupies and has color of title to it; that respondent is in serious doubt whether the land in dispute is the one sold as unknown in St. James Goose Creek, or another separate and distinct tract in St. Johns Berkeley. On the 11th November, 1893, relator replied that he acted without legal advice when he applied to the attorney general, but has since been advised that the irregularities in description, if any, are not sufficient to vitiate his title, but denies that there are any; alleges that the land sold to him and that claimed by Winningham are one and the same; denies that the sale was stopped as alleged in the return, and that respondent made no levy on the land claimed by Winningham; sets up the deed to himself from respondent as an estoppel. Respondent is estopped by his deed from denying that he levied on the land described and conveyed therein, but such estoppel does not establish that the tract claimed by Winningham is the one so levied on. That is an issue of fact, which it would be proper to submit to a referee or to a jury if the rights of relator and respondent alone were involved. It appears in the pleadings that the rights of one Winningham are also involved; that he is in possession of and claims title to the tract of land claimed by relator under his sheriff's tax title. If the peremptory writ should issue, and he be ejected thereunder, he would be barred by the limitation fixed in the act

from instituting any action to recover the land, more than two years having now elapsed since the sale was made under which relator claims. Winningham's title may be good or it may be bad. I do not pass on that. But he has not been made a party to any suit, and appears to have had no notice of the tax sale under which relator claims before it was made, unless he saw the advertisement, which was so defective in description that relator was himself at first led to believe that the land held by Winningham was not identified by it. If relator had promptly sought this remedy, and diligently pursued it, he might have obtained possession under it, but, as he has delayed until Winningham will be deprived of the right to try titles as contemplated by the act under which he claims, it is ordered that the peremptory writ be refused, and the proceeding herein dismissed."

McCradys & Bacot, for appellant. E. J. Dennis, for respondent.

McIVER, C. J. On the 10th of November, 1891, the respondent, as sheriff, having levied upon a certain tract of land in the county of Berkeley for unpaid taxes assessed thereon for the year 1889, sold the same to the relator, who, having complied with the terms of sale, received a deed, a copy of which is set out in the case. Relator then applied to the respondent to put him in possession of the said land, who refused to do so; and thereupon this proceeding for a mandamus was commenced to compel the respondent to put him in possession of the land, and the same was heard by his honor, Judge Norton, who rendered the decree set forth in the case, refusing the application for mandamus, and dismissing the petition. From this judgment relator appeals, upon the several grounds set out in the record.

The respondent, in his return, bases his refusal to put the relator, who was the purchaser at the tax sale, in possession, as he is expressly required to do by the act of 1887 (19 St. 862) and the amendments thereto, upon the ground that, inasmuch as the land levied on for the unpaid taxes was described as lying in St. James Goose Creek parish, instead of St. Johns Berkeley parish, and that it was described as containing 400 acres instead of 480 acres, which was claimed to be the area of the tract of which relator claimed possession, he doubted his right to comply with the demand of relator. But the land was also described by metes and bounds, and there certainly could not have been much doubt of its identity; for as appears from the record of a former proceeding in this very matter, referred to by Judge Norton, and set out in the case, the respondent admitted that it was the same land, and such admission is formally repeated on the record in the present case. The further fact, stated in respond-

ent's return, that, owing to the irregularities in the description of the land, he readvertised the land as lying in St. Johns Berkeley parish, and, when it was offered for sale under such readvertisement, counsel for one Winningham appeared, "and exhibited plat concerning the said described land in St. Johns Berkeley parish, and offered to pay any claim that the state might have against the said land," cannot affect the question. It was the plain statutory duty of the respondent to put the relator in possession of the land which he had previously sold and conveyed to the relator, by the terms of which conveyance he was estopped from denying that he had made a levy upon the land, and which the statute expressly declared should "be held and taken as prima facie evidence of a good title in the holder, and that all proceedings have been regular, and all requirements of the law have been duly and fully complied with." If, when the land was first exposed for sale, Winningham, or any one else, had complied with the provisions of section 3 of the act of 1887, as amended by the act of 1888 (20 St. 51, 52), his rights could have been protected (if he had any), and the sale prevented; but after the sale was made, and the land conveyed to the relator, it was the sheriff's duty to put the purchaser in possession; and it was neither his right nor duty to inquire into any supposed irregularities in the proceedings previous to the sale, or any supposed defects in the description of the premises, which seem to have been more apparent than real, for certainly neither the fact that the land was mentioned as situate in St. James Goose Creek parish, when in fact it lay in St. Johns Berkeley parish, nor the fact that there may have been an error in the number of acres, could invalidate the sale or the relator's rights thereunder. See *Henderson v. Jones*, 2 Brev. 402, as to the error in the name of the parish. And surely no authority is needed to show that a mistake (if, indeed, there was one) as to the number of acres was of no consequence. It will be observed that in the return of respondent it was not stated that Winningham had or even claimed title to the land in question, but simply that his counsel exhibited a plat covering the land, and offered to pay any claim that the state might have against the said land. This court, therefore, on the previous hearing of this appeal, deeming it necessary that it should have further information as to the facts, especially as to the possession of the land, remanded the case to the circuit court for the purpose of determining two issues of fact: (1) Whether any one, and, if so, who, was in possession of the land in question at the time the same was first levied on by the sheriff. (2) Whether any one, and, if so, who, was in possession of the said land at the time the same was sold and bid off by the relator. Accordingly, these issues were, by a consent order, referred to a referee for determination; and his report, having been confirmed by the circuit court, and

duly certified to this court, is now before us, as a part of the record in the case. By that report it appears that the referee found "that one James R. Winningham has been in possession of the land in question from some time in 1890 up to the present time, within which period the said land was first levied on by the sheriff, and was sold and bid off by the relator." But the referee goes on to find, from the testimony, the nature and character of such possession, as follows: "About 1890 the said Winningham applied to J. C. Beatty, a civil engineer and surveyor, of more than forty years' experience, to survey and make a plat of the land for him [Winningham], which he [Beatty] did in 1890. At the time of this survey no one was in possession of the land. For ten years or more preceding, it had been neither on the tax duplicate nor on the forfeited land list. It was vacant and abandoned land. It appeared for the first time on the tax duplicates of the fiscal year 1893, in the name of J. R. Winningham. The said Winningham had no titles for the land, and there were no plats or other papers showing the ownership of it, etc.; so that Beatty had some difficulty in surveying it, and approximately estimated its contents at 480 acres. He [Winningham] desired Beatty to survey and make a plat of it for him, so that he could claim it and get it on the tax book in his name; and some time after the said survey and plat were so made by Beatty, in 1890, he [Winningham] took possession of it, and afterwards returned it for taxation in his own name for the fiscal year 1893. In 1891 the said Beatty made another survey and plat of this land for the state, it having previously been reported to the secretary of state as abandoned land; and under this last survey and plat it was conveyed to relator by the sheriff of Berkeley county, by his deed dated the 10th day of November, 1891. On this last survey Beatty found that it contained 400 acres, instead of 480 acres." This last survey was doubtless made under the authority of an act entitled "An act in relation to abandoned lands not upon the tax duplicate or forfeited land list," passed in 1889 (20 St. 347), which authorized the commissioners of the sinking fund "to have surveyed any lands that they are informed and believe have been continuously for ten or more preceding years upon neither the tax duplicate or forfeited land list of this state; and if after such survey the said absence from tax books be found to exist, to cause the said land to be placed upon the tax duplicate in the owner's name if known, or in the name of 'Unknown' if the owner's name be not known, charged and taxed with the entire costs of the survey and investigation, and fifty per cent. penalty additional thereto, and with the taxes for five years immediately preceding and collecting the same under existing law for collection of taxes." And under that law the sheriff levied upon and sold the land in question to the relator, for in his deed he recites, among

other things: "And whereas there appears on the tax duplicate of Berkeley county for the year 1889 certain real estate consisting of * * * four hundred acres (400 acres), assessed in the name of 'Unknown,' and valued at one hundred and fifty-six dollars, the taxes, penalties, and assessments thereon amounting to ten 99/100 dollars, and whereas the above-named Unknown having neglected to pay the county treasurer of Berkeley county the above taxes, assessments, and penalties as prescribed by law, an execution was issued therefor, as directed by said act, on the 20th day of February, 1891, and lodged with the sheriff of Berkeley county,"—going on to recite the levy and sale of the land under said execution to the relator, and his compliance with the terms of sale, proceeding to convey the said land to the relator.

From the foregoing facts, as they are now made to appear before us, we can have no doubt that it was the statutory duty of the sheriff (the respondent in the case) to put the relator into possession of the land, notwithstanding the fact that the said J. R. Winningham has intruded himself into the possession of the land in 1890, upon which the taxes for 1889 had never been paid, and which had not been even returned for taxation until the year 1893, long after the levy and sale under which relator claims possession. It seems from the decree of Judge Norton, which should be set out in the report of this case, that he bases his conclusion, refusing the writ of mandamus, largely, if not entirely, upon the ground that the relator, by his laches or delay in asserting his rights, has allowed the two years to elapse within which the owner of the land, possession of which has been acquired under a tax sale, is permitted to bring his action to recover possession of the same, and that, if the relator is now put in possession of the land, Winningham, if he has any lawful claim, will be barred of his action to assert the same by the lapse of the two years. In the first place, we do not think that there was any laches on the part of the relator, for it appears from the record before us that the relator promptly proceeded to require the sheriff to put him in possession, by resorting to an ordinary rule on the sheriff, which was denied solely upon the ground that an ordinary rule on the sheriff was not appropriate remedy; and the rule was discharged, expressly without prejudice to his right to resort to the appropriate remedy. *Gibbes v. Morrison*, 39 S. C. 360, 17 S. E. 803. Now, as the judgment in that case was rendered on the 26th of June, 1893, more than two years after the sale, by which the relator was not only not forbidden, but in terms invited, to institute the appropriate proceeding, it is very obvious that this court could not then have thought that the relator was shut off from instituting the present proceeding. In the second place, it seems to us far from clear

that, under a proper construction of that clause of the statute fixing the two-years limit, the time begins to run from the day that the sale is made, for it may well be argued that the true construction of that clause is that the two years commenced to run from the time when the sale is consummated, by the conveyance to the purchaser, and by putting him in possession; for otherwise, by collusion between the sheriff and the purchaser, such delay might occur as would effectually exclude the claimant from asserting his claim, if it should be held that the two years commenced to run from the day of sale, without regard to the time when the same was consummated by conveyance and possession. Indeed, it is somewhat difficult to understand how any action could be commenced against a purchaser at a tax sale of land, for the recovery of the possession of the said land, unless the purchaser was in possession. But, in the third place, in view of the express stipulation of the relator, filed with the record in this case, that he will waive the bar afforded by the two-years limitation, and consent that an action for the recovery of the land, or for the recovery of the possession thereof, may be commenced by the said Winningham within such time as may be just and reasonable, the point upon which the judgment of the circuit court seems mainly to rest loses its importance.

It seems to us that there was error on the part of the circuit judge in dismissing the application for mandamus. The judgment of this court is that the judgment appealed from be reversed, and that the case be remanded to the circuit court for Berkeley county, with instructions to issue the writ of mandamus as prayed for, provided the relator will file with the clerk of the court of common pleas for said county his consent in writing to waive all benefit of the two-years limitation provided for in the act of 1887 and its amendments, in case any action shall be commenced against him by the said J. R. Winningham within the time to be prescribed by the circuit court.

(44 S. C. 454)

HELIAMS v. PATTON.

(Supreme Court of South Carolina. Sept. 3, 1895.)

ORAL LEASE—USE AND OCCUPATION—PAROL EVIDENCE.

1. Though possession of premises was not pursuant to any writing, recovery may be had for use and occupation, and for that purpose evidence is admissible as to length of occupation, value of the use and occupation, and whether any payment had been made therefor.

2. Though Rev. St. 1893, § 2149, declares that interests in lands created by parol, and not put in writing, shall have the effect of estates at will only, such an estate may be converted into a tenancy from year to year by other circumstances, and such conversion may be shown by the payment and receipt of rent computed by the year.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Action by R. Y. Hellams against Della A. Patton. Judgment for defendant. Plaintiff appeals. Reversed.

Plaintiff's grounds of appeal are as follows: (1) That his honor erred in excluding the evidence of the plaintiff, R. Y. Hellams, to the effect that the defendant had entered into possession of the premises referred to in the complaint, and had remained in possession thereof, as a tenant of plaintiff under a verbal lease, at any time prior to the institution of this suit; such testimony being offered prior to the amendment of complaint allowed by the judge. (2) That his honor erred in ruling, both prior and subsequently to the said amendment, that no testimony could be introduced by plaintiff showing the entry into and possession of said premises by the defendant as a tenant of plaintiff unless the contract of lease was in writing; and the ruling that no evidence could be introduced to prove any contract with defendant, or to prove the occupation of the premises by her, unless the contract therefor was in writing. (3) Because his honor erred in excluding evidence offered by the plaintiff, R. Y. Hellams, to sustain the allegations of the complaint, and going to show when the defendant went into possession of the said premises, how long she remained in possession thereof, what rent she paid for the use of said premises per month, and the amount she was due for the occupation of the said premises as rent therefor. (4) Because his honor erred in not holding that plaintiff could introduce evidence to show that the defendant had entered into possession of the said premises as a tenant of plaintiff, and had remained in possession thereof during a period of two years or more, and that by operation of law she became a tenant from year to year, such tenancy commencing on the 1st of January of each year after the first year, and terminating at the close of such year, unless otherwise renewed. (5) Because his honor erred in granting the nonsuit in this case, and holding that no action can be brought to recover of a defendant who enters into possession of property under a verbal lease the rental value thereof for the time of the occupation of the premises.

Haynsworth & Parker, for appellant. Cothran, Wells, Ansel & Cothran, for respondent.

McIVER, C. J. In his original complaint the plaintiff alleged: (1) That on the 15th of November, 1893, he leased to the defendant a certain house and lot in the city of Greenville "for the term of one year from the date of the entry into the possession thereof, at the price of twenty-two and $\frac{50}{100}$ dollars for each month during said term, payable at the end of each month thereof, and that the defendant did agree to the terms of said lease, and did, on November 15, 1893, enter into the possession of said premises under said agreement."

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(2) "That the rent reserved to the plaintiff amounted to two-thirds of the full improved value of the said premises during said term." (3) That the defendant is indebted to the plaintiff in the sum of \$157.50, being rent for the months of March, April, May, June, July, August, and September of the year 1894,—the rent for the earlier period of the said term having been paid by the defendant.

The defendant answered: (1) Denying that she ever had any contract whatever with plaintiff in relation to the premises described in the complaint. (2) Admits that she occupied the said premises from the 3d day of October, 1893, to the 1st of March, 1894, paying the rent by the month during that period; and that on the 1st of March, 1894, she surrendered the said premises to the plaintiff, who retained possession thereof until the 1st of October, 1894, when, as she is informed and believes, the plaintiff sold and conveyed the said premises, and the purchaser at once took possession. (3) That if she was in point of fact a tenant of plaintiff she was only a tenant at will or by the month, and she denies that she owes plaintiff anything. (4) She denies each and every allegation of the complaint not previously admitted or denied.

The case being thus at issue came on for trial before his honor, Judge Watts, and a jury, and when the plaintiff was on the stand, and was asked the question whether the defendant was a tenant of his, counsel for defendant interposed an inquiry whether there was any written lease, which being answered in the negative, defendant's counsel objected to any testimony as to any oral lease, which objection was sustained, and counsel for plaintiff excepted. The witness was then asked whether the defendant had ever occupied the premises in question; and, if so, when. Defendant's counsel objected. The court said, "I have ruled that he could not show that there was any lease here except that lease was in writing, but I think you can show that the premises were occupied." The witness then answered that defendant had occupied the premises,—her occupation being in 1890 or 1891. At this state of the case counsel for plaintiff asked leave to amend the complaint by alleging "that defendant had previously occupied the premises and had been paying the rent." Counsel for defendant objected, upon the ground that plaintiff sued on an express contract and now proposes to amend by setting up an implied contract. The circuit judge allowed the amendment, and granted an order "that the first paragraph of the complaint be amended as follows: That on January 1, 1894, the defendant had, for a period greater than one year, been in possession of the house and lot owned by plaintiff situate, etc. * * * That the said defendant had, on November 15, 1892, entered into possession of said premises under a verbal agreement with plaintiff by which she

was to pay to plaintiff the sum of twenty-two $\frac{50}{100}$ dollars per month, payable at the end of each month, as rent for said premises and for a period of one year. That the said defendant remained in possession of said premises on January 1, 1894, and so remained until October 1, 1894, when she vacated the same. That the sum of twenty-two $\frac{50}{100}$ dollars monthly rent of said premises was the rental value thereof. That paragraph 3 of the complaint be amended by striking out the words 'the rent for the earlier period of the said term having been paid by the defendant,' and insert in lieu thereof the words 'the rent up to March 1, 1894, having been paid by the defendant.'" After the order of amendment was granted, counsel for plaintiff proceeded to ask the witness when he purchased the premises in question, and from whom, and whether defendant had been occupying said premises prior to his purchase. Counsel for defendant objected, and the court sustained the objection, saying, "I rule that you cannot introduce any testimony here at all unless the contract is in writing." All further attempts to offer testimony tending to show when defendant took possession, how long she remained in possession, and whether she had ever paid any rent to the plaintiff for the year 1894, were objected to, and ruled out. At the close of the plaintiff's testimony, a motion for nonsuit was made and granted, and plaintiff appeals, upon the several grounds set out in the record, which should be incorporated in the report of the case.

The first four of these grounds impute error to the circuit judge in his rulings as to the admissibility of testimony, while the fifth and last ground alleges error in granting the motion for a nonsuit.

The circuit judge seems to have based his rulings, both as to the admissibility of the testimony and in his order of nonsuit, upon the recent case of *Davis v. Pollock*, 36 S. C. 544, 15 S. E. 718. But that case differs from this in the important particular that there the action was "to recover damages from the defendant for failure to put plaintiff into possession of the Merchants' Hotel at Blacksburg, South Carolina, pursuant to an alleged parol lease of the same for the term of one year," and the defendant answered, denying the alleged contract of lease, and pleaded the statute of frauds. So that there the action was to recover damages for the failure to perform an executory contract. But here the cause of action, as stated in the original complaint, is to recover the rent reserved in a parol lease for the term of one year, which, it is alleged, amounted to two-thirds of the full improved value of the said premises during said term. And in the amended complaint the cause of action is the breach of the implied promise to pay, for the use and occupation of the premises, the amount stated in the verbal agreement as rent, which is alleged to be the rental value

thereof. It seems to us, therefore, that the case of *Davis v. Pollock* furnishes no authority for the rulings of the circuit judge as to the admissibility of the testimony offered, except, perhaps, under the cause of action as stated in the original complaint, which was based upon the verbal contract for the lease. But under the cause of action, as stated in the amended complaint, for the use and occupation of the premises, we think there was error in rejecting the parol testimony offered to show the length of time which the defendant had enjoyed the use and occupation of the said premises, and the value of such use and occupation. If, as alleged in the amended complaint, the defendant was in possession of the premises on the 1st January, 1894, and remained in possession until the 1st of October, 1894, she was certainly liable to pay to the plaintiff the rental value thereof, whether she originally entered under a parol or written lease. This is upon the principle that natural justice requires that one person shall not be permitted to enjoy or use the property of another without paying proper compensation therefor, and constitutes the foundation of the universally recognized action for use and occupation. Indeed, it is expressly provided by section 1933, Rev. St., that a landlord, where the agreement is not by deed, may recover from the tenant a reasonable satisfaction for the use and occupation of his land; "and if, in evidence on the trial of such action, any parol demise, or any agreement [not being by deed] whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the amount of damages to be recovered." It seems to us, therefore, that the circuit judge erred in excluding the testimony offered tending to show how long the defendant had been in the enjoyment of the use and occupation of the premises and the rental value thereof, and whether she had paid any rent therefor during the year 1894.

There is also another view under which it may have been error to exclude the testimony offered. While it is quite true that section 2149, Rev. St. 1893, does declare that "all estates, interests of freehold or terms of years, or any uncertain interests of, in, to or out of any lands * * * made or created * * * by parol, and not put in writing * * * shall have the force and effect of estates at will only * * * except leases not exceeding the term of one year from the time of entry, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds parts at the least, of the full improved value of the thing demised," yet such parol leases are not declared void, but the declaration is simply that, except in the excepted case, such lease shall have the effect of creating an estate at will only, leaving a lease, whereon the rent reserved amounts to the sum specified,

good and valid for the term of one year from the time of entry. But, because the lease by itself creates an estate at will only, it does not necessarily follow that such an estate may not be converted into a tenancy from year to year by other circumstances. While this point has not, so far as we are informed, been distinctly decided in this state, yet it has been elsewhere, as may be seen by reference to the case of *Talamo v. Spitzmiller*, 120 N. Y. 37, 23 N. E. 980, where it is said: "The mere fact that a person goes into possession under a lease void because for a longer term than one year does not create a yearly tenancy. If he remains in possession, with the consent of the landlord, for more than one year, under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year," or, as it is considered in this state, to the end of the calendar year. *Floyd v. Floyd*, 4 Rich. Law, 23; *Wilson v. Rodeman*, 30 S. C. 210, 8 S. E. 855. See, also, extended note by Mr. Freeman to the case of *Wallace v. Scoggins* (Or.) 17 Am. St. Rep. 752, 21 Pac. 558, where, at page 755, in speaking of a parol lease, that distinguished writer says: "The better opinion is that such a lease is in itself void, and creates no tenancy whatever; and that, if the lessee enters under it, the tenancy is at will, unless from the payment and receipt of rent computed by the year, or from the circumstances, the inference may be legitimately drawn that the parties, notwithstanding the void lease, intend a tenancy from year to year." See, also, *Reeder v. Sayre*, 70 N. Y. 180. This doctrine is impliedly, at least, recognized in *Wilson v. Rodeman*, supra. See, also, *Godard v. Railroad Co.*, 2 Rich. Law, 346. It seems to us, therefore, that the ruling of the circuit judge as to the admissibility of testimony was erroneous upon this ground also, as it tended to exclude the plaintiff from showing such circumstances as might convert the tenancy at will into a tenancy from year to year.

It only remains to consider whether there was error in granting the nonsuit. The order of nonsuit is in the following language: "After hearing all the evidence in the case which was admitted by the court, and after full argument of the case before me, I am of the opinion, under the decision of our supreme court in the case of *Davis v. Pollock*, 36 S. C. 544, 15 S. E. 718, 'that no action can be brought to charge any person upon a contract, not in writing, for the use of any real estate, even for a term not exceeding one year, no matter what may be the amount of rent reserved by such a lease.' This being an action of that character, it is, on motion of defendant's attorneys, ordered that a nonsuit be, and the same is hereby, granted." It will thus be seen that his honor

did not hold, as is attributed to him in the fifth ground of appeal, "that no action can be brought to recover of a defendant who enters into possession of property under a verbal lease the rental value thereof for the time of the occupation of the premises," but he held that no action could be brought on a contract, not in writing, for the lease of any real estate; and his real error, as we think, was in regarding this as an action on the contract for the lease, instead of as an action (under the amended complaint) to recover for the use and occupation of the premises. So that, strictly speaking, the fifth ground of appeal cannot be sustained. But this is not material to the result, for, as we have seen, there must be a new trial for the error in excluding the testimony above referred to. We do not think that the language quoted from the concluding paragraph of the case of *Davis v. Pollock* by the circuit judge is applicable to this case, when considered, as we think it should be, under the amended complaint, as an action for use and occupation, and not as an action upon the contract for the lease, which was by parol. As we understand it, section 2149, Rev. St., simply declares that a parol lease of land shall have the effect of creating a tenancy at will only, except where the rent reserved by such lease shall amount to two-thirds of the full value of the thing demised, and declares nothing as to the right of action upon such lease; whereas section 2151, Rev. St., declares that no action shall be brought to charge any person upon any contract for the sale of lands, or any interest in or concerning them, whether by lease or otherwise; and section 1933 plainly recognizes the right to recover for the use and occupation of land where the tenant enters into possession of the land even under a parol lease. Hence, the language quoted from the case of *Davis v. Pollock*, and relied upon by the circuit judge, may have been applicable to that case, in which the action was upon the executory contract to lease, where the alleged tenant had not entered into possession of the premises, but has no application to the present case.

The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

POPE and GARY, JJ., concur.

(95 Ga. 383)

MYERS v. CANN et al.

(Supreme Court of Georgia. Feb. 5, 1895.)

EXECUTORS—RIGHT OF CREDITOR TO APPOINTMENT
—RIGHT OF LEGATEE.

1. A corporation which is a creditor of a testator is entitled to the same rights as other creditors in the selection of an administrator with the will annexed, but one who is appointed administrator upon the selection of a creditor or

creditors must be himself a creditor. The president of such a corporation, having no individual claims against the testator, is not a creditor, and cannot be thus selected as administrator.

2. The sole devisee and legatee of a deceased person who was the sole devisee and legatee of another deceased person is, irrespective of the question of the solvency of the estate of the last, the person entitled to that estate, within the meaning of paragraph 6 of section 2494 of the Code; and, where the person so entitled is a minor, his guardian, in a contest for administration with the will annexed on that estate, has the right to select a disinterested person as administrator, and if that person is duly qualified he is entitled to the appointment.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Petition by Henry Myers for the appointment of an administrator of the estate of Peter Patterson, deceased, wherein George T. Cann, guardian, and others, were made parties. From the judgment rendered, petitioner brings error. Affirmed.

Barrow & Osborne, for plaintiff in error.
G. T. & J. F. Cann, for defendants in error.

ATKINSON, J. The questions made in this case arise on the following state of facts: Herman Myers presented his petition to the ordinary of Chatham county, asking that letters of administration with the will annexed be granted to him upon the estate of Peter Patterson. In his petition he set forth that Patterson had died testate, but nominating no executor, leaving an estate worth about \$1,500; that the sole legatee of the estate was Emma Jones, who failed to administer said estate; and that the Savannah Grocery Company, of which petitioner is president, is a creditor of deceased. A caveat was interposed by G. T. Cann, as executor of Emma Jones, deceased, upon the grounds: (1) Emma Jones, as sole legatee, is entitled to the estate of Patterson, and in her lifetime selected, and her executor hereby selects, E. S. Elliott to be administrator, and requests his appointment as such. (2) Neither Emma Jones nor her executor ever relinquished any of her rights under the law of administration and any delay in having a permanent administrator appointed has been due to her inability, until November 2, 1893, to secure a suitable disinterested party to administer and give bond, and she was unable, on account of ignorance, to properly administer; and the application of Myers was made prior to November 1, 1893. (3) The interest of Myers is hostile to the estate of Patterson. (4) Myers is not a creditor of, or otherwise interested in, said estate. (5) The Savannah Grocery Company is not authorized, under its charter, to administer upon the estate of deceased persons; and Myers, as president of that company, would not be authorized to administer upon the estate of Patterson. (6 and 7) Emma Jones, G. T. & J. F. Cann, and B. S. Purse are creditors of the estate of Patterson, and they have and do select and request the appointment of Elliott as administrator. The

matter went by appeal to the superior court, where the caveat was amended, and the following grounds added: The estate of Patterson is not insolvent. The claim of the grocery company against it is not a true and correct statement of the indebtedness thereof to the grocery company, and the correctness of said account and liability of said estate to said company are disputed; and it is necessary that letters be granted to Elliott, that the correctness of the account may be properly investigated. Emma Jones died testate, bequeathing all her property to Viola Jones, a minor, and appointing G. T. Cann executor of her will, and he has been appointed guardian of the property of Viola Jones. The jury found against the application of Myers, and that letters be issued to Elliott. Myers moved for a new trial, and, his motion being overruled, excepted.

1. The various grounds of error alleged to have been committed upon the trial of this case are covered by the two general propositions stated in the headnotes hereto. That upon failure of administration upon an estate by the next of kin, and on the selection by creditors of a person to be administrator, no person can be so selected unless he be either of kin to the intestate or a creditor, or otherwise interested in the grant of administration, we think, is settled by paragraph 8 of section 2494 of the Code. According to this record, Herman Myers, the applicant for administration, was neither of kin, nor was he a creditor, nor had he any personal interest in the administration of the estate. The indirect interest which he had in the assets of this estate, resulting from his interest in the corporation, was not of such a character as to make him a creditor of the estate, or give him such personal interest in the administration thereof as to bring him within the terms of the section of the Code cited. The estate owed him no money, but its debt was due entirely to the corporation, upon whose nomination the election of Myers depended. Not being a creditor, he was not eligible to selection. The mere fact that he was the president of the corporation would not authorize his appointment, at its nomination, to this position. It is the creditor himself, and not his representative, who must administer; and therefore, if wanting in power to conduct an administration because of the absence of provisions in its charter to that effect, if the corporation desires to exercise its right of selection, it must select either some other creditor, or one of the other classes of persons enumerated in the section of the Code referred to.

2. The estate upon which administration was sought had been devised by Peter Patterson, the testator, to Emma Jones, as the sole legatee, who had, in her lifetime, selected the person now named by the caveator to be administrator upon this estate. Before qualification, however, she departed this life; having devised her estate to her minor daughter.

ter, of whom the caveator in this case is the guardian. The guardian, acting for and on behalf of this minor devisee, claims the right to select an administrator upon this estate. Under paragraph 6, § 2494, of the Code, the persons entitled to an estate may select a disinterested person as administrator, and, if otherwise qualified, he may be appointed. There is no question but that the person named by the caveator was disinterested, and was otherwise qualified to take the administration. We think the term, "person entitled to an estate," means the person in whom the legal right is vested. Though an estate be entirely insolvent, the persons to whom it descends under the statute of distributions, or the persons to whom it is devised by the testator, are those who are legally entitled to it. It is true that all estates, in the first instance, constitute a trust fund charged with the payment of the debts of the intestate or testator, but the charge upon the estate in no way changes the tenure under which it is held. The legal right is in the heirs and devisees, charged with a trust to the extent of the intestate's or testator's debts; and, while the whole estate may be consumed in the payment of these debts, still the creditor is not entitled to the estate, as an estate. He has no interest in the estate, further than the law charges upon it the payment of his debt; and we therefore hold that inasmuch as the legal title to this estate was vested in the ward of this guardian, who files the caveat in this case, and inasmuch as the verdict was in favor of the selection of that person named by him to be administrator, the appointment should be upheld. The verdict of the jury is in accord with the evidence. Let the judgment of the court below be affirmed.

(96 Ga. 301)

GEORGIA RAILROAD & BANKING CO. v. HICKS.

(Supreme Court of Georgia. Jan. 14, 1895.)

INJURY TO RAILROAD EMPLOYEE—FELLOW SERVANTS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—EXPERT EVIDENCE.

1. The plaintiff, an employé of a railroad company, having brought suit against his employer for damages sustained by reason of injuries inflicted in consequence of the negligence of a fellow servant in and about a common employment, if himself free from fault, is entitled to recover notwithstanding their engagement in a business not immediately connected with running and operating the company's trains.

2. In such a case, negligence of the plaintiff, however slight, which contributes in an appreciable degree to the cause of the injury, defeats a recovery. No presumption of negligence against the company arises until he shows affirmatively that he was himself without fault. It was therefore error to give in charge to the jury section 3033 of the Code.

3. When, in such a case, the plaintiff shows that the injury was inflicted through the negligence of a fellow servant engaged in and about the common employment, and without fault upon the part of the former, the burden is cast upon the company of showing only that its servants exercised ordinary and reasonable care;

and an instruction to the jury which imposes upon the defendant the superadded duty of showing how the casualty occurred is erroneous.

4. The rule of law which admits as evidence the opinions of experts is limited in its application to those cases only where the question at issue is one of opinion, involving some particular matter connected with a special art, trade, or science, and to the opinions of those persons who from accurate knowledge of the particular art or trade, or thorough understanding of the particular science, are supposed to be able to speak with precision concerning the same. Therefore, where the question at issue is one of fact, involving none of the mysteries of a particular craft, but only such matters connected therewith as are easily within the comprehension of reasonably intelligent men engaged in the ordinary pursuits of life, opinions of experts thereon are not admissible, though the fact under investigation may be in some way connected with such particular trade or calling. (Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Thomas N. Hicks against the Georgia Railroad & Banking Company. There was a verdict for plaintiff, and a new trial denied. Defendant brings error. Reversed.

The following is the official report:

Hicks sued the railroad company for damages resulting from personal injuries sustained by him while working in the company's shops. He obtained a verdict, and the company excepted to the refusal of a new trial. The declaration alleges that on April 3, 1889, he was 35 years old, and was a practical and experienced plumber and gas fitter, earning \$2 to \$2.50 per day when working at his trade. Prior to the date of the injury, he was of strong constitution, fine health, and great physical strength. In 1888, business in his regular line became dull, and he accepted employment by defendant at \$1.60 per day as a blacksmith's helper to work in the car shops of the company. He worked only a few days as a laborer, when the company, learning of his plumbing knowledge, put him at pipe work,—fitting up cars,—in which line he worked for a considerable time. About June 25, 1889, he was directed to put on the ceiling of the car shops a line of inch gas pipe. The ceiling was about 16 feet high, and he was furnished with a ladder and a man servant of the defendant to assist him in putting up the pipe. He began the work in the usual and proper way, and put up and fastened three sections of the pipe, each weighing about 26 pounds, and being 16 or 18 feet long. He moved his ladder, and screwed a fourth section to the third section; and, standing upon the top round of the ladder, which rested securely against the wall, he held the screwed end of the pipe securely on his left shoulder, and was pressing it up firmly against the timbers to drive in the hooks by which it was to be permanently held. Williams, the servant assisting him, was standing on a pile of lumber about 4 feet high and about 12 feet from plaintiff, holding up the unfastened and loose end of the pipe with a stick about 10 or 12

feet long, in the end of which Williams had cut a fork to hold the pipe. Without any notice or warning, and while plaintiff was exercising all due care and caution, Williams negligently and suddenly let go the pipe at his end, by means of which the heavy pipe began suddenly and irresistibly to fall, thereby pressing down in a horizontal instead of a perpendicular direction, throwing plaintiff from his balance and from the ladder, and tearing down the pipe. Plaintiff fell about 16 feet, striking on a piece of timber on the floor, which came just in the instep of his left foot, breaking some of the small bones and tendons, and greatly jarring and shocking him. He suffered great pain and agony, and was confined to his bed and obliged to walk with crutches for about three months, and from then until now has been obliged to use a stick, especially if going to walk a quarter to a half mile. He was unable to do any work for about nine months, and is now unable to do heavy work, especially where the use of his feet is necessary. He still suffers great pain, and is unable to walk any distance without great pain, or to use his left foot as before, and will through life continue to suffer from the effects of the fall. The wearing of his shoe is accompanied all the time with pain and suffering, and on wet and cloudy days the pain in his foot is almost unbearable. At the time of his fall he weighed about 200 pounds. His ability to labor has been greatly diminished. He has not the general strength he had before, is unable to work at his regular trade, and has been compelled to refuse offers at \$2.50 or \$2.75 per day on account of the condition of his foot, caused entirely by said fall. The fall was due to the negligent and unskillful manner in which Williams held his end of the pipe. Plaintiff was in the regular performance of his duty, was exercising care and skill, was putting up the pipe in a workmanlike manner, and the falling of the same was not in any way the result of his negligence or want of care, but was due entirely to the negligence of Williams.

The motion for a new trial alleges that the verdict is contrary to law and evidence, and that the amount of damages awarded is excessive, the same being \$1,500. The motion also contains the following special grounds: The court charged: "Under the law, a railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that its agents had exercised all ordinary care and diligence, the presumption in all cases being against the company." It is alleged that this charge is error, in that it makes defendant liable notwithstanding any negligence of plaintiff, and because it was error to charge that plaintiff was entitled to recover at all,

the only negligence relied on by him being that of a fellow servant. The court charged: "If you find from the evidence that the injury claimed was occasioned by the negligence of a coemployé, and without fault on the part of plaintiff, then he would be entitled to recover." It is contended that this was error, because it is not the law that plaintiff could recover for the negligence of a coemployé. The refusal to give the following charge is assigned as error: "In considering the question whether or not the company was at fault, I charge you that the railroad company, though responsible to its employes for negligence on the part of superior officers, such as bosses, foremen, etc., is not responsible for negligence on the part of a fellow employé which results in injury to the other employé. Therefore, if you should find that a fellow employé was negligent, and that his negligence was the only thing that caused the accident, then the plaintiff cannot recover. Fellow employes are those who are engaged together in accomplishing any particular piece of work." The court charged: "Hicks is not bound to show how the accident happened, provided he shows it was without fault on his part. If the road was unable to show how it happened, then the presumption is still against the company,"—assigned as erroneous in requiring the company, after showing that its servants exercised ordinary care and prudence, to go further, and show the exact cause of the injury, though it were an accident for which it is impossible to ascribe the cause. A witness for the plaintiff was asked, as an experienced plumber, from the statement of facts he had heard in connection with it, what, in his opinion, caused the pipe to fall, and answered, "I can hardly see any other reason than the way he describes; that is, his assistant behind him let go the pipe." He was further asked: "What would be the effect of 16 feet of pipe held at one end on a stick if one man let go,—what would be the result to the man on the ladder if he had the pipe on his shoulder, as described?" and answered that as to his own balance it would have a tendency to throw him off, but that he had seen a man struck, and not knocked off. Defendant objected to this testimony, because it was an expression of opinion on a subject not of expert knowledge, by one who was not a witness to the accident, about ordinary matters of every-day experience, which could be as well understood and interpreted by the jury as the witness, and because it was an expression by the witness of his opinion as to negligence, on facts testified to by plaintiff.

Jos. B. & Bryan Cumming, for plaintiff in error. J. S. & W. T. Davidson, for defendant in error.

ATKINSON, J. The facts upon which the questions in this case arise are so fully and accurately stated in the official report that

we do not deem it necessary to restate them here.

1. The principle declared in the first head-note has been so frequently and so strongly stated by this court heretofore that it is unnecessary to attempt a further elaboration of the reasons which justify its recognition. It might be well for the profession to recognize that with reference to some matters, at least, they are so well established as, upon the doctrine of *stare decisis*, to be beyond further controversy.

There was no possible view from which in this case section 3033 of the Code could have had the slightest application or the slightest relevancy. Its provisions are utterly foreign to this kind of a controversy, and state a rule of law which imposes the burden of proof exactly where the true law says it ought not to be. In a case where an employé of a railroad company brings an action for damages against his employer, the burden of proof is upon the plaintiff, in addition to the injury, to show one of two things,—either that he was himself entirely free from fault, or that he was injured by the negligence of a coemployé. Thus, the burden is imposed upon the plaintiff to prove his case. But section 3033 of the Code, which deals with injuries not done to, but done by, the employés of the company, raises a presumption of negligence against the company upon the proof of injury alone. So that, whatever may have been the charge of the court thereafter, and even though the correct rule may have been thereafter stated, yet the effect of giving in charge section 3033 of the Code to the jury was to confuse the jury by giving to them two rules directly in conflict the one with the other, both of which were to be employed by them in determining what their verdict should be. Under such a condition it would be impossible for them to regard the instructions of the court, and at the same time render an intelligent verdict.

2. The court charged the jury that the plaintiff was not bound to show how the accident happened, provided he showed it was without fault on his part, and then adds, if the road was unable to show how it happened, then the presumption is still against the company. We do not think this is a correct rule by which to determine the liability of the company. When the plaintiff shows that the injury was inflicted through the negligence of a fellow servant engaged in and about the common employment, and without fault upon his part, the law imposes then upon the company only the duty of showing that its servants exercised ordinary and reasonable care. It vindicates its conduct by submitting evidence satisfying the jury that this is true. Yet this charge of the court instructs the jury that, before the company would be excused, it must show how the injury occurred. No such duty is imposed by law; none such should

be required by the court; and the charge was erroneous.

3. We think the objection to the introduction of expert testimony, as stated in the last ground of the motion for a new trial, was well founded, and the opinions of the alleged expert touching the particular matters concerning which he was called to testify should have been excluded by the court. The evidence showed that one employé of the company was assisting another in holding a long piece of iron pipe against the ceiling overhead. The witness was asked: "What would be the effect of sixteen feet of pipe held at one end on a stick if one man let go,—what would be the result to the man on the ladder if he had the pipe on his shoulder, as described?" He was further asked what, in his opinion, caused the pipe to fall. We do not think these matters involve any of the mysteries of any particular science, trade, or craft. The plumber was doubtless an expert touching matters involved in his particular trade, but these matters, concerning which an expression of opinion from him was then invoked, though bearing some slight relation to the plumbers' trade, are simply the ordinary happenings and events of life, concerning which any man of reasonable intelligence, from his own observation, would be able to speak with as much precision as the most expert plumber. Verdicts should not ordinarily be founded upon the opinions of witnesses, and, to authorize their admission, the court should be well satisfied that the circumstances concerning which they are called to testify relate to matters of opinion, and not to matters of fact. Judgment reversed.

(95 Ga. 271)

HUTSON v. KING.

(Supreme Court of Georgia. Jan. 14, 1895.)

NEGLIGENCE—DANGEROUS PREMISES—INJURY TO TRESPASSER—PLEADINGS.

1. The mere maintenance of a dangerous nuisance upon one's inclosed premises gives no right of action to another, who, without necessity, and without invitation from the owner, either express or implied, voluntarily deviates from a public highway adjacent thereto, and, entering upon such premises, is injured in consequence of the existence of such nuisance.

2. If the nuisance complained of be per se of such an obviously dangerous character as that a person of reasonable discretion, entering upon the premises of another, inclosed or uninclosed, either from necessity or upon invitation, express or implied, could readily perceive its danger, and, in so entering such premises, should suffer injury which he, by the exercise of ordinary care, could have prevented or avoided, he cannot recover.

3. It is the duty of the owner of premises so to inclose a cellar thereon which lies in dangerous proximity to a public street as to afford to one passing along such street, in the exercise of ordinary care, reasonable immunity against the danger of casually falling therein. If the owner fail to perform this duty, and a person exercising such care so falls and is injured, he is entitled to recover from the owner damages therefor.

4. While the averment of facts contained in independent counts of a declaration may not be taken in aid the one of the other, yet if the pleader, by appropriate averment in one count, adopts as a part of such count facts stated in another, such facts so adopted may be taken as stated in the former, without formal repetition; and even though the latter count be insufficient in statement of a cause of action, if the former, so aided, states a cause of action, a demurrer thereto for want of a cause of action should be overruled.

5. Upon the principle above enunciated, each of the counts in this case was insufficient, save the second; and the court erred, as to that count, in sustaining a general demurrer to the declaration.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by John C. Hutson against Henry B. King. To a judgment dismissing the action on demurrer, plaintiff brings error. Reversed.

Henderson Bros., Craft & Chaffee, F. H. Miller, W. K. Miller, and F. H. Miller, Jr., for plaintiff in error. Jos. B. & Bryan Cumming and J. R. Lamar, for defendant in error.

ATKINSON, J. The declaration substantially alleges that Broad street was one of the principal thoroughfares in the city of Augusta; that the defendant was the owner of a certain lot fronting thereon, upon which he had erected certain improvements, consisting of a three-story brick building, with a door and windows fronting on Broad street, and immediately adjacent to the sidewalk thereon, and a cellar underneath the building, about 10 feet deep; that on the 28th day of August, 1892, the building was consumed by fire; that thereafter, and until the occurrence hereinafter stated, the defendant negligently permitted the brick walls to remain standing, without barricade to the open door and windows or other protection to the public against injuries that might result from an entrance into or accidental falling into such cellar; that on the 1st day of October, 1892, the plaintiff, not being a citizen of Augusta, nor familiar with the situation, was a visitor to the city, and that, while passing along Broad street that night, he saw this open door leading into the burned building, and, assuming that it was an entrance to some retired spot, he undertook, in response to a call of nature, to enter, and immediately fell from the sidewalk into the bottom of the cellar, inflicting upon him serious bodily injuries. Each count in the declaration described the character of the building, and the local situation, and the circumstances of the plaintiff's presence in the city, as herein stated. The second count in the declaration alleges that the plaintiff, while passing along the sidewalk on Broad street, adjacent to said building, in the exercise of all ordinary care and diligence, casually fell from the sidewalk into the cellar, thus sustaining his injuries. The third and fourth counts in the declaration allege,—one of them, that after the destruction of the building, and before the injuries, the defendant

was engaged, by his agents, in the reconstruction of the building, and further alleges that because of their negligent conduct, in failing to provide some barricade, he was induced to enter, as stated in the first count of the declaration, and was injured. The only difference between the third and fourth counts is, the fourth count alleges that, the defendant having employed a contractor in the work of reconstructing the building, the agents of the contractor were negligent in leaving the door without a barricade. To this declaration the defendant filed a general demurrer, which the court sustained, and to the judgment of the court dismissing his writ the plaintiff excepted.

1. The mere maintenance upon his inclosed premises of a dangerous nuisance gives no right of action against the owner in favor of any person who may enter thereon without invitation, either express or implied, from the owner. Nor does it give a right of action as against one who voluntarily, without necessity and without invitation, deviates from a highway adjacent thereto, and, entering upon the premises, is injured in consequence thereof. Every man has a right to presume that upon his own premises, guarded by a clearly-marked and clearly-defined inclosure, other persons will respect his rights of property, and will not intrude upon the privacy thereof; and if upon such premises he maintains a dangerous nuisance, as a pitfall or other like contrivance, and a stranger, without invitation, either express or implied, enters thereon, he should take all those risks resulting from mere negligence of the owner which he may encounter on the venture. With reference to uninclosed premises, a different rule prevails; and if, upon such premises, the owner shall maintain a dangerous nuisance, in such situation as that persons lawfully entering thereon, without fault upon their own part, suffer injury, he is answerable in damages.

2. If the owner of premises, inclosed or uninclosed, maintains thereon a dangerous nuisance, and the character of the nuisance be of such an obviously dangerous nature as that a person of ordinary prudence, in the exercise of ordinary care, could have readily discovered the dangerous character of such nuisance, and nevertheless exposes himself to its dangers, and in consequences is injured, he cannot recover, for this may be classed as the voluntary exposure of one's person to an unnecessary hazard. It comes within the provision of the Code that if one, by the exercise of ordinary and reasonable care, could have avoided the consequences to himself of a negligent act upon the part of another, but fails to exercise such care, and is injured, he is not entitled to recover. Tested by this latter rule, the first, third, and fourth counts in the declaration, it seems to us, fall short of stating a cause of action. According to this plaintiff's declaration, as embodied in the three counts just mentioned, he was passing along

the street in a strange city at night; he saw an open door leading into a dilapidated building, and he voluntarily, without invitation, either express or implied (except in so far as he saw proper to construe the mere finding of this dilapidated building, thus open, as an invitation from the owner to enter therein), stepped into the door, and down into the cellar. It is not claimed in the declaration of the plaintiff, in the three counts (the first, third, and fourth) in which he seeks to recover upon this theory of the defendant's liability, that in going into the door he was not guilty of negligence; but, on the contrary, in the first count of the declaration he alleges a fixed purpose to enter the building, and that while so entering he exercised all ordinary care and prudence, and, notwithstanding, fell into the cellar. The third count alleges that while he was walking along the street, exercising all ordinary care and prudence, he turned towards the open door of the premises, and determined to enter, supposing it would lead to a retired spot. The fourth count alleges that the injuries were sustained as alleged in the foregoing counts. The negligence of the plaintiff which defeats his recovery upon these three counts consists in the exposure of himself voluntarily to the hazard of going into the building at all, without reference to whether he was using ordinary care in the effort to get in. If a man going upon the premises of another should see an open well, and should voluntarily attempt to descend to its bottom, exercising the most extreme care and caution, but, in the descent, should fall and receive injuries, he could not recover, not because he was wanting in care or caution in making the descent, but because it was manifestly dangerous and hazardous to attempt the descent at all. So, in this case, it could make no difference how careful this plaintiff was as he walked along the sidewalk, nor how carefully guarded were his footsteps as he walked into the dilapidated building,—he could not recover, because, thus voluntarily exposing himself to an unnecessary hazard, he assumed the risks of the hazard; and, being injured, he must abide the consequences. If upon the premises of an owner, situated in dangerous proximity to a public thoroughfare, there be an excavation into which persons passing along the thoroughfare, in the exercise of ordinary care, might casually fall, it is the duty of the owner of the premises so to inclose the same as to afford reasonable immunity against the danger which might otherwise probably result from its existence. Whatever may be the duty of an owner of premises, with reference to persons who unlawfully intrude thereon, such owner has no right to maintain upon his premises any dangerous nuisance which might imperil the lives of those persons who, from lawful necessity or convenience might pass along, and by accident or some superior force, and without fault upon their own part, fall or be thrown from the sidewalk, or from a public thoroughfare, into

such excavation. A man must so guard his premises situated immediately adjacent to a public highway as that one who of necessity deviates slightly therefrom may not be injured. The second count in the declaration, upon these principles, states a cause of action. It alleges the existence and character of this dangerous nuisance upon the defendant's premises; alleges that plaintiff was passing along the street in the exercise of ordinary and reasonable care, and, without fault upon his part, casually fell therefrom into this cellar upon the defendant's premises. We think, if the facts be proven as laid in this count of the declaration, a recovery may be had; and that is the test always in considering, upon a demurrer, the sufficiency of a declaration.

3. It was insisted, however, upon the argument here, that inasmuch as the second count in the declaration did not, of itself, state all of the facts necessary to constitute a cause of action,—there being no *ad damnum* or allegation of pain and injury, except by reference to another count,—the same could not be aided by averments of facts in such other count contained. This is a correct rule where the counts are expressly wholly independent of each other. Yet the better rule of pleading, where the facts stated in the declaration justify it, is the one stated and declared in the fourth headnote *supra*. Judgment reversed.

(95 Ga. 543)

KINGSBERRY v. LOVE.

(Supreme Court of Georgia. Jan. 14, 1895.)

SALE BY ADMINISTRATOR—SCOPE OF POWER—RIGHTS OF PURCHASER.

1. An order of the court of ordinary authorizing an administrator to sell the real property of a decedent operates as a limitation upon his power, and at a sale thereunder, while he may sell a less, he can sell no greater, interest than that described in the order of sale.

2. Where the order conferred upon an administrator the power to sell a certain bond for titles, wherein the obligor covenanted to reconvey to the intestate certain premises therein described, upon the payment of a sum certain therein named, the order also authorizing the sale of the interest of the intestate in the premises so described, the doctrine of caveat emptor applied, and a purchaser was bound to take notice that the administrator had no power to sell other than the equity of redemption of his intestate in such premises. Yet where, at the sale, the auctioneer, acting for the administrator and in his presence, announced, in reply to a question from a person who contemplated bidding, that the land itself, and not a paper, was being sold, and this person then announced that he would bid only for the land free from all incumbrances, and did so bid, the administrator then and there also announcing that he would pay off the debt secured by the deed out of the proceeds of the sale, and the property was knocked off to such bidder, although the administrator may have had no legal authority to make such an announcement, if the bidder was thereby misled, and induced to believe he was bidding for an unincumbered title, and his bids were accepted accordingly, these facts, in connection with a subsequent refusal by the administrator to comply with the terms of his announcement, constituted such a fraud upon the bidder as released him from completing his purchase and taking

and paying for the land subject to the incumbrance, and he was not liable for the difference between the amount of his bid and the price for which the bond for titles, together with the interest of the investate thereunder, was afterwards resold at his risk. It was accordingly error to strike, on general demurrer thereto, a plea setting up these facts, there being no special demurrer attacking the plea for want of sufficient accuracy and fullness.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by S. B. Love, administrator, against Joseph Kingsbery. From the judgment rendered, defendant brings error. Reversed.

The following is the official report:

Love, as administrator of C. C. Green, sued Kingsbery, alleging: On April 7, 1891, under an order from the court of ordinary of Fulton county, granted to him as administrator, and after having legally advertised the same, as such administrator, before the courthouse door, and in conformity to law, he publicly offered for sale to the highest bidder a bond for title made by one Achey to C. C. Green, copy of which bond is attached. The advertisement under which the bond for title was being sold was read, and bids asked for. Kingsbery bid \$20,000 for the bond, and, being the highest and best bidder, it was knocked off to him at that sum. Kingsbery refused to pay petitioner the amount so bid, though petitioner made out and tendered to him a proper conveyance of the bond, in conformity to the advertisement under which it was sold. Petitioner readvertised the bond according to law, and according to law, on June 2, 1891, again offered it for sale, when it was knocked off to one Hendricks, the highest and best bidder, for \$14,180. The second sale was made at the risk of Kingsbery, who, under the facts, is indebted to petitioner \$5,820. Petitioner was put to the expense of readvertising the sale, in the sum of \$31.50, and this also he is entitled to recover of Kingsbery. Though the bond was bid off at the last sale by Hendricks, the purchase was made in the interest of, and for the benefit of, Kingsbery. The readvertisement declared that by virtue of an order of the court of ordinary granted at the February term, 1891, there would be sold the following property of C. C. Green, deceased: "One bond for title made by F. L. Achey, dated 21st day of September, 1881, which bond obligates the said F. L. Achey to convey to C. C. Green, his heirs, executors, administrators, or assigns, all the right, title, interest, claim, or demand which the said F. L. Achey has in the following described property [then followed a description of certain lands]; also, at the same time and place, all the interest of C. C. Green, deceased, in and to the land above described,—the sale of the interest of said estate in the land and the bond for titles being authorized by the ordinary, by order as above stated." The original advertisement was similar.

Defendant pleaded the general issue. Also, before the sale, and on the same day thereof,

the advertisement being ambiguous, he went to plaintiff, and told him he desired to bid on the land, and wanted to know exactly what was to be sold, because he did not want to buy land, and then have to pay any more than his bid. The administrator informed him the land would be sold, and referred him to R. T. Dorsey, the attorney of the administrator, for information as to exactly what would be sold, who replied that, in his judgment, defendant would get the land free from lien. Said attorney referred him to M. A. Candler for further information; Candler being an attorney at law, and, with Dorsey, being interested in the claim held by Achey against the estate. Defendant was informed by Candler that the land would be sold, and that defendant would, if he bought it, get the land, and the Achey claim or lien would be paid out of the proceeds of the sale. When the sale came on, defendant inquired of the auctioneer, while he was actually engaged in making the sale, what he was selling, who answered: "I am selling the land. I am offering you land, with great, big trees on it, and not a paper." Defendant then said, "I bid for the land, unincumbered," so much, and then continued to bid—Candler being the party who finally ran it up on defendant—until the sale culminated in a bid by defendant of \$20,000 for the land unincumbered, at which price it was knocked off to him. Defendant tendered the money to the administrator, and was tendered in receipt therefor a simple transfer of the bond, the latter claiming that defendant must pay off the lien in addition thereto. Defendant replied that he did not bid for any such thing or purpose, and declined then to accept the offer. The conduct of the administrator and his advisers operated as a legal fraud upon him. He was misled and surprised thereby, and therefore is not indebted to plaintiff. He never bid for the bond, or the land as affected thereby, and would not have given or offered \$20,000, or any such sum, for the land unincumbered, or any qualified interest. From the announcements made at the sale, and conversations with the parties before the sale, he thought he was buying the whole property free from liens; and, if in fact he did not do so, he was honestly mistaken, and did not make the contract as contended for by plaintiff, and the minds of the parties never met in respect thereto. The negotiations between him and the administrator before and at the time of the sale were in reference to the claim of Achey alone, and as to whether the purchaser at the sale would have to pay off that claim, or whether the administrator would settle it out of the proceeds of the sale; and the administrator stated, in substance, that he could settle that claim out of the proceeds. When defendant tendered the \$20,000 to plaintiff, he requested an administrator's deed, and declined to pay only when the administrator stated he would do no more than transfer the bond, and would not pay the amount due Achey out of the proceeds of the

sale. This plea was stricken on demurrer. There was a verdict for plaintiff for \$5,850.50 principal, with interest, and \$30.50 cost of advertising. Defendant's motion for new trial was overruled, and he excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in refusing to allow defendant to prove, under the plea of the general issue, that by special agreement with the administrator the bond was not to be sold, but that the land itself should be sold, and that the administrator would pay off all incumbrances on the property out of the proceeds of the sale. Error in sustaining the demurrer to the plea, and in refusing to allow defendant to introduce testimony in support thereof. Defendant offered to show by evidence that prior to said sale the administrator agreed with defendant that the land of the deceased should be sold, and that the administrator would, out of the proceeds of the sale, pay off the claims against said estate, and especially the claim of F. L. Achey, who held a deed to the property as security for a loan; and the court refused to admit this evidence, and thereby committed error. Defendant offered to prove that it was the understanding and the agreement of the administrator and his counsel, the creditors and their counsel, who had bought the land of the said Achey, and of the auctioneer who sold the property, that the land itself was sold unincumbered, and that the bond for titles was not sold, which the court refused to admit, and thereby committed error. (Note by the Court: "The advertisement was read by the auctioneer to the bidders. It followed the order of the sale by the ordinary. The court held that the bidders must look to the advertisement and the order, and could not, by parol, enlarge their purchase.") Defendant offered to prove that before making his first bid he inquired of the auctioneer what he was selling, and that the auctioneer replied that he was selling the land, and not the bond for title; that he was selling the land, with "great, big trees on it,"—which the court refused to admit, and thereby the court committed error. Because defendant offered to prove that just before making his bid he announced to the auctioneer, and in the hearing of those present, that he bid for the land unincumbered, which the court excluded, and thereby committed error. Defendant offered to prove that immediately after his final bid was made and accepted, before the people present had dispersed, and in the hearing of those present, he announced that his bid was for the land unincumbered, which testimony was excluded by the court, and the court erred therein. (Note by the Court: "My opinion was, this being a judicial sale—under a proper order, and advertisement read to all bidders at the sale, which recited said order—of the interest of

the intestate in the land under a bond for title, that the last bidder got that interest in the land unincumbered, and that he could not, under the doctrine of caveat emptor, prove by parol that he had an agreement that he was buying a fee-simple estate.") Because defendant offered to prove that he was misled into bidding on said property by M. A. Candler, who represented the creditors, and especially the claim of F. L. Achey and others, who were interested in the proceeds of the sale, and by R. T. Dorsey, who was likewise interested, as a creditor, in the proceeds of the sale, and was counsel for the administrator, and by the administrator himself and the auctioneer, all telling him that if he bid at the sale he would buy the land, and that the claims would be paid off. Defendant offered to prove further that, but for the fact of his being entrapped and misled by the statements of all the parties interested in said sale, he would not have bid on said property, all of which testimony the court refused to admit, and the court committed error therein. (Note by the Court: "There was no offer to show that the heirs of this estate agreed to convey a fee-simple estate under this judicial sale of a bond for title.") Because the court erred in holding that the announcement by the defendant, prior to his first bid, that he was bidding for the land unincumbered, applied only to that bid, and that before it could apply to subsequent bids it was necessary that the announcement be repeated with each bid. Because the court erred in holding that the announcement made by defendant immediately after his last bid, and after the bond for title had been knocked off to him, and before the crowd dispersed, was not such a qualification of his bid as would make it binding only for the land unincumbered. Because the court erred in refusing to allow defendant to prove that Col. M. A. Candler was the only other bidder at said sale, and that he made the same announcement as to what he was bidding for, to wit, that he was bidding for the land free from all incumbrances. Because the court erred in holding that a bid for the land unincumbered was a bid for the bond for title which was advertised. Because the court erred in holding that the administrator could not enter into an agreement with defendant, whereby the terms of the sale were changed to the extent that all claims should be paid out of the proceeds of the sale, and that the land should be sold free of incumbrances. (Note by the Court: "The court held that a judicial sale of a bond for title could not be changed by parol to a sale of a fee-simple estate.") Because the court erred in holding that the conveyance to Achey, which was a deed to secure a loan, was not a mortgage, in the sense that the lien thereof would be divested by an administrator's sale of the bond for title. Because the court erred in allowing the advertising expenses

as a part of the recovery. Because the court erred in taking charge of said case, and directing the jury to find a verdict for the plaintiff for the amount claimed. Error in charging: "The evidence in this case is undisputed. There is no issue of fact for the court to instruct you upon and give you the law in reference to. The evidence is undisputed. Under the undisputed evidence of the case, I charge you to find for the plaintiff the difference in the first sale, which was for twenty thousand dollars, and the amount the property brought at the second sale, the difference being \$5,820. I charge you to find that for the plaintiff, with legal interest at seven per cent. upon it from the date of the first sale. And, upon one other item, I charge you to look into the evidence, and if it appears that the administrator incurred any expenses in the fact of having to sell the property over, and those expenses appear to be reasonable and necessary, that you will allow them. The form of your verdict will be, 'We, the jury, find for the plaintiff so many dollars principal, and so many dollars interest, with costs of suit.' Whether the charges subsequently incurred, if any were, were necessary, or whether the amount testified to is reasonable in amount, is for you. I leave that to you. The interest is to run from the date when the obligation to pay arose, and, as this was a cash sale, it arose immediately upon the first sale,—the sale at which it was knocked off to Mr. Kingsbery at twenty thousand dollars." Because the court erred in refusing to allow defendant to prove that the administrator made an agreement with him that he would sell the land of C. C. Green, and not the bond for title, as advertised for sale by said administrator, and, therefore, that the administrator will pay off the lien, and not require the purchaser so to do.

Pending the trial the court sent out the jury from the court room, and allowed the cross-examination of the witness S. B. Love to proceed as follows: "Q. (by defendant's attorney). Mr. Love, didn't Mr. Kingsbery come to you on the day of the sale, and ask you what you were going to sell? A. Well, he came to me. I don't recollect very distinctly what he said. Q. Didn't you and he talk about whether you were going to sell the land, or bond for title? A. No; there wasn't anything said about selling the land. My understanding was, in talking about it, that the selling of the bond carried the land with it. I might have said I was going to sell the land in selling the bond. Q. You might have said you were going to sell the land? A. Yes, sir; going to sell the land. Q. (by plaintiff's attorney). What was your answer? A. I say, in saying I was going to sell the bond I might have said I was going to sell the land, as selling the bond carries the [land] with it. Q. (by defendant's attorney).

tion when he asked you what you were going to sell,—that you were going to sell the land? A. No sir. Q. Do you swear positively that you did not tell Mr. Kingsbery that that is what you meant, or do you swear you didn't tell him in those words when he asked you what you were going to sell? Didn't you tell him you were going to sell the land? A. I might have said it in that way. I didn't mean I was going to sell the land. Q. Didn't you refer him to Judge Dorsey? A. Yes, sir; I did. Q. Now, at the time the sale occurred, who did the selling? A. George Adair. Q. Don't you recollect that, whilst Col. Adair was talking there, Col. Candler asked him a question as to what he was going to sell? A. I don't know who asked the question. I heard a question asked. Q. There was a question asked, but you don't know who asked the question? A. I don't think I do. Q. Didn't you hear Mr. Kingsbery ask a question of Col. Adair? A. Well, no; I don't recollect that I did. I was standing close by, too. Q. Do you remember what the words of Mr. Kingsbery's bid were,—the words he used in making the bid? A. No, sir; I never paid any attention to that. Q. To refresh your mind,—didn't he say, 'I will give you so many dollars for the land unincumbered?' Didn't you hear that? A. No, sir; I never heard that. Q. You don't say he didn't say it? A. Oh no, sir; there was a considerable crowd there. Q. Do you know Mr. James R. Gray? A. Yes, sir. Q. Did you have a talk with him that day about this land? A. Yes, sir. Q. Didn't Mr. Gray ask you if you were going to sell the land incumbered, or unincumbered? A. He asked me in relation to the mortgages, and I told him the mortgages would go upon the money, I thought. Q. You did tell him the mortgages would have to go on the fund? A. Yes, sir; I did. Q. In that very talk, didn't Mr. Gray ask you about this Achey claim? A. No, sir. Q. He didn't say anything about that to you? A. I don't remember. Q. You don't swear that he didn't say it, though, do you, Mr. Love? A. No, sir; but I think I would be likely to recollect it if he did. Q. Who was it that did the bidding, besides Mr. Kingsbery? A. I understood that Col. Candler bid. He was there in the crowd. I couldn't hear very well. Q. At any rate, is it true that towards the end of the bidding the thing dropped off between Col. Candler, on the one side, and Mr. Kingsbery, on the other, didn't it? A. Well, I think so. I don't know. I didn't hear Col. Candler bid. I didn't hear him speak out, you know. Q. Didn't Col. Candler say that he would start the bidding by bidding so much for the land? A. No, sir; I never heard what he said. Q. The fact is, Mr. Love, you didn't pay much attention to what was going on, did you? A. No, sir; he was over in a crowd, you know. Q. Col. Adair was your agent, appointed by you to conduct the sale, wasn't he? A. Yes, sir. Q. He was your auctioneer? A. Yes, sir. Q. And you paid him

out of the funds of the estate, did you? A. Yes, sir. Q. Mr. Love, don't you remember, when Col. Adair was asked there what he was selling, that he said 'I am selling you land, with great, big trees on it'? A. Well, George said a good deal at the outset, when he first started out, and then some one asked him what he was selling, and he turned to me, and asked me something about the land, —'What am I selling?' says he; and I said, 'You sell it just as it is advertised.' Q. How loud did you say that? A. Loud enough for him to hear it. Q. But you were right by him, weren't you? A. Right behind him. Q. You always talk low, don't you? A. Well, sometimes I talk out. Q. Mr. Love, I want to ask you if, after this first sale occurred, you didn't state to Mr. Kingsbery that there was such a misunderstanding about the matter that in your opinion it would be fair and right to declare the first sale off, and to resell this property? (Plaintiff's counsel objected.) The Court: This is simply to see what the scope of the testimony is. You may answer the question. A. No, sir; I didn't tell him that. I told him I was sorry he misunderstood it. He said he did, and I told him I was sorry for it. Q. You didn't tell him anything like the fact that you misunderstood it? A. No, sir. Q. Did you say anything to him about that,—that, in your opinion, fairness demanded a resale of the property, and a cancellation or doing away with the first sale? A. Well, I notified him I was going to sell it again. We were talking about it, and I told him— He said he was misled in the bid, and I told him I was sorry for it. Q. (by plaintiff's attorney). Mr. Love, did you ever say anything to Mr. Kingsbery or to anybody else, in reference to taking the money that arose from the sale of this bond for title, and the interest of the estate in the land, and paying off purchase-money notes? A. No, sir. Q. Did you ever intimate to anybody that that was your purpose? A. No, sir; I said I was going to take the purchase money, and pay off the mortgages. I was talking about the mortgages. You know there were five or six or seven mortgages younger than that. Q. And you told them that you were going to take the money that arose from that sale, and pay the mortgages? A. Yes, sir; the mortgages would go upon the money. That's what I meant. Q. Is that what you told them? A. I think it is, precisely. Q. What did you ever do or say to create the impression on Mr. Kingsbery, or anybody else, that you would take the money arising from this sale, and pay off the Achey debt? A. I never done or said anything that would cause him to think it, I don't think. Q. Now, you said something about Col. Adair. Did Col. Adair read that advertisement? A. Yes, sir. The Court: I don't know that it is necessary to pursue this testimony further. I am going to exclude it. But I am glad I allowed you to develop the testimony you wish to offer, by this witness, for two reasons: One

is that if he would testify to a state of facts that made it a rational inference that he did give Mr. Kingsbery an assurance that he was going to treat this Achey debt as a mortgage, and pay it off out of the proceeds of the sale, I desired that that fact, for the benefit of the defendant, should appear in the record of the excluded evidence; and if, on the other hand, the administrator developed that there was a controversy between him and the purchaser as to what the parol understanding was, so as to leave it entirely to the opinion of the jury, based on the credibility of the witnesses, where the evidence was conflicting, as to what was the truth of the administrator's sayings and conduct, I desire that evidence to be in the record, as bearing on the question of public policy, which excludes that kind of evidence. An undertaking of that sort upon the part of this administrator is directly in the teeth of the sale. It is contradictory of the sale; and I don't think, for that reason, that this evidence is admissible."

After hearing the testimony developed by the above cross-examination the court recalled the jury, and made the rulings hereinbefore complained of.

Ellis & Gray, for plaintiff in error. Dorsey, Brewster & Howell and J. A. Anderson, for defendant in error.

PER CURIAM. Judgment reversed.

(95 Ga. 323)

MAYOR, ETC., OF SAVANNAH v. MULLIGAN.

(Supreme Court of Georgia. Jan. 23, 1895.)

ABATEMENT OF NUISANCE—LIABILITY OF CITY FOR DESTRUCTION OF PROPERTY BY HEALTH OFFICER.

1. The municipal authorities of a city have no right to destroy the private property of a citizen for the public good without compensating him for the loss thus occasioned, unless the property is itself a nuisance endangering the public health or safety. In that event it may be destroyed by such municipal authorities, without paying the owner its value, if the charter of the city confers upon them the power to abate such nuisances; but even then, unless the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities; and, when sued for its value, the burden is on them of showing that it was in fact a nuisance, and that its destruction was really necessary to the public health or safety. In cases of emergency the destruction may properly be ordered without a preliminary condemnation, but the municipal authorities will in that event carry the same burden.

2. In the present case the evidence showed conclusively and beyond question that the property destroyed was in fact a nuisance, endangering the public health, and that the mayor and aldermen of Savannah had due authority to abate it. Consequently the destruction of the property was lawful, and the owner was not entitled to recover its value from the city.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Thomas Mulligan against the mayor, etc., of the city of Savannah. Plaintiff had judgment, and defendant brings error. Reversed.

S. B. Adams, for plaintiff in error. Gignilliat & Stubbs, for defendant in error.

SIMMONS, C. J. This was an action against the municipal corporation of the city of Savannah for the value of a feather bed, pillows, and mattress destroyed by a sanitary inspector of that city, under orders of its health officer. On certiorari the superior court ruled that the city was liable to the plaintiff, under section 2226 of the Code; and to this ruling the city excepted. The section referred to is as follows: "Analogous to the right of eminent domain is the power from necessity vested in corporate authorities of cities, towns and counties, to interfere with and sometimes destroy the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of a conflagration, or the taking possession of buildings to prevent the spreading of contagious diseases. In all such cases, any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such corporation." We do not think the section above quoted, is applicable to this case. Under the ruling of this court in *Dunbar v. City Council of Augusta*, 90 Ga. 390, 17 S. E. 907, a city having the power, under its charter, to abate nuisances endangering the public health and safety, may destroy property without making compensation to the owner, where the property constitutes a nuisance of that kind; and we think the decision in that case controls the present case. There the city authorities destroyed grain which had become wet and damaged by a flood while stored in the plaintiffs' warehouse. The plaintiffs sued the city for the value of the grain, and it was held by this court that, "it not being alleged in the declaration that the damaged grain condemned and destroyed by the municipal authorities was not a nuisance or was not dangerous to the public health (that being the ground on which it was condemned and destroyed), no cause of action against the municipality was set out in the declaration." *Bleckley, C. J.*, in delivering the opinion of the court, said: "To destroy property because it is a dangerous nuisance is not to appropriate it to a public use, but to prevent any use of it by the owner, and put an end to its existence because it could not be used consistently with the maxim 'sic utere tuo ut alienum non lædas.'" Section 2226 of the Code, though not referred to in the opinion, was cited and relied on by counsel for the plaintiff in error in that case, and was not overlooked by the court in the consideration of the case. An illustration of the class of cases to which this section applies will be

found in the case of *Town of Dawson v. Kuttner*, 48 Ga. 133, the only case we know of in which the section referred to has been construed. In that case the plaintiff was held entitled to recover from the municipal corporation for property destroyed by the authorities thereof in attempting to prevent the spread of a fire, but the fire did not originate in and had not extended to the property in question at the time of its destruction. In cases of emergency the municipal authorities, if authorized by their charter to abate nuisances, are not bound, before ordering the destruction of property as a nuisance, to wait until the fact that the property is a nuisance is judicially determined. In such cases the destruction may be ordered without a preliminary condemnation. See *Mayor, etc., of Americus v. Mitchell*, 79 Ga. 807, 5 S. E. 201; *Dunbar v. City Council of Augusta*, supra, and cases cited. Unless, however, the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities; and, when sued for its value, the burden is upon them of showing that it was in fact a nuisance, and that its destruction was really necessary to the public health and safety. In the present case the evidence showed conclusively and beyond question that the property destroyed was in fact a nuisance endangering the public health, having been used as bedding by a person who had scarlet fever, a highly contagious disease; and the mayor and aldermen of the city, under its charter, had ample authority to abate the nuisance. Code, § 4375. Consequently the destruction of the property was lawful, and the owner was not entitled to recover its value from the city. Judgment reversed.

(95 Ga. 370)

DIETER v. ESTILL et al.

(Supreme Court of Georgia. Feb. 5, 1895.)

STREET-RAILROAD COMPANIES—SPECIAL CHARTERS—CONSTITUTIONAL LAW—INJUNCTION.

1. Even if, after the passage of the general law (Code, § 1689a et seq.) for the incorporation of railroad companies, the general assembly could not constitutionally grant a special charter to a railroad company of the kind contemplated by the provisions of that law, inasmuch as that law is not applicable to street-railroad companies, the general assembly could, after its enactment, constitutionally grant a special charter to a railroad company of the latter kind, and, in doing so, could authorize such a company to extend its line to a suburban terminus beyond the limits of the town or city in which the same was to be located.

2. It affirmatively appearing that the acts complained of in the plaintiff's petition were not done by the defendants, but by a duly-incorporated company, the court was right in refusing to grant the injunction.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by Josephine Dieter against J. H. Es-

till and others for an injunction. The temporary writ was refused, and plaintiff brings error. Affirmed.

Barrow & Osborne, for plaintiff in error.
A. C. Wright, West & McLaws, and Charlton. Mackall & Anderson, for defendants in error.

ATKINSON, J. Plaintiff filed her petition against the defendants in Chatham superior court, alleging that she was the owner of a certain tract of land situated outside of the city of Savannah; that some of the defendants had procured the passage of an act of the legislature, approved November 3, 1889, incorporating the Savannah & Isle of Hope Railway Company, by the terms of which this company was authorized to construct a railroad from a certain point in the city of Savannah, through divers of its streets and lanes, into the country, and thus in the county of Chatham to the Isle of Hope,—the terminal point last named being situated outside of the corporate limits of the city of Savannah,—and with the further privilege of constructing a street railroad through certain of the streets of the city of Savannah; that other of the defendants had procured the passage of an act by the general assembly, approved December 9, 1890, incorporating the Electric Railway Company of Savannah, and authorizing the construction within the city of Savannah, upon certain of the streets, routes, and ways therein, as the mayor and aldermen might thereafter authorize, of a street railway; that there was, subsequent to the construction of the railways provided for by these charters, an arrangement made whereby the Electric Railway of Savannah was operating the Savannah & Isle of Hope Railway in connection with its system of street railways already then existing in the city of Savannah. It was alleged that this plaintiff was the owner of certain premises upon the line of the Savannah & Isle of Hope Railway; that these railways were operated by electricity; and that, without condemnation and without just compensation, the persons controlling the franchises of the two railway companies had erected upon her premises certain electric poles, maintaining thereon, without her consent, a continuing nuisance; and she therefore prayed that they be enjoined from the maintenance of this nuisance. The defendants were sued and served as individuals, the plaintiff alleging in her declaration that as to the wrongful act of which she complained they were partners and tortfeasors; she further alleging that the grant of the charters to these railway companies by acts of the general assembly was void, because the legislature, previous to the passage of these acts, had passed a general law for the incorporation of railways by the act of 1881, embodied in section 1689a et seq. of the Code, and had thereby conferred upon the secretary of state

authority to issue certificates of incorporation to railway companies, and because of the constitutional prohibition against the passage of special statutes, where there was already of force a general law making provision for the same subject. The defendants answered, denying their liability as individuals for the wrongful act complained of, substantially admitted the maintenance of the nuisance as stated in the plaintiff's declaration, but showed for cause against the grant of an injunction as against themselves as individuals that the wrongful acts complained of were committed by the corporation along whose line the poles were erected. The circuit judge, upon the hearing of the application for injunction, upon the coming in of the answer, refused to grant a temporary injunction, and the cause is here for review.

The maintenance by one person of a continuing nuisance upon the premises of another, without his consent, gives a right of action. It is a good reply to such an action, however, that the tortious act was committed by some person other than he against whom the plaintiff has declared. The admitted facts show that these several acts were committed by the railroad companies, and if the charters of these companies be valid, even though these defendants may have been the corporators and stockholders therein, they could not be held personally answerable to the plaintiff for the wrongful act of the corporations. We do not think the contention of plaintiff's counsel that these acts of incorporation are void is well founded. Prior to the passage of the act of 1881, the power to grant charters to railway companies inhered in the general assembly as the depository of the sovereign legislative will of the people. To divest itself of this authority, and confer it upon another body, the legislature must have expressed itself in the clearest and most unequivocal of language. In order to divest itself of this, one of the highest attributes of its sovereign power, its expressions upon that subject must have been so clear and convincing as to express indubitably its intention so to do. The constitution of the state of Georgia, in dealing with the subject of the construction of railroads, treats the two classes of railroads as being entirely separate and distinct. The power generally is reserved in the general assembly by that instrument to grant charters to railway corporations; but there is a prohibition upon the power of the general assembly to grant charters to street-railway companies, except upon certain conditions, and the conditions expressed are in the following language: Section 5079 of the Code (paragraph 20, art. 3, of the constitution): "The general assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities." This limitation operates against the power of the general assembly to authorize the construction

of a passenger railway within the limits of incorporated towns or cities, thus recognizing the distinction between those passenger railways employed for the transportation of passengers within the limits of cities and those railways designed for the accommodation of the general commerce of the country between distant points. It was the purpose of the constitution to leave with the city authorities the right to select those streets along which, without inconvenience to the general public in populous cities, these street railways could be operated. The act of 1881, to which we have heretofore referred, contains no provision of this character. There is no requirement of this act that before the secretary of state shall issue a certificate of incorporation the consent of the municipal authorities shall be first obtained to the act of incorporation, without which consent no charter could be granted to such railway, even by the general assembly itself. We are not to presume that the general assembly intended to confer upon the secretary of state a power which it did not itself possess. The omission to provide this as one of the prerequisites to the grant of a charter by the secretary of state affords the strongest inference that the legislature did not design to confer upon the secretary of state any authority with respect to street railways. If that act be held to authorize the incorporation of street railways, by its terms the secretary of state may proceed with or without the consent of the municipal authorities, and this would be manifestly in violation of the constitution.

An analysis of the whole scheme of legislation outlined in this general law indicates a fixed legislative purpose to confine the power therein conferred upon the secretary of state to the granting of charters for the construction of railroads for the transportation of passengers and freight between the different sections of the state. In the formation of a company it is required that publication of the application shall be made in a daily paper in each of the several counties through which the proposed line extends. The articles of association are required to state the name of the company and the places from which the road is to be constructed or maintained, the length of the road, the name of each county in the state through which or into which it is made or intended to be made, thus indicating that in the legislative mind the idea was uppermost that the road should connect different places,—that it would be built through different counties. The provision for crossing other railroads at other than grade points, the width of its right of way stated at 200 feet, and the right to cut down trees that might be in danger of falling on the track or obstructing the right of way, the right to maintain docks, stations, etc.,—all of these things indicate that the legislature was dealing with railroads other than mere street

railroads. Railroads other than mere street railroads, constructed between different places in the same county, might properly be incorporated under a certificate from the secretary of state; but where, in connection with its suburban line, it is designed to confer upon it the power by its charter within the limits of a city to construct and operate a street railroad along the streets and lanes of such city, the power must be conferred by the general assembly. To have one main line leading into a city for the accommodation of the commerce of that city with the outside world is one thing, and to appropriate its streets and public thoroughfares for regular passenger traffic therein by a system of street railways is entirely a different thing. The legislature might well have designed to grant to the secretary the power to issue certificates of incorporation to the one, and reserved to itself the power to determine upon the propriety of granting the other. The interpretation placed upon its constitutional power by the general assembly itself from time to time is in harmony with the views herein expressed. The vast number of charters granted to street-railway companies by the general assembly since the passage of the act of 1881 indicates clearly that according to the legislative mind the general assembly alone had the power to grant these charters. The charters of both the railway companies in question here contemplated the construction and maintenance within the city of Savannah, by and with the consent of the corporate authorities, of a system of street railways. One of these companies had within the city limits a complete system of railway, and the other, with the power to construct such a system within the city, had in fact constructed its suburban line to the Isle of Hope. The traffic arrangement by which these corporate interests were amalgamated did no violence to any rule of law, and was an act which by the several corporators and stockholders could have been legally performed. The answer shows that the organization of the corporations was regular. No question is made in this court upon that point; and, inasmuch as the acts complained of were committed by these companies in the exercise of their corporate functions within the limits conferred by their charter, if a wrongful act were committed in the maintenance of a nuisance upon the land of this plaintiff, the suit should have been brought and the prayer for injunction should have been against the corporations themselves. These considerations, taken in connection with the general presumptions which must always be indulged in favor of the constitutionality of statutes, lead us to the conclusion that in the denial of an injunction as against these individual defendants the court rendered a proper judgment, and it is therefore affirmed.

(95 Ga. 387)

VERNON SHELL-ROAD CO. v. MAYOR,
ETC., OF SAVANNAH.

(Supreme Court of Georgia. Feb. 5, 1895.)

CONDEMNATION OF CORPORATE PROPERTY — DAMAGES—EVIDENCE—INSTRUCTIONS.

1. An act of the legislature incorporating a company to construct and maintain a turnpike road to be constructed and laid on and over the bed of a certain designated public road then existing did not, although it provided that all rights in the property acquired by the company with the said road when completed should be vested in the stockholders, their heirs, legal representatives, or assigns, forever, and in proportion to their respective shares, pass title in fee to the land upon which the road was constructed, but conferred only an easement in the maintenance, use, and enjoyment of the turnpike road when completed in accordance with the terms of the charter. Consequently, where, by the extension of the corporate limits of a city, a portion of the turnpike road was appropriated to the public use as a street, or its use and enjoyment by the company as a part of its turnpike road was otherwise rendered valueless, the compensation to be paid to the company should be estimated, not with reference to the value of the land in fee, but with reference to the injury done to the company's easement therein.

2. The value of the stock of a corporation, and the amount at which its property is returned for taxation, though not conclusive, are competent evidence bearing upon the value of the property owned by the corporation.

3. The charge of the court as a whole was clear and accurate, and properly submitted to the jury the issues involved. The requests to charge, so far as legal and pertinent, were covered by the charge given. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Condemnation proceedings by the mayor, etc., of the city of Savannah against the Vernon Shell-Road Company. To the judgment rendered, defendant brings error. Affirmed.

Saussy & Saussy and D. B. Lester, for plaintiff in error. S. B. Adams, for defendants in error.

SIMMONS, C. J. The mayor and aldermen of the city of Savannah sought to appropriate to public use, for streets, so much of the toll road of the Vernon Shell-Road Company as was situated within the corporate limits of the city. Assessors were appointed, under the city charter (Code, § 4849), who awarded as compensation to the shell-road company \$5,000, and the company appealed to a special jury in the superior court. The jury found for the appellant \$5,500, and the appellant made a motion for a new trial, which was overruled, and it excepted.

1. The shell-road company contended that its compensation should be estimated upon the theory that the company was absolute owner of the land upon which the road was built, and, if it should cease to use the same as a highway, could sell or dispose of the land for any other purpose; this contention being based upon the act of December 13, 1859, by v.22s.E.no.16—40

which the company was incorporated, and which provided that it should be lawful for said corporation to construct a shell road from the city of Savannah to White Bluff, on the Vernon river, in the county of Chatham, to be constructed and laid on and over the bed of the White Bluff road, on condition that the assent of the inferior court and commissioners of roads of Chatham county be first obtained, and to erect toll gates across the same, and charge toll for the use of said road, and for passing over the same, and that "all laws, rights, and property acquired by said company with said road when completed, and all profits which may accrue therefrom, shall be invested in their respective stockholders, their heirs, legal representatives, or assigns, forever, in proportion to their respective shares." Acts 1859, p. 341. The court declined to instruct the jury as requested by counsel for the company on this subject, and charged them as follows: "The right of the shell-road company was to establish, construct, and own and operate a shell road constructed upon the roadbed of the White Bluff road. They had a right under their charter to do this, and hold it to them and their stockholders and their heirs and assigns forever; and as long as they maintained the shell road, through all the future, they and their heirs and assigns could hold it for all legitimate purposes." "Your estimate is not to be upon the theory that the shell-road company owns as its private property, in fee simple forever, with the power to divide up into lots, and sell that section of the foundation of the shell-road company; so that you will disregard any such idea as that in making your estimate." The court did not err in refusing to instruct the jury as requested by counsel for the plaintiff in error, and in charging as it did on this subject. The grantee under an act like the one in question can take nothing by implication. The rule which requires a grant to be taken most strongly against the grantor does not apply to a legislative act. On the contrary, in such a case the grant, whether it be of property or franchises, is to be construed strictly in favor of the public; and nothing passes but what is granted in clear and explicit terms. Code, § 2362; *Harrison v. Young*, 9 Ga. 359; *McLeod v. Railroad Co.*, 25 Ga. 457, and authorities cited; *Suth. St. Const.* § 378, and citations. So construing the act in question, it did not, in our opinion, pass title in fee to the land upon which the road was constructed. The interest conferred in the land was merely an easement in the maintenance, use, and enjoyment of the turnpike road when completed in accordance with the terms of the charter. Consequently, the compensation to be paid to the company should be estimated, not with reference to the value of the land in fee, but with reference to the company's easement therein. The decision of this court in the case between the same parties, reported in 88 Ga. 342, 14 S. E. 610, is not in conflict with what we rule in the present case.

There the question was whether the city authorities could appropriate the road to public use without making any compensation whatever. We held that they could not do this, and that the company was entitled to be paid for the damage to its easement. The court did not say that the land upon which the road was built was vested absolutely in the company.

2. Evidence as to the market value of the stock of a corporation and the amount at which its property is returned for taxation is, of course, not conclusive as to the value of the property owned by the corporation; but such evidence may be considered by the jury for what it is worth, in connection with other evidence, as throwing light upon the value of the property. The court did not err in admitting evidence on this subject, nor in refusing to charge the jury in reference thereto as requested by counsel for the plaintiff in error.

3. The charge of the court, as a whole, was fair and correct, and properly submitted to the jury the issues involved. The requests to charge, so far as legal and pertinent, were covered by the charge given. The evidence warranted the verdict, and there was no error requiring a new trial. As to the refusal to give the appellant the opening and conclusion on the trial, see *Streyer v. Railroad Co.*, 90 Ga. 56, 15 S. E. 652; *Wolff v. Railroad Co.*, 94 Ga. 555, 20 S. E. 484. Judgment affirmed.

(95 Ga. 361)

MARTIN v. GEORGIA RAILROAD & BANKING CO.

(Supreme Court of Georgia. Feb. 5, 1895.)

INJURY TO PERSON ON RAILROAD TRACK — CONTRIBUTORY NEGLIGENCE.

It affirmatively appearing from the evidence that the defendant company was not, relatively to the plaintiff, guilty of any negligence, and also that the latter, by the exercise of ordinary care, might have avoided the injury he received, the court was right in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Dekalb county; H. H. Clark, Judge.

Action by G. H. Martin against the Georgia Railroad & Banking Company. To a judgment of nonsuit, plaintiff brings error. Affirmed.

W. W. Braswell and Hulsey & Bateman, for plaintiff in error. Jos. B. & Bryan Cumming and Candler & Thomson, for defendant in error.

SIMMONS, C. J. The plaintiff, while walking along the main track of the defendant's railroad, heard the noise of a train behind him, and stepped aside until the engine passed. No cars were attached to the engine, and he did not know that any were following it. When it passed, he stepped back on the cross-ties, without looking in the direction from which the engine came, and two cars which had been cut loose from

the engine, and were following about 100 feet or more behind it, ran into him, inflicting the injury on account of which this action was brought. When the cars struck him they were running at a speed variously estimated at from 8 to 15 miles an hour. One or more employes were on the cars, putting on or trying to put off the brakes, which were midway of the two cars, and the speed was gradually decreasing. The cars ran about as far as the public crossing, about 100 yards beyond the point at which the plaintiff was injured. It is clear from this evidence that the defendant was not, relatively to the plaintiff, guilty of any negligence. The evidence shows that it was impossible, after the plaintiff stepped back upon the track, to stop the cars in time to avoid striking him; and the failure to comply with the statutory requirements as to giving signals, etc., while approaching the public crossing, was not negligence as to him, inasmuch as these requirements raise no duty as between the railroad company and strangers who may be upon the track elsewhere than at a public crossing. *Atlanta & C. Air-Line Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550. It is also clear that the plaintiff failed to exercise ordinary care for his own safety, and that, by the exercise of such care, he could have avoided the injury. He knew that this train, which was engaged in hauling rock from a neighboring quarry, at which he was employed, passed frequently at that point, and that other trains might pass at any moment. Ordinary care required, when he undertook to walk along the track, that he should look behind to see if a train was approaching; and his failure to do so is not excused by the fact that an engine had already passed him. The court below, therefore, did not err in granting a nonsuit. See *White v. Railroad Co.*, 83 Ga. 595, 10 S. E. 273, and cases cited; *Smith v. Railroad Co.*, 82 Ga. 801, 10 S. E. 111. Judgment affirmed.

(95 Ga. 402)

REEVES et al. v. BOLLES et al.

(Supreme Court of Georgia. Feb. 27, 1895.)

RESTRAINING EXECUTION—DISCRETION OF COURT.

Under the facts disclosed by the record, there was no abuse of discretion in denying the injunction.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Action by J. T. Reeves and others against George A. Bolles and others for an injunction. To a judgment for defendants, plaintiffs bring error. Affirmed.

Johnston & Brinson, for plaintiffs in error. Lawson & Scales and W. T. Davidson, for defendants in error.

LUMPKIN, J. J. T. Reeves borrowed a considerable sum of money from William

Bolles, and secured the same by a deed to a large tract of land. The lender afterwards died, and his executors transferred and assigned the note to George A. Bolles, and at the same time conveyed to him the land above mentioned, having the power so to do under the testator's will. George A. Bolles then sued Reeves upon the note, and obtained a judgment, filed in the clerk's office a deed conveying the land to Reeves, and had the same levied on and advertised for sale. Reeves and certain persons, who were his judgment creditors, filed an equitable petition to enjoin the sale, and praying that the land be surveyed and platted, and sold in separate parcels. Petitioners alleged that, if the land were sold in one entire body, it would bring a much less sum than if sold in parcels, and would therefore be sacrificed unless the defendants were enjoined from making the sale as advertised. The judge heard the application upon the petition, answer, and affidavits submitted by both sides, and, after so doing, refused to grant the injunction.

Before dealing with the case upon its merits, we will notice a preliminary question which was presented. It was insisted that the deed from the executors to George A. Bolles did not pass the title, because these executors had not given bond in conformity to section 2817 of the Code. This section is not applicable to the facts of the present case. These executors were not endeavoring to sell the land in Georgia, as an act done in the due course of administering the estate of William Bolles, but they simply passed the title to the purchaser of the note, in order that the security might be transferred along with the note itself.

There was a conflict in the evidence submitted as to whether or not the plaintiff's land would sell to better advantage if divided up into parcels than it would if sold as a whole. This, of itself, would be a sufficient reason for declining to interfere with the discretion of the trial judge in refusing by injunction to arrest the progress of the defendants' execution. It is well settled by repeated adjudications of this court that, as to questions of fact passed upon by a judge in determining whether an injunction should be granted or refused, his findings will not be disturbed unless it plainly and manifestly appears that he grossly abused his discretion. Granting, however, for the sake of the argument, that a larger amount would be realized by selling the plaintiff's land in separate tracts, we are still of the opinion that the judge was right in denying the injunction. It may be within the power of a court of equity, in some cases, to decree that the property of a debtor shall be sold in parcels, and not as a whole, where it manifestly appears that gross injustice would result if the latter course were pursued. We are entirely satisfied, however, that the case in hand is not one of this kind. The plaintiff Reeves borrowed money, gave his note for the same, and, for the purpose of securing its repayment,

executed a deed covering the entire body of land now in controversy. This gave to the lender an absolute legal right to enforce the collection of any judgment he might obtain upon the note by a sale of the land as one entire tract; and, of course, any person acquiring by purchase the note in question, together with the title to the land conveyed as security for the debt, would have the same rights in the premises as the original lender. The land, in its entirety, being specifically pledged for the payment of the debt, it must inevitably have been within the contemplation of the parties that, if it should become necessary to enforce payment by resort to legal proceedings, the land would be subject to sale as a whole, just as it was conveyed. It is not denied that the plaintiff in execution has a perfect legal right to have all the land sold to satisfy his judgment, and to have granted the injunction sought would necessarily have been to interfere to some extent with the exercise of this right. It would certainly at least have caused delay in the collection of the debt. It was the undoubted right of the judgment creditor to have the land sold at once, and without delay; and as it would be impracticable, in the present condition of the land, to sell it in parcels, he must necessarily be entitled to have the land sold as an entire tract, or else his right to subject the land to immediate sale would be an empty one indeed. We do not understand that a court of equity will ever interfere with a positive legal right unless equitable reasons, which are good and valid against the party having such right, are presented. In this case nothing of the sort appears. The plaintiff in execution has done absolutely nothing to give rise to any equity, as against him, in favor of the debtor, and the fact that other judgment creditors of Reeves join in the bill with him adds nothing whatever to the merits of the petition. They had no more right, and were no more entitled, in equity, to enjoin the sale under the execution of George A. Bolles, than the defendant in the execution himself had; and what has been said with reference to him is also applicable to these judgment creditors who joined with him in the petition. In fact, there is no equity at all in the petition. After all, it seeks to delay the creditor, and presents no good reason, either in law or morals, why he should be delayed. When the suit was brought the debtor might have anticipated that the very state of affairs now impending would result. He had ample time, before judgment, to have his land surveyed, laid off into tracts, and platted so that it could be accurately described in an advertisement, and each tract sold separately. In that event, intending purchasers could have examined these tracts, and have bid intelligently at the sale, knowing precisely in each instance what property was offered. Had the debtor pursued this course, he might have pointed out to the sheriff the several parcels into which the land had been divided, and have required the officer

to advertise and sell accordingly. If this had been done, and the sheriff had refused to comply with these directions, and injury to the debtor had resulted, he might have had his action against the sheriff. Be this as it may, on the facts, as they stood at the time of the levy, he had no right, either against the sheriff or the plaintiff in execution, to demand the delay necessary in order to so survey and plat the land that it might thereafter be offered and sold in parcels, instead of having it sold as one entire tract. To postpone the sale for the purpose of doing this would be to illegally and inequitably delay the plaintiff in execution in the enforcement of his rights. So, upon the whole, we are satisfied that there was no error in refusing the injunction. Judgment affirmed.

(96 Ga. 394)

MERCHANTS' NAT. BANK v. CARHART.
(Supreme Court of Georgia. Feb. 18, 1895.)

LIABILITY OF BANK TO DEPOSITOR — EMBEZZLEMENT BY BANK'S CASHIER — INSTRUCTIONS.

1. Where a special deposit of property for gratuitous safe-keeping was made with a bank, which, through its cashier, issued a receipt for the property, specifying that the same was held subject to the order of the depositor, the cashier being duly authorized to issue such receipt, in an action by the depositor against the bank for the value of the property so deposited, a *prima facie* case for the plaintiff was made out by introducing the receipt in evidence, and proving a failure to deliver to the plaintiff on his demand the property therein described, and the burden was thus cast upon the defendant of showing it had exercised, at least, slight diligence in the care and keeping of the property.

2. Where, in such a case, it appeared that the property so deposited was stolen by the cashier himself, the bank, even if it exercised due diligence in selecting him, was not discharged from liability, unless it affirmatively showed, further, that it had not been guilty of gross negligence in retaining the cashier in office after it knew, or ought in the exercise of slight diligence to have known, that he was or had become unworthy of trust; and it does not show this by merely proving that up to a given time, three or more years previous to the discovery of the theft, his reputation was good, and that "he stood in the community for honesty and integrity as high as any man." In view of the fact that he had actually stolen the property in question, it was incumbent upon the bank to show that during the whole term of the bailment it had exercised, at least, a slight supervision of him, and that, in so doing, no indications of dishonesty or other reason for distrusting him had appeared.

3. The court was right in refusing by its charge to make the determination of the question whether or not the bank observed that degree of diligence which was due to the plaintiff dependent upon the question whether or not, under similar circumstances, it trusted its cashier with its own property of like kind. What the bank ought to have done in order to come up to the measure of diligence required by law cannot be arrived at by showing what it actually did in other matters relating to its own affairs.

4. The case, upon its substantial merits, is controlled by the propositions above announced. The requests to charge were, so far as consistent with the law of the case, covered by the general charge. The verdict, under the evidence, was right: and in none of the grounds of the motion for a new trial does cause for a reversal of the judgment below appear.

(Syllabus by the Court.)

Error from city court, of Savannah; A. H. MacDonell, Judge.

Action by George B. Carhart against the Merchants' National Bank. Plaintiff had judgment, and defendant brings error. Plaintiff also assigned error. Affirmed.

Erwin, Du Bignon & Chisholm and Barrow & Osborne, for plaintiff in error. J. R. Saussey and C. N. West, for defendant in error.

LUMPKIN, J. The case now before us is quite similar to that of *Bank v. Gullmartin*, 88 Ga. 797, 15 S. E. 831, and 93 Ga. 503, 21 S. E. 55, in which this court dealt at length with the duties and liabilities incurred by a bank in accepting from one of its customers a special deposit, under circumstances which, in law, would create a gratuitous bailment. In view of the elaborate discussion of the subject then entered into, it will not be necessary in this opinion to again cite the numerous authorities in support of the rule that it is incumbent upon a bank, in order to vindicate its diligence where the loss of a special deposit occurs through the negligence or dishonesty of one of its employees, to show reasonable care and circumspection on its part, both as regards the selection of such employee in the first instance, and as to his subsequent retention in a position of trust. Our present endeavor will therefore be simply to show the application of this rule to the facts of the case at bar.

1. The plaintiff having satisfactorily proved authority on the part of the defendant's cashier to receive and receipt for the special deposit in question, a *prima facie* case was made out by then introducing in evidence the receipt given by the cashier, and proving a failure to deliver the property on demand. Under section 2064 of the Code, the burden would thus be cast upon the defendant of showing it had exercised, at least, slight diligence in the care and keeping of the property.

2. The defendant sought to escape liability on the ground that the loss of plaintiff's property was sustained through no negligence on its part, but was due solely to the wrongful conduct of its defaulting cashier, who had embezzled not only the special deposit of the plaintiff, but also a considerable amount of valuable property belonging to the bank itself. In support of this defense, evidence was introduced to show that all requisite diligence had been observed in the selection of the cashier; that he had remained in the service of the bank many years, and had gained the implicit confidence of its managing officers; and that, up to about three years previous to the discovery of the theft, his reputation was not merely good, but "he stood in the community for honesty and integrity as high as any man." No definite account, however, was given of the cashier, either as to his reputation or conduct, during the three

years next preceding the discovery of his defalcation. It does not appear that during this period any effort was made on the part of the officials of the bank to inquire into or even casually scrutinize the conduct or habits of the cashier, and determine for themselves his true character for honesty and integrity, or to exercise even a slight supervision over the important affairs with which he was intrusted. On the contrary, it would seem that they allowed themselves to be lulled into a state of tranquil inactivity by the sense of fancied security they derived from the assumption that, as he had in the past proved faithful to his trust, he must surely remain equally trustworthy in the future.

In the argument before us it was earnestly insisted by counsel for the plaintiff in error that the officials of the bank had done all that could reasonably be expected of them in regard to informing themselves as to the real character of the cashier; for, as was argued, it having been once definitely ascertained by them that his reputation for honesty and integrity was above suspicion, they had a right to rely upon the presumption of law that he would remain honest and reliable. While this contention is ingenious and was strongly stated, it cannot be accepted as sound. Presumptions of this kind are raised by law as mere rules of evidence, and have no application whatever to the conduct of men in the ordinary affairs of life; being designed merely to expedite and assist judicial investigation, and not being intended to influence or justify the acts, or omissions to act, of those upon whom is devolved the performance of legal duties, nor to set up a standard by which their diligence shall be measured and tested. The application of these rules of evidence in the conduct of every-day business affairs would often lead to absolute absurdities. For instance, how could it be said that a banker, implicitly relying upon the vague presumption of law that every one is honest until the contrary is shown, would be justified in piling up money intrusted to his care in the middle of the street, and leaving it there to take care of itself. We cannot reach the conclusion that the showing of diligence made by the defendant in the present case reasonably met the requirements of the law. The rule, as laid down by the supreme court of the United States in *Presten v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162, and as universally recognized, is that "persons depositing valuable articles with banks for safe-keeping without reward have a right to expect that such measures will be taken as will ordinarily secure them from burglars outside and from thieves within; that, whenever ground for suspicion arises, an examination will be made to see that they have not been abstracted or tampered with; that competent men, both as to ability and integrity, for the discharge of these duties,

will be employed; and that they will be removed whenever found wanting in either of these particulars." The requirement that not only must due diligence be observed in selecting a cashier in the first place, but that some degree of supervision over him, with a view to ascertaining whether he should be retained, ought to be exercised, is by no means a harsh one. Indeed, the rule of diligence applicable to banks is a very material modification in their favor of that governing ordinary bailees. Usually, where a bailee is intrusted with valuable property, he cannot shift his responsibility of accounting for it by showing that a wrongful conversion of the property was committed by another person to whom he delegated the duty imposed upon himself alone; for, as a general rule, he would be held to have employed such other person at his own peril, and every act of his agent would, in law, be the act of himself. It is only that the law looks to the intention of the parties, where property is deposited with a bank for safe-keeping, that the strict rule as to bailments is relaxed, and a bank is allowed to discharge itself from liability by showing that, although loss occurred through the dishonesty of its agents, it had itself exercised due care and circumspection, both as to their selection in the first place, and as to their retention in office thereafter. A corporation can act only through its agents; and it is evident that, when a person makes a special deposit with a bank, he understands that his property must, of necessity, be placed in the keeping of employes in the service of the corporation. Therefore he is held to tacitly agree that he will not attempt to hold the bank responsible for loss if it in good faith takes all reasonable precautions in having suitable and competent agents to discharge the trust delegated to it. However, it is not true that in such case the depositor consents that the duty raised by the bailment may be shifted upon the shoulders of persons other than the bailee. This duty remains owing by the bailee alone. The depositor simply assents to the employment by the bailee of agents to aid it in the performance of such duty, the effect of which is merely to change the test of liability resting upon the bailee in case of loss.

The court below, fully, but concisely, charged the jury as to the manner in which the defendant could vindicate its diligence in regard to the employment and retention of its cashier. The only possible objection to the charge we have been able to discover is that the judge instructed the jury, in effect, that it was incumbent on the bank to show that, during the whole term of the bailment, it had exercised, at least, a slight supervision over its cashier, and that, in so doing, no indications of dishonesty, or other reason for distrusting him, had appeared. After careful reflection, we feel safe in reaching the conclusion that this was not stating the rule

too strongly against the defendant. The duty imposed by law upon a bank to remove from its service an employé who has become wanting either in ability or integrity necessarily comprehends the incidental requirement of maintaining a reasonable surveillance or supervision over such employé; else, how is the bank to know when such duty of removal arises? Certainly, where a bank is called upon to explain its nonobservance, it cannot be deemed a sufficient answer that the bank failed to comply with this duty simply because it was not aware that the time for its observance had arrived, when it was within the power of the bank, by the exercise of but slight diligence, to have fully informed itself that the necessity to act, and to act promptly, was at hand. The duty of a bailee to provide competent agents to care for the property of the bailor may be analogized to the similar obligation resting upon a master to provide suitable coemployés when a servant is expected to work in connection with others. This court recognized that a master's duty in this regard did not cease with simply providing, in the first place, competent fellow servants, when in *McDonald v. Manufacturing Co.*, 68 Ga. 839, the rule was laid down that "a principal is not liable for the negligence of a fellow-servant in the same job, unless the principal himself was negligent in not using ordinary diligence in selecting the fellow servant, or in retaining him after knowledge of incompetency or negligence." Such is the rule which likewise obtains in many other jurisdictions. Thus, where an agent, competent and skillful at the date of his hiring, subsequently acquires the habit of intoxication, the master is guilty of negligence if he retains such agent with knowledge of that fact. *Lanning v. Railroad Co.*, 49 N. Y. 521; *Chapman v. Railway Co.*, 55 N. Y. 579; *Coal Co. v. Decker*, 84 Pa. St. 419; *Railway Co. v. Collarn*, 73 Ind. 261. And mere lack of actual knowledge of the servant's unfitness will not necessarily excuse the master. He cannot shut his eyes, and claim exemption from liability, but must use the proper degree of diligence in keeping informed of the servant's habits and conduct. In *Gilman v. Railroad Corp.*, 10 Allen, 233, it was held: "If the switchman was an habitual drunkard, and this fact was known, or ought to have been known, to the corporation, and the injury resulted from his intoxication, the corporation is responsible." The same rule was announced in *Railroad Co. v. Sullivan*, 63 Ill. 293, Scott, J., saying: "Whether O'Keefe was a careful and competent man when he was first employed by the company is not now a material inquiry. The controlling question is whether he was an unfit person for his position at the time of the injury to Sullivan, and whether the company knew of his incapacity, or could have known it by the exercise of reasonable diligence." Certainly, it is all-important that a bank should

keep a reasonable supervision over such of its employés as occupy positions offering the temptation and the means to do wrong, for, as already intimated, without the maintenance of some surveillance, the duty of removing such employés when they become deficient or unreliable could seldom be known or performed until too late to shield from loss the persons for whose protection the duty is imposed by law.

3. The fact that the defendant bank intrusted its own money and other property to the safe-keeping of its defaulting cashier, and, in consequence, itself suffered a heavy loss through his speculations, is one which the jury might very properly consider in arriving at a conclusion concerning the good faith and diligence observed by the bank's officials. However, this solitary fact could not properly serve as the test upon which the liability of the bank should be made to depend. What the bank ought to have done in order to come up to the full measure of diligence required by the law could not be arrived at by showing simply what it actually did in other matters relating to its own affairs. Indeed, the officials of the bank might have been grossly negligent concerning the care bestowed upon its own property, and it could not excuse its negligence in regard to the duty owing to its customers by showing it had been equally negligent in failing to properly look after its own affairs. The question is not a new one, but has been repeatedly passed upon by other courts of unquestionably high standing, as came to the notice of the writer when he made a thorough and laborious research of the authorities preparatory to writing an opinion in the *Gulmartin Case* when it made its first appearance before this court. See 83 Ga. 797, 15 S. E. 831. We confidently assume that our ruling upon this question will be readily accepted as correct without further citation of authority.

4. In none of the numerous grounds of the motion for a new trial filed by the plaintiff in error have we discovered error which would require or justify a reversal of the judgment of the court below denying another hearing. We cannot attempt the laborious task of dealing specifically with each of the alleged errors complained of, and have confined this discussion to such questions only as control the case upon its substantial merits. As will have been seen by the foregoing brief, but exhaustive, statement of the evidence relied on by the defense to rebut the *prima facie* case of liability made out by the plaintiff, the defendant bank utterly failed in its attempt to prove due compliance with the requirements of the law as to diligence. Indeed, under the evidence submitted upon this issue, which was the main defense relied on by the bank, the jury would not have been warranted in finding other than they did. As to all other issues involved in the case, the verdict of the jury

is amply sustained by the record before us, and could not properly be set aside. Judgment on main bill of exceptions affirmed. Cross bill of exceptions dismissed.

(95 Ga. 410)

CENTRAL RAILROAD & BANKING CO. v. POOL.

(Supreme Court of Georgia. Feb. 27, 1895.)

NEW TRIAL—BRIEF OF EVIDENCE—EXTENSION OF TIME—AMENDMENT OF MOTION.

1. The filing of a motion for a new trial, together with a brief of the evidence, within the time prescribed by the act of November 12, 1889 (Acts 1889, p. 83), in a court to which that act is applicable, is sufficient to make the motion, to the extent of keeping it alive and capable of subsisting until the final hearing, a legal and valid one. The approval of the brief of evidence is not indispensable to the vitality of the motion, and may be obtained at that hearing; the movant, of course, taking the chances that the judge may, from want of memory or other cause, be unable then to approve it at all.

2. Accordingly, where a case was tried in the superior court at a term which continued longer than 30 days, and the losing party, during the term and before the expiration of the 30 days, filed a motion for a new trial and a brief of the evidence, the latter "subject to the supervision of the court," and there was a consent order setting the motion down for a hearing at chambers on a day named, the order further providing that the movant have until that time to perfect the brief of evidence and amend the motion, it not appearing, however, that the brief needed anything to make it a perfect one except the final approval of it by the judge, then, although no action whatever was taken upon the motion on the day specified in the order, it was error at a subsequent term to dismiss the motion on the ground that because the brief was not approved within the time fixed by the order, and no extension of time had been then granted for that purpose, it was too late to obtain an approval of the same.

3. The motion was amendable at the hearing; but, as the judge then presiding was not the judge before whom the case was tried, it was incumbent on the movant to produce satisfactory evidence of the truth of any recitals of fact in the amendment offered before he would be entitled to have the same approved.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. M. Griggs, Judge.

Action by Mrs. J. M. Pool against the Central Railroad & Banking Company. Plaintiff had judgment, and defendant brings error. Reversed.

Steed & Wimberly and J. R. Cooper, for plaintiff in error. W. Dessau, A. L. Miller, and C. L. Bartlett, for defendant in error.

LUMPKIN, J. 1. 2. A case was tried in the superior court on February 13, 1893, during a term which continued longer than 30 days, resulting in a verdict for the plaintiff. During the term, and before the expiration of the 30 days, the defendant filed a motion for a new trial and a brief of the evidence. Upon the latter was an entry, signed by the judge, in these words: "This brief of evidence subject to the supervision of the court." On the day the motion for a new trial was

filed it was duly entered on the motion docket, and a consent order was passed setting the motion down for a hearing at chambers on April 24, 1893, and providing that the movant have until that time to perfect the brief of evidence and amend the motion. So far as appears, the brief of evidence needed nothing to make it a perfect one except the final approval of it by the judge. On the day last mentioned, no action of any kind was taken on the motion. Afterwards the judge before whom the case was tried resigned his office, never having approved the brief of evidence. The judge of the court in which the case was tried was disqualified. He called the motion one or more times, and simply passed it; and with this exception no action was taken upon it until January 12, 1894, although in the meantime the judges of other circuits had, at different times, presided in that court in his stead. On the day last mentioned, the successor in office of the judge who had resigned was presiding in that court, and announced that this motion would be in order for a hearing on the next day. The hearing, however, did not take place until January 22, 1894. On that day movant tendered to the counsel for respondent in the motion an amendment to the motion, and also, for their approval preliminary to submission to the judge for final approval, the above-mentioned brief of evidence. Thereupon counsel for the respondent moved to dismiss the motion for a new trial, on the grounds "that said motion for a new trial was set down to be perfected, heard, and determined at chambers the 24th day of April, 1893, and no order was taken at said date continuing or keeping alive said motion, or extending the time within which the brief of evidence could be perfected by counsel and approved by the court, and that, the motion for a new trial not being completed, and the brief of evidence not being approved and filed as an approved brief of evidence within the time fixed by the order, and no extension being provided for, the brief of evidence could not now be approved, and the motion must be dismissed." Counsel for respondent also objected to the allowance of the amendment offered to the motion for a new trial. The court refused to allow any amendment, and sustained the motion to dismiss the motion for a new trial.

Under the facts above set forth (the recital of other facts deemed immaterial being omitted), it was, in view of the provisions of the act of November 12, 1889 (Acts 1889, p. 83), error to dismiss the motion for a new trial on the grounds stated. In a court to which that act is applicable, the filing of a motion for a new trial, together with a brief of the evidence, within the time prescribed, is sufficient to make the motion, for the purpose of keeping it alive till the final hearing, a valid and legal one. The approval of the brief of evidence is not indispensable to this purpose, and may be obtained after the time for filing

has expired. *King v. Sears*, 91 Ga. 577, 18 S. E. 830. In such case, however, the movant must, of course, take the chances that the judge may, from want of memory or from other causes, be unable to approve the brief at all. See, in this connection, *Watson v. Long*, 94 Ga. 255, 21 S. E. 507, and *Hinson v. Guckenheimer*, 95 Ga. —, 22 S. E. 274. In *Railroad Co. v. Johnson*, 59 Ga. 626, it was held that where a party, instead of pursuing the course prescribed by law in relation to new trials, entered into a consent order to file an approved brief of the evidence within a given time, he must abide by his contract, and that, if the brief was not presented for approval within the time fixed by the order, it was not error to dismiss the motion for a new trial. In *Pease v. Pease*, 68 Ga. 277, a similar ruling was made. It appeared in that case that the brief was filed within the time prescribed by the consent order, but was not presented to the judge for approval until several months after the prescribed time had elapsed. The judge dismissed the motion for a new trial, apparently doing so without being moved thereto by counsel for the respondent. It is also worthy of note that counsel for both parties sent to the judge what purported to be briefs of the evidence, with a request that he approve the movant's brief of evidence, and then decide the motion upon the written argument submitted. It is quite probable that the refusal of the judge to approve the brief of evidence was due to the fact that he did not remember, after the lapse of time which had intervened, what the evidence was, and found it impossible to decide between the conflicting briefs. At any rate, this view is suggested by Chief Justice Bleckley in *Moxley v. Kinloch*, 80 Ga. 46, 7 S. E. 123.

It was insisted in the case now under consideration that the movant had bound himself by a consent order to have his brief of evidence approved on or before the 24th of April, 1893, and, as he did not do so by that day, his motion for a new trial ought to have been dismissed. The two cases last cited were relied on in support of this contention. It will be observed that in the first of these cases the brief of evidence was not even filed within the time limited; and in the second it was not held that the judge was bound to dismiss the motion for a new trial, but simply that he was justified in doing so under the circumstances. Again, it must be remembered that both of these cases were decided before the passage of the above-mentioned act of 1880, which, as already stated, does not require the approval of the brief of evidence during the time within which it must be filed. Besides, in each of these two cases it affirmatively appeared that there was something to be done by the movant in order to give validity to his motion. In the present case it does not appear that the movant had anything whatever to do in order to make his brief of

evidence a complete one, except to obtain the final approval of the judge. It is true this brief was filed "subject to the supervision of the court," and the consent order does recite that the movant have until the time specified to "perfect" it; but, after all, so far as the record discloses, it only needed the judge's approval to make it perfect. So we do not think the cases of *Railroad Co. v. Johnson* and *Pease v. Pease*, *supra*, are controlling authorities upon the question at issue. If the trial judge had seen proper to refuse to approve the brief of evidence, and had dismissed the motion for a new trial for the want of such approval, this court would not have controlled his action in the premises. See the opinion of Simmons, C. J., in *Anderson v. McLean* (decided Jan. 14, 1895) 22 S. E. 302. In the case now under review, however, the movant was not allowed the opportunity of obtaining from the judge who was presiding at the final hearing of the motion his approval of the brief of evidence. It would seem that the counsel were about to submit the brief to the judge for approval when the motion to dismiss was made; and the real ground of that motion was that because the brief was not approved by the 24th day of April, 1893, and no further time had been then granted for that purpose, it was too late to ever afterwards obtain an approval of the same. This motion was sustained, and the judge therefore did not pass, nor attempt to pass, upon the question whether the brief was a correct one or not, but, by summarily sustaining the motion to dismiss, cut the movant off from showing in any proper way at his command that the brief presented was in fact a true and correct one. After reviewing and considering all the cases bearing upon the subject, we have reached the conclusion that this action by the judge was erroneous. The motion for a new trial in this case might have been dismissed for want of prosecution on the day last named; but, as it was not so dismissed on that day, we think it went over to the next term of the court as a living motion, capable of subsisting from term to term, and, at the final hearing, the judge ought first to have determined whether or not he could properly approve the brief of evidence accompanying the motion. If he found he could do so, the motion would have been in order for a hearing on its merits. If he found he could not approve the brief, and had then dismissed the motion for want of such approval, the question would have been materially different from that now presented.

3. We also think, in view of the facts above stated, that the judge should have given the movant an opportunity to satisfy him that the recitals of fact in the amendment offered to the motion for a new trial were correct; and, if so satisfied, the judge ought to have allowed the amendment. Judgment reversed.

(95 Ga. 415)

SHARP v. AMERICAN FREEHOLD LAND MORTGAGE CO. OF LONDON, Limited.

(Supreme Court of Georgia. Feb. 27, 1895.)

HOMESTEAD—WAIVER.

1. Where a homestead was duly set apart in 1868, the head of the family had no power or authority, in subsequent transactions, to waive the homestead right as to the land embraced in this homestead; and although the homestead proceedings were not recorded until September 25, 1877, and the record book was subsequently lost, one who dealt with the head of the family after the record had been actually made was chargeable with notice of the homestead.

2. Where, after such record had been made, the head of the family borrowed money, giving for the same his promissory note, with waiver of homestead as against that debt, and at the same time represented to the lender that there were no incumbrances on his land (it being the same land which was in fact embraced in the homestead), neither such waiver nor representation could defeat the homestead, and consequently the land could not, as against a claim filed by the head of the family setting up the homestead right, be subjected to a judgment rendered upon that note.

(Syllabus by the Court.)

Error from superior court, Crawford county; C. L. Bartlett, Judge.

To the property levied on at the suit of the American Freehold Land Mortgage Company of London, Limited, John M. Sharp interposed a claim of ownership. To judgment subjecting the property, claimant brings error. Reversed.

R. D. Smith and Hardeman, Davis & Turner, for plaintiff in error. W. E. Simmons and W. B. Dew, for defendant in error.

SIMMONS, C. J. An execution in favor of the American Freehold Land Mortgage Company of London, Limited, based on a judgment of March 20, 1893, was levied on lot of land No. 160 in the Second district of Crawford county, as the property of John M. Sharp, defendant in execution. The property was claimed by Sharp as the head of a family, under the homestead law. The case was submitted to the presiding judge upon all questions of law and fact, who found the property subject; and to this ruling the claimant excepted.

It appeared at the trial that the judgment from which the execution issued was based upon a promissory note of the defendant in execution, dated December 1, 1891, and containing a waiver of homestead and exemption. The claimant introduced the homestead papers, which showed that the petition was filed November 2, 1868, approved November 14, 1868, and recorded September 26, 1877. The petition stated that Sharp was the owner of the land in controversy, with other land, and of certain personalty. He also introduced a petition to amend the application by alleging that he was the head of a family consisting of his wife and minor children, and by alleging that he was a citizen of and resided in Crawford county; also

an order of the ordinary allowing the amendment, and reciting that citation had been issued and published in terms of the law, and no objection had been filed or appeared. The homestead included the land in dispute. It was admitted that the record of homesteads of Crawford county had been lost. The plaintiff introduced the following question and answer in defendant's application to it for the loan of the money, which was the foundation of its claim or debt: "Q. Are there any incumbrances on said land? A. No." Claimant testified that no questions were asked him about any homestead, nor did he make any statement in reference thereto; that when the question introduced by the plaintiff was asked he inquired of plaintiff's agent what he meant by "incumbrances," and the agent replied, "Mortgages or executions," and the witness then replied, "No."

We think the court erred in finding the property subject. All the presumptions were in favor of the validity of the homestead, and no reason appears for treating it as invalid. See *McDonald v. Williams*, 94 Ga. 515, 19 S. E. 830. Under the law as it stood at the time the homestead was granted, it was not essential that the names of the beneficiaries should be set out in the application. *Horton v. Summers*, 62 Ga. 304 (2), and cases cited; *Wilder v. Frederick*, 67 Ga. 669 (2). As to the amendment, see *Hardin v. McCord*, 72 Ga. 239 (2). If there was a valid grant of a homestead, the waiver was ineffectual after the homestead had been set apart. The fact that the homestead papers were not recorded until 1877, and that the book in which they were recorded was subsequently lost, did not affect the rights of the beneficiaries. The debt to which the plaintiff in execution was seeking to subject the property was contracted after the homestead papers were recorded; and the loss or destruction of the record could not impair any rights the beneficiaries may have acquired, nor affect the constructive notice afforded by the record. See *Wade*, Notice, § 157; *Webb*, Record Titles, § 187, and authorities cited. Nor could the representations of the head of the family that there were no incumbrances on the land operate as an estoppel upon the beneficiaries, or preclude him from setting up their right to the homestead, in his character of head of the family. *Hawks v. Hawks*, 64 Ga. 243; *Hall v. Matthews*, 68 Ga. 492 (2); *Bank v. Dickinson*, 83 Ga. 711, 10 S. E. 446. Judgment reversed.

(95 Ga. 418)

ORME v. BIRNEY.

(Supreme Court of Georgia. Feb. 27, 1895.)

ARBITRATION AND AWARD—MISCONDUCT OF ARBITRATOR.

There being ample evidence to show that, during the progress of the trial before the arbitrators, one of them was guilty of conduct manifesting that he was not impartial, but was,

on the contrary, a partisan of one of the parties, and prejudiced in his favor, the jury were warranted in setting aside the award; and, the sole issue being whether or not the arbitrator whose conduct was excepted to was fair and impartial, it was not material or necessary to have before the jury the evidence introduced before the arbitrators. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. M. Griggs, Judge.

Action by Mrs. R. E. Birney against J. A. Orme, agent, to vacate an award of arbitrators. There was a verdict for plaintiff, and defendant brings error. Affirmed.

L. D. Moore, for plaintiff in error. J. L. Anderson and Harris & Harris, for defendant in error.

LUMPKIN, J. This case can be disposed of upon one controlling question, without noticing specially the various points raised by the motion for a new trial. The evidence shows unquestionably that one of the arbitrators was not impartial. His conduct throughout the entire investigation shows that he was a partisan of one of the parties, and prejudiced in his favor. This, without more, was sufficient to render the award illegal, and of no binding effect against the party against whom it was rendered. We quite agree with Chief Justice Bleckley in saying: "It is a misconception of the relation of arbitrators to consider one of them as being the arbitrator of one party, and the other the arbitrator of the other party. Courts have often held that a feeling of partisanship among arbitrators is incompatible with the impartial state of mind in which they ought to enter upon and discharge their duties." *Wilkins v. Van Winkle*, 78 Ga. 568, 3 S. E. 761. It was not necessary to have before the jury the evidence introduced before the arbitrators. The case of *Akridge v. Patillo*, 44 Ga. 585, is not in conflict with the assertion just made. There it was held that all the exceptions to the award were, in effect, merely objections to it as being contrary to the evidence or the weight of the evidence; and, this being so, it was, of course, necessary that the testimony submitted to the arbitrators should be before the court in order to enable it to pass intelligently upon the objections made. In *Jackson v. Roane*, 90 Ga. 609, 16 S. E. 650, it was held that, where improper conduct on the part of the arbitrators was shown, it was not incumbent upon the complaining party to show that such conduct actually operated to his injury. The verdict to set aside the award was right, and there was no error in denying a new trial. Judgment affirmed.

(56 Ga. 434)

COMER v. NEWMAN.

(Supreme Court of Georgia. Feb. 27, 1895.)

FIRE SET BY LOCOMOTIVES—PROOF OF INTEREST.

The action being for damages alleged to have been occasioned to the plaintiff's land by

setting fire to and burning wood, undergrowth, straw, leaves, and timber thereon, and it appearing from his own testimony that the land belonged to himself and his children, and there being no proof showing the number of the children, or what particular share or interest was owned by the plaintiff himself, there could be no legal recovery in his favor, and it was error to refuse a nonsuit. The alleged injury being to the freehold, it was incumbent upon the plaintiff to show what interest he owned therein, in order to enable the jury to arrive at his just proportion of the compensation which should be allowed for the entire injury.

(Syllabus by the Court.)

Error from superior court, Houston county; C. L. Bartlett, Judge.

Action by W. L. Newman against H. M. Comer, receiver. Judgment for plaintiff, and defendant brings error. Reversed.

Steed & Wimberly and John R. Cooper, for plaintiff in error. M. G. Bayne, for defendant in error.

LUMPKIN, J. In this case we felt constrained to grant a new trial because of a fatal defect in the plaintiff's evidence. His action was brought to recover damages alleged to have been occasioned to his land by setting fire to and burning undergrowth, straw, leaves, and timber thereon. The injury complained of was not a mere injury to his term, or to his right to occupy the land for the time being, as would have been the case of a tenant; but it was an injury to the freehold, and therefore one giving a right of action only to the owner or owners of the legal title. Indeed, the plaintiff does not, in his declaration, attempt to sue otherwise than as owner of the land itself. For some reason the defendant did not require any written proof of title, but allowed the plaintiff to establish his ownership by his own parol evidence. Upon this question his testimony was to the effect that the land belonged to himself and his children. He did not state how many children he had, or what particular share or interest in the property was owned by himself, or by any one of the children. Consistently with his testimony, he might be a life tenant of the whole, and the children remainder-men, or he might be a tenant in common with them, and his particular share might be one-half, one-tenth, or any other fractional interest. There were, it is true, some loose references to the land as "Newman's land" by witnesses who made no pretense of knowing anything about the title, and whose testimony was directed to other matters, and really threw no light at all upon the question of ownership. The only evidence bearing directly upon this subject was that of the plaintiff himself, the substance of which has been stated above. Assuming that the jury were able to ascertain from the evidence the amount of damages which should be awarded for the entire injury to the property, it would certainly seem clear that the plaintiff would not be entitled to recov-

er the whole of this amount. If he could, then each one of the remaining joint owners could do likewise, and thus the defendant would be made to respond in damages several times for the same cause of action. If the plaintiff could not recover the whole of the damages, to what per cent. of the same would he be entitled? The evidence totally fails to furnish any answer to this question. We are therefore compelled to set the verdict aside. If, at the next trial, it should be made to appear that the defendant is liable for the injury, and the plaintiff shows what proportion of the damages should be awarded to him, exact justice may be done in fixing the amount of the verdict. Judgment reversed.

(95 Ga. 307)

MORRIS v. MURPHY et al.

(Supreme Court of Georgia. Jan. 14, 1895.)

RES JUDICATA — CLAIMS AGAINST ESTATE — AFFIDAVIT OF ILLEGALITY.

1. In the absence of fraud or collusion between an administrator and a creditor of an estate, a judgment regularly rendered in a court of competent jurisdiction in favor of such creditor against such administrator is conclusive, as to all matters adjudicated thereby, upon legatees and all other creditors of the estate.

2. Where an issue was formed in a justice's court upon an affidavit of illegality, and the affiant failed to appear to prosecute the same, the proper practice was for the court to dismiss the affidavit of illegality, and not to render judgment against the affiant upon the merits of the issue. Where, however, in such a case, the latter judgment was rendered, though erroneous, it was not void, and, if acquiesced in by the affiant, became conclusive upon him and his privies.

(Syllabus by the Court.)

Error from superior court, Upson county; J. J. Hunt, Judge.

Action by William R. Murphy & Co. and others against D. P. Morris. Judgment for plaintiffs, and defendant brings error. Reversed.

Simmons & Corrigan, for plaintiff in error. M. H. Sandwich and Hall & Hammond, for defendants in error.

ATKINSON, J. 1. In 1878 a judgment was obtained, and in 1879 an execution issued thereon. In 1882 another judgment by a different plaintiff was recovered against the same defendant. In 1893 the execution issued on the older judgment was levied on certain land as the property of the defendant in execution, and he, between the date of the rendition of the judgment and the date of the levy, having died, the administrator upon his estate filed an affidavit of illegality to the execution, on the ground that the judgment which was the basis of plaintiff's execution was dormant, and that the same had not been revived within the time allowed by law. Two other executions, in all respects similar to the one then proceeding, were issued in favor of the same plaintiff, but we

do not deem it necessary to set out in detail all the entries thereon nor proceedings thereunder, as the same questions are involved with reference to each, and may be fairly stated in our discussion of the questions arising upon a consideration of one of them. The illegality thus filed came on to be heard, and, the administrator neither appearing in person nor by counsel, the court, upon tender of issue by the plaintiff in execution, after hearing evidence, rendered a judgment overruling the affidavit of illegality, the effect of which was an adjudication in favor of the validity of the judgment upon which said execution was issued. Afterwards, the plaintiff seeking to enforce this judgment, the plaintiff in the junior execution above referred to, but whose judgment had in the meantime become dormant, though the time allowed by law, in which it might be revived had not then elapsed, instituted equitable proceedings, and sought thereunder to enjoin the enforcement of the judgment and execution then proceeding against said estate, upon the same grounds that were made and set up in the affidavit of illegality as filed by the administrator. Upon the hearing of the application the court granted an injunction. There were certain affidavits introduced upon the hearing, and, as well, certain documentary evidence; but, as the questions which control this case arise under the facts hereinbefore stated, the consideration of this additional evidence is not necessary to a correct determination of this case.

The grant of this injunction and the exception to its allowance present for the adjudication of this court the question as to whether all creditors of an estate, either by judgment or otherwise, are so far in privity with an administrator thereof as that a judgment in favor of one of such creditors against the administrator is conclusive upon all questions adjudicated thereby as between himself and other creditors. It is a well-recognized and universal rule of law that judgments unexcepted to and unreversed are, upon all matters which were or ought to have been adjudicated thereby, conclusive as between the parties thereto and their privies in estate. "Privity" is defined to be," says Black on Judgments (volume 2, § 549), "a mutual or successive relationship to the same rights of property; and the common law writers classify privies as privies in law, in blood, or in estate, sometimes adding as a fourth class privies in representation. But, for the purposes of a discussion of the doctrine of res judicata, this classification is of no practical importance, and if a person is bound by a judgment as a privy to one of the parties it is because he has succeeded to some right, title, or interest of that party in the subject-matter of the litigation, and not because there is privity of blood, law, or representation between them, although privity of the latter sort may also exist. The person who is to be thus connected with the judgment

must be one who claims an interest in the subject affected through or under one of the parties. Every person is a privy to a judgment whose succession to the rights of property thereby affected, coming through one or other of the parties, occurred subsequent to the commencement of the suit." "All privies are, in effect (with reference to the operations of judgments) if not in name, privies in estate. They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner, and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest. The manner in which the estate was lawfully acquired neither limits nor extends the operation of the estoppel by a former adjudication, and is therefore immaterial. It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." 1 Freem. Judgm. (4th Ed.) § 162. The administrator is in law the personal representative of the deceased. He is, for all practical purposes involving the administration of his affairs, a legal substitute for the deceased. Clothed, as a trustee, with the duty of administering all the assets which may come into his hands, and applying the same under the statute of distributions, it is his duty to represent the estate in any litigation in which it may become involved, to prosecute suits in favor of, and defend suits against, the estate he represents. He is the party chosen of the law to whom these interests are committed. No person other than he for and on behalf of the estate can, in his own name, as matter of right, prosecute or defend a suit in which his estate is interested as plaintiff on the one hand or defendant on the other. The administrator, with respect to such matters, stands upon the same footing as the deceased. It will not be seriously insisted that a judgment rendered against a person in his lifetime, with due notice of the pendency of the action, fairly rendered, and to which no exception was by him taken, could thereafter be called in question by a creditor of such a person. No more can it justly be said that his estate would not be equally bound where a judgment, under similar circumstances, has been rendered against his administrator. In contests which arise between the administrator and third persons who are indebted to the estate the administrator represents all persons who may be interested therein either as heirs or creditors. As against persons preferring claims against the estate, the administrator likewise stands as the representative of the estate and its interests for and on account of heirs at law and all other creditors. Through him alone can they reduce to present possession any of the credits or assets of the deceased, or make the same available for the purposes of dis-

tribution. If this were not true, and on the contrary each individual creditor and heir at law were authorized in his own name to bring suits and collect assets, no man could afford to submit to a judgment rendered against him at the suit of an administrator, because the acquiescence therein might subject him to further suit at the instance of any other person who might conceive that he had a claim against the estate. So, persons indebted to the estate could never pay the administrator, for fear some outside creditor, upon his own account, might bring a suit against them. To hold that each individual creditor might, upon his own behalf, proceed with the collection of his debt from the debtors of the estate, without the intervention of the administrator, would involve the whole affair in the most inextricable confusion; for if one creditor could so assert his right outside of the administrator another could do so, and a man who was so unfortunate as to find himself the debtor of an estate would in every individual instance be compelled to file a bill of interpleader to determine whether he should pay the money, and who was entitled to receive it. The law avoids all this confusion by nominating the administrator in advance as the stakeholder, and compels creditors, through him, as against the estate and its debtors, to enforce their demands. It is only through the administrator that a creditor can compel the payment of debts due the estate, for the reason that there is no direct privity between individual creditors and debtors of an estate. The only privity existing between the administrator and a debtor of the estate is such as results from the pre-existing relation between the intestate and the debtor, and privity of some sort is essential to the maintenance of an action. Inasmuch as it is the duty of the administrator to collect the assets of the intestate, and inasmuch as outside creditors are not authorized to interfere with the collection of such assets, it is the corresponding duty of the administrator to defend all suits that may be brought against the estate. It thus being his duty, for and on account of the estate, to prosecute and defend such suits as its interests might seem to require, and he being not only a proper but an indispensable party thereto, it were ill to say that the judgment would have no binding force as against the estate. If it be binding upon the estate, it must of necessity be binding upon creditors who could have no interest except such as was derived from his privity with the administrator. An outside creditor, if he can do so at all, can only interfere as a party to such litigation when he shows that because of some wrongful act of the administrator his debt is likely to be imperilled. So that in this case it was the duty of the administrator, when a creditor of the estate sought to subject this land, under a pre-existing judgment, to the payment of his debt, and when he conceived that he had good

cause for so doing, to have filed this affidavit of illegality. It was his duty to have prosecuted it to a successful termination, if that could have been accomplished. Failing in that, the judgment overruling the affidavit of illegality must be taken as binding upon the administrator upon the point made in that affidavit, and, inasmuch as no person other than the administrator has any right to interfere, then this complainant cannot be heard to impeach the judgment with which the administrator was himself satisfied. Of course this whole argument proceeds upon the idea that this judgment was fairly rendered. If the administrator and one creditor permit a collusive judgment to be taken which may operate as a fraud upon other creditors, they may, for that reason, impeach and set it aside. Such creditors may also have their election to proceed against the administrator and his bondsmen. But in this case there is no intimation that this judgment is void for any such reason. If, without collusion with the plaintiff in execution, who is a creditor, the administrator negligently permit a judgment to be rendered against him to the prejudice of other creditors, then the administrator and his bondsmen might be answerable to such creditors. So far, however, as this record discloses, the administrator filed this affidavit of illegality in good faith, intending to insist upon it, but simply, for some reason not disclosed by the record, failed to be present when it was tried, and did not except to the rendition of the judgment thereon. He is simply in the situation of a defendant in execution who has permitted a judgment to be rendered against him by default. For this reason alone a judgment cannot be impeached or set aside. If void for any other reason, that reason must be alleged and proven. The effect of this disposition of the affidavit of illegality is to adjudicate that the judgment which was enjoined was, as against the attack made by the equitable petition, a valid, subsisting judgment, and entitled, according to its priority, to participate in the distribution of this estate. This question of the administrator, in behalf of all concerned, has been fully heard, and we hold that both heirs and creditors are concluded.

2. Where an affidavit of illegality is filed to an execution, and when the case comes on to be heard the affiant in the affidavit of illegality does not appear, the proper practice is for the court to dismiss the affidavit of illegality and not adjudicate upon its merits. If the court, however, proceed to final judgment upon the merits, such a judgment is not void. It is at most only irregular, and, if not excepted to, becomes binding as though in all respects regular. The practical effect, however, of the dismissal and an adjudication upon the merits of an affidavit of illegality is the same, for no second affidavit of illegality to the same execution for the same reason assigned in the first can ever be received. Therefore, as to questions made in

the affidavit of illegality, where the same go to the validity of the judgment, it would make little practical difference whether the affidavit be dismissed or be adjudged adverse upon its merits to the party filing the same. Judgment reversed.

(95 Ga. 357)

BEALL et al. v. STOKES et al.

(Supreme Court of Georgia. Jan. 28, 1895.)
COURTS OF ORDINARY—JURISDICTION—GUARDIANS
FOR LUNATICS.

Courts of ordinary in this state have no jurisdiction to appoint guardians for lunatics residing in, and who have been committed to the lunatic asylum of, another state; and, where such a lunatic has an estate within this state, the superior court, in the exercise of its equitable powers, has jurisdiction over the same, and may, at the suit of the wife of such lunatic, upon proper allegations, appoint a receiver and take possession of and administer such estate.

(Syllabus by the Court.)

Error from superior court, Randolph county; J. M. Griggs, Judge.

Action by John H. Stokes, executor, and others against H. O. Beall, guardian, and others. Decree for plaintiffs, and defendants bring error. Affirmed.

Hood & Moye and Harrison & Peebles, for plaintiffs in error. Hardeman, Davis & Turner, W. C. Worrill, and W. B. Willingham, for defendants in error.

ATKINSON, J. It appears from the record in this case that the lunatic whose estate was involved in this litigation was a resident of, and had been committed to the lunatic asylum in, the state of Alabama. It appears further that he had an estate situated in the county of Randolph, in the state of Georgia, and that the wife and child of this lunatic, who brought this proceeding, were residents of the latter state; that a number of years ago, and while the lunatic was a resident of, and an inmate of the asylum in, the state of Alabama, the ordinary of Randolph county had appointed a guardian for that part of his estate which was situated in that county, who had taken possession of that property, and had refused, according to the allegations in the bill, to make any provision out of that estate for the maintenance of this wife and child. The wife, for herself, and as guardian for her minor child, brought a petition against the guardian, praying that a receiver be appointed by the court to take possession of the estate, and that the guardian be required to account, etc. Upon the hearing the court granted the relief prayed, and exception was taken to the granting of this order.

Under the view we take of this case, it is unprofitable to inquire into many of the matters and things set up in the defendants' answer. The Code of Georgia (section 1852) authorizes the ordinaries of the several

counties of this state to appoint guardians for idiots, lunatics, and insane persons, and deaf and dumb persons when incapable of managing their estates, habitual drunkards, and persons imbecile from old age or other cause, and incapable of managing their estates. The next section provides that such guardians shall take the same oath and give a like bond with guardians of minors, and their powers, duties, and liabilities shall be the same, and be exercised under the same rules and regulations. Courts of ordinary in this state are essentially local in their nature, and can exercise no extraterritorial jurisdiction. In order to bring the estate of a lunatic within the jurisdiction of a court of ordinary for a particular county, he must be, of necessity, a resident therein; otherwise, the power to appoint a guardian for such lunatic or his estate would vest in the court of ordinary for the county of which the lunatic was a resident. The jurisdiction of the court being thus confined to the limits of the county within which the ordinary assumes to exercise his authority, it follows that, though there be property in a county within the state of Georgia belonging to a lunatic who resides in another state, the court of ordinary has no power to issue letters of guardianship and extend its dominion and control over the estate of such nonresident lunatic. Such estates might be subject to control by a foreign guardian duly appointed under the provisions of our law for that purpose. But in the absence of such, if the interests of any person resident within this state should require it, the superior court, in the exercise of its chancery jurisdiction, has the authority, by and through a receiver, to administer such estate, and hold it to the use of such persons as might from time to time make their interests to appear. The wife and minor child of the lunatic in question were entitled out of his estate to a reasonable support, taking into consideration their station in life and the value of the estate. The highest obligation that a man can owe, whether he be a lunatic or otherwise, to society, is the obligation to maintain his wife and children. They are, in its strictest sense, preferred creditors, from a moral as well as from a legal point of view, and therefore, at their suit, upon proper cause, as stated in this petition, the superior court had jurisdiction to seize and administer this estate. Being citizens of Georgia, they will not be required to go into a foreign jurisdiction to sue a foreign guardian and call him to account in the courts of a foreign state, but, being creditors of this estate, the courts of this state, in the exercise of their chancery powers, will hold the property and administer it for the protection of their interests as creditors.

These considerations lead us to the conclusion that the appointment of this guardian, in the first instance, was without authority

of law; and, in the second instance, the mere fact that he was so appointed is no obstacle to the assertion by the superior court, through its receiver, of its dominion over this estate. The court committed no error in granting the relief prayed for by the bill. Let the judgment of the court below be affirmed.

(95 Ga. 359)

MERCER et al. v. HOUSTON GUANO & WAREHOUSE CO. et al.

(Supreme Court of Georgia. Jan. 28, 1895.)

INSOLVENT TRADER—APPOINTMENT OF RECEIVER.

1. Where one who had been engaged in the business of selling commercial fertilizers had sold out the business and his entire stock of goods, the mere fact that he retained notes received for the purchase of the same would not be evidence sufficient to prove his continuance in the business, as a trader, after the making of such sale.

2. It appearing from the evidence, fairly construed, that the defendant, at the time of the filing of the plaintiffs' petition, had ceased to be a trader, it was error to grant the injunction and appoint a receiver.

(Syllabus by the Court.)

Error from superior court, Terrell county; J. M. Griggs, Judge.

Action by the Houston Guano & Warehouse Company and others against J. R. Mercer & Co. and others for the appointment of a receiver. Decree for plaintiffs, and defendants bring error. Reversed.

J. H. Guerry, J. A. Laing, and J. W. Walters, for plaintiffs in error. L. C. Hoyle, L. L. Brown, J. G. Parks, Hall & Hammond, Payne & Tye, and M. Erwin, for defendants in error.

SIMMONS, C. J. This case was brought under the traders' act of 1891 (Code, § 3149a et seq.).¹ We have repeatedly held that this act is to be construed strictly, and that to entitle creditors to the relief provided for therein it must appear that the debtor was engaged in business as a trader at the time of the filing of the petition. *Comer v. Coates*, 69 Ga. 491, 493; *Blanchard v. Van Syckle*, 70 Ga. 278; *Coates v. Allen*, 71 Ga. 787. And, under the ruling in the case last cited, the mere fact that the debtor, after having sold out his business and stock of goods, retains notes received for the purchase of the same, and is engaged in collecting them, is not sufficient to prove his continuance in the business as a trader. It appears from the evidence in this case that the defendant sold out his buggy business on July 16, 1894, his warehouse and fertilizer business on August 1, 1894, and the remainder of his stock of guano on October 18, 1894. The petition was not filed until November 19, 1894. At that time the defendant was engaged simply in collecting what was due him and the bank

¹ These sections provide for the appointment of a receiver for an insolvent trader on a bill filed by creditors.

of which he was president. The defendant and the parties to whom he sold out his business, stock of guano, etc., testified that the sales were absolute and made in good faith, and the evidence introduced in behalf of the plaintiffs fails to show the contrary. Under this state of facts, the plaintiffs were not entitled to proceed against the defendant under the act referred to, and it was error to grant the injunction and appoint a receiver. Judgment reversed.

(95 Ga. 499)

JOHNSON v. STATE.

(Supreme Court of Georgia. Feb. 5, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL—RECORD—
HOMICIDE—INSTRUCTIONS—HARMLESS
ERROR—EVIDENCE.

1. The grounds of the motion for a new trial, so far as they relate to the overruling of the motion for a continuance, not being approved by the judge otherwise than by reference to a stenographic report of the evidence introduced in support of the motion to continue, are not verified in such manner as to require consideration by this court. Even if they had been properly verified, it would not appear that the court erred in refusing a continuance, the absence of the alleged leading counsel of the accused not being sufficiently accounted for; and it not being in the least probable that he would ever be able to procure the attendance of the absent witness, who resided in Rhode Island, and on account of whose absence the case had been continued at the preceding term.

2. The ground of the motion assigning error upon the charge of the court upon the subject of the character of the accused for peaceableness was not approved at all, and therefore cannot be considered. The request to charge upon this subject was argumentative, and stated the law too favorably for the accused. The other requests to charge, including one with reference to the law of reasonable doubt, were, so far as legal and pertinent, covered by the general charge of the court.

3. Where, during the progress of a trial, the court refused to allow the introduction of certain evidence, on the ground that the same was irrelevant, and afterwards this evidence, in the opinion of the judge, becoming relevant on account of the introduction of other testimony, and being then admitted, the refusal to admit it when first offered is not cause for a new trial, even if it was really relevant when so offered.

4. The evidence being such that the jury might have found the accused guilty of the crime of murder, and the verdict being for voluntary manslaughter, the accused has, in this respect, no cause of complaint. There was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Dodge county; J. J. Hunt, Judge.

Ebenezer Johnson, Jr., was found guilty of voluntary manslaughter, and brings error. Affirmed.

The following is the official report:

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the defendant did not have a fair trial nor the benefit of counsel, in this, to wit: At the last term of the court he had employed as his sole counsel E. T. Davis, of the city of Savannah, who continued, up to about two weeks before the

trial, his original, leading, and sole counsel in his case; that he fully expected his presence at the trial, and greatly relied upon him in the preparation of his case; that the defendant was all this time confined and imprisoned in the common jail of Bibb county, and had no opportunity or means to prepare his case or his evidence for the trial; that he was thus deprived of the presence and testimony of witnesses whose presence he could have procured had he been at liberty; that he depended solely upon the said E. T. Davis to make all the legal preparation of the case, but out of caution sought other counsel, but failed to employ any, and was unable to do so, for want of means, until about two weeks before the trial, when he was then, through his father and brother, enabled to employ J. W. Preston, Esq., of Macon, Ga., who had no knowledge of the facts of the case, nor was previously acquainted with the defendant, and who knew none of the witnesses, nor the people of Dodge county, and was not in a condition to do more than to prepare the law of the case; and that under these circumstances he was forced to trial without benefit of counsel. This ground of the motion was only approved in so far as sustained by the report of the stenographer, setting forth the facts on the motion to continue. It appears from the record that, upon the motion to continue, defendant testified that he had no counsel employed except E. T. Davis, of Savannah, who is absent; that Davis wrote to defendant that he would be present, and defendant had the letters showing the fact; that he fully expected Davis to be present until, the night before, a telegram was sent from him, which is in court, that he was sick and could not come; that witness had made all the efforts possible to prepare his case for trial, had been in jail in Bibb county since his arrest the August before, had no acquaintance with anybody there, and had been unable to get other counsel until about two weeks ago he succeeded in employing Mr. Preston, of Macon; that until then he greatly relied upon Mr. Davis, and now greatly relies upon him, as he has been depended upon solely to prepare the case; that he needs Mr. Davis in the case, and does not think he could go safely to trial without him, Davis knowing more about the case than any one else, having been engaged in preparing since the last term, and being employed for that purpose; that he had not employed any counsel except Mr. Davis and Mr. Preston; that Mr. Loud appeared when the case was called at the last term; that Mr. Davis wrote the motion for continuance, but had nothing to say in the argument of the motion. Defendant's father testified that he employed Davis since the last court, and paid him to prepare the evidence in the case, also sent a telegram to him; that Davis wrote him the week before that he, Davis, would meet witness "here Friday night,"

but witness went to the depot and found that Davis did not come.

In a note to the bill of exceptions the judge states: "It should appear, in connection with this exception, that defendant continued the case at the previous term of the court, and at that time had other counsel than Mr. Davis, namely, Mr. Loud and [Mr. Preston], that at the last trial Mr. Herman testified that he represented defendant only in a motion to continue, and was not in the case after that time,—the preceding term; that Mr. Loud was not present nor attending the term at which defendant was tried; that a telegram, not addressed to the judge, but to defendant or his counsel, from Davis, saying he was sick, was brought to the attention of the court; and that no evidence was submitted showing that Mr. Davis had taken any steps, as counsel, to prepare the case for trial, except that defendant swore he relied on him to do so, and, although in communication with defendant's father prior to the convening of the court, [he] took no steps to prepare the case or make known his inability to attend court."

Error in denying the motion for continuance on the ground of the absence of a witness, Satuwick, who was present at the time of the killing, and by whom defendant expected to show that he saw and heard of the rencounter, and that he, Satuwick, went and picked a knife up at the place of the rencounter; that, though the witness resided out of the state and in Rhode Island, he yet hoped to have the witness present at the next term, and expected him to be present at the next term. This ground was disapproved except in so far as it agreed with the record. The record shows that, on the motion for continuance, defendant testified that he had an absent witness named Satuwick; that he had made efforts, through Davis, to have him present; that he expected to prove by Satuwick that he was present at the shooting, saw it all, and picked up the knife; that he expected to have the witness present at the next term; that he is informed that Davis made efforts to get this witness here; that the witness is not absent by defendant's procurement or consent; that he did not suppose Satuwick had been subpoenaed, and did not know what Satuwick would swear by his, defendant's, own knowledge, and never talked to him about it. One Clark testified that he talked with Satuwick, and Satuwick said that when the gentlemen had taken up Currie from where he fell, and carried him away, he came to the spot, and found and picked up a small knife with three blades, one blade open, and carried the knife to the room where Currie was, and asked whose knife it was, and Mrs. Currie said it was Bill Currie's knife, and took the knife. In a note to the bill of exceptions as to this ground the judge stated that at the last term the case was continued by defendant, and one of the grounds of his

motion was the absence of Satuwick, and that in his last motion to continue defendant stated he did not know of his own knowledge what Satuwick would swear, but that this should be considered in connection with Clark's testimony on the motion to continue. The subpoena docket showed that a subpoena had been issued for Satuwick.

Also because the court erred in ruling out the evidence of Clark, who was offered by defendant to testify to a previous quarrel between deceased and defendant, during which deceased threatened defendant's life, to wit, that if he ever went to his mother's house to see his sister Ruth again he would have to take the consequences; and that while the court, some hours afterwards, during the trial, reconsidered his ruling and restored the evidence, the court remarked that, since the witness Wilcox had been allowed to testify to the quarrel without objection, he would not allow the evidence of Clark to go in,—all of which had a tendency to affect the minds of the jury against defendant. This was approved, with the qualification that when Clark's testimony was ruled out the court stated he would exclude it for the present, and later on would determine whether it should be admitted.

Error in refusing to allow defendant to prove by Mrs. Laslie that she saw a gun in the post office—being the place where Miss Ruth Currie, about whom the difficulty occurred, was engaged in the daytime—a short time before the killing, it having been stated by defendant's counsel that he expected to show that the deceased placed it there, and a pistol in his mother's house, with the statement that he intended to kill defendant. This ground was approved, with the qualification that the court excluded the evidence as inadmissible at the stage of the trial when presented, saying that it might or might not be admitted later, if authorized by proof of other facts to connect it; and that, if it should be subsequently shown, by evidence, that deceased had placed the gun in the post office, or had any connection with its being placed there, the witness might be recalled.

Error in refusing to give in charge the following written request from defendant: "That character is admissible in all cases of homicide, whether doubtful or not, the object of such testimony being to explain motive or the absence of motive, upon the idea that a man of bad character would likely do such acts as charged, and that a good man would not. Evidence of character is not confined to doubtful cases, but is admissible in all cases. The jury have a right to consider the character for the purpose of accepting or rejecting his statement, and weighing it as against, and as corroborative of, sworn evidence; and, whenever the case is doubtful, character should control the jury, in favor of the innocence of the prisoner. If the jury should believe from the evidence that the deceased, Currie, had threatened the defendant

repeatedly, and had threatened to kill defendant on the next day (being the day of the homicide), had repeatedly ordered him from his mother's house, had made preparation and done acts of preparation by placing a gun at the post office, where his sister was accustomed to be in the daytime, and a pistol at the house, where she was accustomed to be at nights, and these facts were all known to the defendant, and that the defendant had declined to enter into any struggle with the deceased, and had remonstrated with him, and expressed to him his desire that there should be no difficulty between them, these facts may be considered by the jury in determining the motive of the defendant, and to rebut the presumption of malice, and to shed light upon the conduct of the parties at the time of the killing. If the jury should believe from the evidence that the meeting of the deceased on the day of the homicide was accidental, and that, with a knowledge of the threats, with the feeling of the deceased against him, the defendant asked an explanation of the treatment of him by the deceased, with no purpose of a difficulty, but with a purpose to bring about a better understanding and a reconciliation between them, and when thus approached deceased spoke to him in a threatening manner, and at the same time raised his right hand in an attitude to strike him with an open knife, the defendant was not required to wait until he was struck, but had a right to resist with sufficient force for his protection; and if he believed that his life was in danger, and that the danger was imminent and pressing at the time, and having reasonable fear that his life was in peril, he had a right to shoot; and if, under these circumstances, he killed the deceased, he would be justifiable, and you would be authorized to so find. Request to charge reasonable doubt, of each grade, murder, voluntary manslaughter, and if the jury have doubts as to any and all grades of the offense charged you should give the defendant the benefit of the doubt, and acquit."

J. W. Preston and E. T. Davis, for plaintiff in error. Tom Eason, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

ATKINSON, J., not presiding.

(95 Ga. 419)

KAHN v. CITY OF MACON.

(Supreme Court of Georgia. Feb. 27, 1895.)

DISORDERLY CONDUCT—GAMBLING IN PRIVATE ROOM.

Quietly playing and betting for money at a game of cards in a private room, although the room be situated over a barroom, and the gaming be done on the Sabbath morning, while an offense against the penal laws of this state, is not "disorderly conduct," as against the municipal ordinances of the city of Macon, it not appearing that the offense was in any sense publicly committed, that the public was in any manner disturbed thereby, or even had any

knowledge of the same until the participants in the game were discovered and detected by the police officers who made a "raid" upon the room for that purpose. It was the duty of the officers to enter the room for the purpose of suppressing the offense and arresting the offenders, and it was the duty of the recorder, when one of them was brought before him, to bind such offender over to the state court for the offense of gaming; but the recorder had no authority, under the facts stated, to impose a fine as for a violation of any municipal ordinance of that city.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Lee Kahn was convicted of disorderly conduct, and brings error. Reversed.

E. A. Cohen, for plaintiff in error. Minter Wimberly, for defendant in error.

SIMMONS, C. J. Kahn was tried before the recorder of Macon for disorderly conduct and gambling. He was fined \$25, and was bound over on the charge of gambling. He took the case by certiorari to the superior court, where the certiorari was dismissed, and to this ruling he excepted. The testimony before the recorder was: About 2:30 a. m., Sunday, March 5, 1894, the chief of police of Macon, having been informed that there was gambling going on over a certain barroom in that city, took with him some officers for the purpose of "raiding" the place. The door was opened by one of the officers with a false key. The defendant was present. There was a card table in the room, on which were chips and cards, and some other men in the room were jumping up and leaving the table when the chief of police entered. During the night card playing for money had been going on, and the defendant had participated in the game. The defendant introduced no testimony, but took the position that, if there was proof of any offense, it was that of gambling, which is a state offense, and therefore the recorder had no jurisdiction in the matter except to bind the defendant over, and no right to impose a punishment for the offense as proven. Whereupon the recorder cited section 372 of the Code of the city, as follows: "Any person who shall be found in the streets drunk, acting in a disorderly, riotous, tumultuous manner, or who shall be guilty of an act against the public safety, morality, and decency not herein specified, shall be arrested by the officer of the police force and confined in the city prison, until such time as he can be brought before the recorder to be dealt with as he may see proper." The recorder, under this section, imposed a fine, and bound the defendant over, as above mentioned. In his answer to the certiorari the recorder stated that, the charge being "gambling and disorderly conduct," petitioner could be fined for the disorderly conduct and committed for the gambling; and that he was guilty of disorderly conduct, because he was engaged at the time of his arrest in violating the penal

statutes of the state, and was one of an assembly of persons on the Sabbath day where gambling was carried on. Under the facts stated, the plaintiff in error was properly arrested and bound over to the state court, authority to make arrests and bind over in such cases being granted in the city charter (Acts 1893, p. 240, §§ 59, 74), but the recorder had no authority to impose a fine as for a violation of the municipal ordinance above quoted. Where an act is punishable under a general law of the state, a municipal corporation cannot punish for it as an offense against the municipality, unless there is an express legislative grant of authority so to do. "The legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist." 1 Dill. Mun. Corp. (4th Ed.) § 368; Mayor, etc., v. Hussey, 21 Ga. 80; Jenkins v. Mayor, etc., 35 Ga. 147; Vason v. City of Augusta, 38 Ga. 542; Reich v. State, 53 Ga. 73; Rothschild v. City of Darien, 69 Ga. 503; and see opinion in Hood v. Von Glahn, 88 Ga. 409, 14 S. E. 564. Such authority will not be implied from the "general welfare clause" in a municipal charter, or the grant of power, in general terms, to punish for offenses against the peace, good order, morality, and decency of the community; and an ordinance providing in such terms for the exercise of this power is not to be construed as applying to acts penal under the law of the state. See cases cited supra. There is no provision of the charter of Macon which expressly authorizes the recorder to impose a punishment for gambling; nor was it contended that it could be punished as an offense against the municipality, under that name; but it was claimed that the act in question was "disorderly conduct," and under the ordinance referred to could be punished as such. The claim that it was "disorderly conduct," however, rested wholly upon the fact that it was gambling, a violation of the penal law of the state; and this fact, as we have shown, so far from being a reason why the corporation could punish for it as disorderly conduct, was a reason why the act could not be dealt with at all as an offense against the municipality. The case differs from those of McKee v. Mayor, etc., 59 Ga. 168, and Karwisch v. Mayor, etc., 44 Ga. 204, relied on by counsel for the defendant in error. In the present case, so far as appears from the record, there was no disturbance of the public. The playing was carried on quietly, and not in any sense publicly. Although the room in which it was conducted was situated over a barroom, it does not appear that there was any communication between the two places. There was nothing independently of the fact that it was gambling which would render the conduct in question an offense of any kind. It follows from what we have said that the court below erred in dismissing the certiorari. Judgment reversed.

(95 Ga. 522)

WESTERN UNION TEL. CO. v. DAVIS.

SAME v. DUNCAN.

(Supreme Court of Georgia. Feb. 27, 1895.)

TELEGRAPH COMPANIES — DELAY IN FORWARDING MESSAGE.

In both of these cases the evidence, fairly interpreted, shows that the defendant exercised at least ordinary diligence in forwarding the messages, and that the delay in getting them to destination was not, under the circumstances, unreasonable or negligent. In the first case the verdict rendered in the county court in favor of the plaintiff for the statutory penalty was contrary to law and the evidence, and ought to have been set aside. In the second case the finding in the county court in the defendant's favor was right, and ought to have been sustained.

(Syllabus by the Court.)

Error from superior court, Houston county; C. L. Bartlett, Judge.

Action by W. C. Davis and J. P. Duncan against the Western Union Telegraph Company. Judgment for Davis, and defendant brings error. Judgment in the second case for the telegraph company, which was set aside in the superior court, and defendant brings error. Judgment in each case reversed.

The following is the official report:

Davis sued the telegraph company in the county court of Houston county to recover the statutory penalty for failure to deliver a message sent by him from Macon to his wife at Perry, Ga. Before the introduction of evidence defendant moved the court to dismiss the case because it appeared upon the face of the declaration that the court had not jurisdiction of the subject-matter, the suit being for the statutory penalty, and neither the act creating the liability of defendant for the penalty nor the act under which the court was organized giving it jurisdiction of the cause. This motion was overruled. There was a verdict for plaintiff for the penalty of \$50. Defendant took the case by certiorari to the superior court, alleging that the court erred in overruling said motion to dismiss, and that the judgment or verdict was contrary to the evidence, and without evidence to support it. In the superior court the certiorari was overruled, to which ruling the defendant excepted.

From the evidence for plaintiff the following appeared: The telegram was delivered at the office in Macon between 2 and 3 o'clock, July 25, 1893, plaintiff paying the charges for transmission. Defendant had an office in Macon and one at Perry, and had wires connecting the offices. Mrs. Davis lived within the incorporate limits of Perry, and within 500 yards of the telegraph office at Perry. The telegram was received by the operator at Perry between 9 and 10 o'clock on July 26th. On July 25th the wire between Perry and Ft. Valley was not working from 7 o'clock until about 9 or 10 o'clock the next day. The operator at Perry did not know what the matter was, and could get no communication

on the wire at all. A message from Macon to Perry had to be first sent to Ft. Valley, and transferred from there to Perry. A very few minutes after, the wire commenced to work. As soon as it began to work well, the Perry operator received the message in question, and another. As soon as he received them he copied them, put them in an envelope, and gave them to one Smith for delivery. It took the operator from 5 to 15 minutes to copy them. He saw Smith start off with them, immediately, he thought. The operator at Perry wrote Rodgers, the railroad agent at Ft. Valley, a letter, which went on the 1:45 train, that the wire was not working. The operator had discovered on the 25th, between 7 and 8 o'clock, that the wire was not working, but did not notify Rodgers by the morning train, because he thought the trouble was that the keys were open at Ft. Valley, and they would shut them back as they had done before. He did not know what was the matter. It is frequently the case that from some cause the wire fails to work for an hour or two, and then again begins to work of itself, and the Perry operator thought every few minutes this would be so. The telegram to Mrs. Davis reached Perry about 10 o'clock. Smith testified that when the telegrams were delivered to him he started out with them at once, delivering the other first, and then going straight to Mrs. Davis' and delivering the message to her; the distance, the way he went, from the depot to her house, going by to deliver the other telegram, being a mile and half, or about that distance. He thought he delivered the telegram to her at about a quarter of 11. It was admitted that if Mrs. Davis were present she would testify that she received the message between 11 and 12 o'clock on July 26th. The message requested her to have Davis met on the night of the 25th.

For the defendant the testimony was to the following effect: The message was received by its operator at Ft. Valley about 2 o'clock on the 25th, and was sent by him to Perry between 9 and 10 o'clock on the 26th. The reason he did not send it until the 26th was because the wire was down and he could not. The trouble with the wire was in the railroad office at Ft. Valley. There was no trouble in defendant's office there. The wire would not work at all after this message was received in Ft. Valley, on the 25th, and when defendant's operator reached his office at 8 o'clock the morning of the 26th he tried the wire, and it was still out of fix. When he found the wire was working he sent the message. He went to the railroad office to see if he could find out what the trouble was. Rodgers was in the railroad office, and they tested the wire, and saw it was in that office. It would not work either way, east or west. Rodgers said he would hunt for the trouble. Defendant's operator did not remember whether he, said operator, reported the trouble over the wire or not, and did not remember wheth-

er he notified the lineman to come the first day or not. He found the instrument would work, and sent the message in two or three minutes after. Rodgers was telegraph operator for the Central Railroad, in the railroad office. The Western Union wire from Perry to Ft. Valley passes through that office on its way to the Western Union office in Ft. Valley. When the Western Union operator at Ft. Valley, on the 25th, asked Rodgers about the wire, Rodgers went to his switch board and tested it and found the trouble was local, but did not know what was the matter; did not know what to do; was not a line repairer; did not know anything about the business of the line repairer; and did not know where to go. On the 26th, between 9 and 10 o'clock, the line repairer was in Ft. Valley, in Rodgers' office, at work on the wire. Rodgers supposed it might have been possible for him or the other operator to have found the trouble in the office if they had known where to look, or had known anything about that department, but they knew nothing about it. It was not their duty to know anything about it. There is a man hired and trained for that business. The line repairer lived at Smithville, and has 75 or 80 miles of line. He visits Rodgers' office regularly, on an average of twice a month, as often as is necessary. Rodgers, who had testified that the line repairer was in his office between 9 and 10 o'clock on the 26th, afterwards testified that he did not know when the line repairer came that day; was not thoroughly positive he was there, but thought he was there; that he did not know who notified the repairer, but he, Rodgers, did not; thought the letter from the Perry operator was the first notice he had of the trouble; and that the train from Perry got to Ft. Valley about 3 o'clock, and he got the letter, and then the Ft. Valley operator came, maybe at 3 or 4 o'clock. If Rodgers had devoted an hour and a half hunting for the trouble, it is possible he might have found it. It was no great trouble about fixing the wire after it was found. An expert operator might have fixed the wires if he could have found where the trouble was, but Rodgers did not know where to look. There are four instruments in Rodgers' office. He did not think it would have been possible to connect one of these instruments with the Perry wire, because the wire goes through a relay before it touches the switch board, and the relay was the one that was broken. Rodgers knows nothing about this, as he knows nothing about this department. He further testified: "We could take an instrument from one wire and put it to another if it was in good repair. I could take another instrument and connect with the Perry wire and work the Perry wire, but I did not have another instrument but what does forty times as much work as the Perry wire, and I could not afford to swap instruments. I keep no extra instrument."

Duncan sued the telegraph company in the county court of Houston county for the statutory penalty for the failure to deliver a telegram sent by him to Dr. Bunn from Ft. Valley to Perry, Ga., with due diligence, etc. The judge of the county court rendered judgment for the defendant. Plaintiff took the case by certiorari to the superior court, alleging that the judge of the county court erred in rendering such judgment, under the law and facts; and that the evidence showed that the telegraph company did not use ordinary diligence in sending the message or delivering it after it was received at Perry. The judge of the superior court sustained the certiorari and remanded the case to the county court for a new trial, to which judgment the telegraph company excepted.

The evidence for plaintiff was to the following effect: Plaintiff, at 3:30 p. m., July 25, 1893, delivered to defendant, at its office in Ft. Valley, during the usual office hours, the telegram in question. This telegram directed Bunn to gather pears that evening. Plaintiff paid the usual charges for sending the telegram. Defendant has a telegraph office in Perry and in Ft. Valley. Bunn resides in the corporate limits of Perry, his place of business is in Perry, and his residence and place of business are within less than a mile of the office of defendant. On July 26th, some time after 10 o'clock in the morning, Smith, messenger for defendant, brought the message in question to plaintiff's office, and inquired of him where Bunn was. Bunn received the telegram at 10:45 o'clock a. m., July 26th. He was at his residence, where the telegram was delivered. If the message had been brought to his place of business, and thence to his residence, it could have been delivered within 15 minutes.

For the defendant the evidence was to the following effect: When defendant's operator at Ft. Valley received the message from plaintiff he knew his wire to Perry would not work, having found it out at 2 o'clock p. m., July 25th. Some time during the afternoon of the 25th he went to the railroad office, through which office all messages from Ft. Valley to Perry passed, and with the agent at that office tested the Perry wire, and found that the trouble was in that office, and that the instrument would not work. Previously, on the same afternoon, the railroad operator at Ft. Valley had received a letter from the operator at Perry, on the afternoon train, telling him that the Perry wire would not work. Defendant's operator at Ft. Valley made no examination to find out what the trouble was, as that was not a part of his business, but was the lineman's business. If he notified the authorities or linemen he does not remember it, and the railroad operator did not inform either the lineman or the authorities that the instrument was out of order. The line-

man lives at Smithville, and could not have reached there, if notified, until 10:20 a. m. on the 26th. When defendant's operator at Ft. Valley went to his office at 8 o'clock a. m. of the 26th the wire was still down. At 9:13 a. m. he found that the wire had come up, and at 9:15 sent the message in question to Perry. The message could have been sent and received at the Perry office in one minute. The instrument that would not work could have been easily detached, and one put in its place that was all right. Defendant's operator at Ft. Valley had nine instruments in his office. The first that the railroad operator knew of the trouble was when he received the letter from the Perry operator. He had had no occasion to use that day the instrument which was out of order. He, the railroad operator, made no examination of the instrument, did not know what the trouble was nor where to look for it. If he had known where to look for the defect he might have found it and repaired it; but that was the lineman's duty and not his. The lineman has charge of about 80 miles of line, came to Ft. Valley about twice a month, and was in the office at work on the morning of July 26th. The telegram was received at Perry between 9 and 10 o'clock a. m., July 26th, and as soon as the operator there could copy it and another message which came at the same time he sent them by Smith to be delivered. He knew at 7:30 a. m., July 25th, that the line would not work, and could have notified the authorities by the train which left Perry at 8 o'clock a. m., but did not notify them until the afternoon train left Perry, when he wrote the railroad agent at Ft. Valley, his reason being because he believed the wire would come up. He had had the wire fail to work, and in a short while it would be all right. He had had his instrument get out of repair, and either fixed it himself or had another at Perry fix it for him. When the telegram was delivered to Smith he went first to plaintiff's office and inquired for Bunn, doing so because Bunn was in the habit of being there very often. From plaintiff's office by Bunn's office was directly on his way to Bunn's residence. Plaintiff told him that Bunn was either at his own office or at home. He went to Bunn's office, and, not finding him there, went to his home, where he delivered the telegram. Did not know what time it was, but supposed it was about 10:30 a. m.

Gustin, Guerry & Hall, for plaintiff in error. J. P. Duncan, W. C. Davis, and Hardeman, Davis & Turner, for defendants in error.

PER CURIAM. Judgment in each case reversed.

(95 Ga. 718)

DAVIS v. DODSON et al.

(Supreme Court of Georgia. April 1, 1895.)

LAW PARTNERSHIP — CONTRACT OF ONE PARTNER
—NEW TRIAL.

1. It is not within the scope of the business of a law partnership to collect choses in action without charging for services rendered in so doing. Therefore, where one member of such a firm, being the owner of a promissory note, sold it to a third person, a part of the consideration of the sale being that the seller's firm would collect the note without charge, this contract was not binding upon another member of the firm. The seller had no power, by virtue of the partnership, to bind his partner by any such contract; and as to the latter it was also without consideration.

2. The verdict was demanded by the evidence, and the newly-discovered evidence was not such as ought to change the result.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by John Davis against Dodson & Moon. Judgment for defendants, and plaintiff brings error, and defendants file cross bill of exceptions. Brought forward from the last term. Code, §§ 4271a-4271c. Judgment affirmed, and cross bill dismissed.

Copeland & Jackson, for plaintiff in error. Payne & Walker, for defendants in error.

LUMPKIN, J. The plaintiff below, Davis, as executor of Hall, sued out an attachment against Dodson & Moon, a nonresident firm of attorneys at law, which attachment was levied upon land in Walker county as the property of Moon, one of the defendants. The case made by the declaration in attachment as amended was, in substance, as follows:

The defendants, as attorneys at law, received for collection from the plaintiff's testator a promissory note, at the same time giving him a receipt in the following words: "Chattanooga, Tenn., Dec. 23rd, 1886. Received of S. P. Hall a note on Larkin Payne, payable to E. M. Dodson, and indorsed by him, for fifteen hundred dollars, dated the 7th day of March, 1886, and due 12 months after date, with interest at the rate of 7 per cent. per annum from date, and secured by a deed of trust on 230 acres of land, the home place of said Payne, made to said Dodson as trustee, with power of sale. If said note is not paid at maturity we agree to foreclose the deed of trust by the first Tuesday in May, 1887, free of cost to Mr. Hall, and not to charge him any fees, this being the agreement under which he purchased said note and deed of trust. Dodson & Moon, Attys. at Law." The money due upon the note specified in the foregoing receipt was collected by the defendants, who failed and refused to pay the same over to the plaintiff. The defendant Moon pleaded, in substance, that he did not sign the receipt; that it was not signed by any one authorized by him; that neither he nor the firm of Dodson &

Moon, as such, ever had the possession, custody, or control, for collection or otherwise, of any such note or paper as was described in this receipt; nor did he or his firm, at any time or in any manner, collect or receive any money thereon, either as attorneys at law or otherwise; but that the giving of the receipt was the individual act of Dodson, for which neither Moon nor the firm was in any manner responsible. At the trial the plaintiff offered evidence to show that the receipt in question was signed by Dodson in the name of his firm, and that he afterwards collected the money due on the note, giving therefor receipts signed by him individually, and had failed to account for the money collected. No evidence whatever was introduced to show that Moon ever had any knowledge of the transaction, or had ever ratified the giving of the receipt to Hall. Nor was it shown that Moon ever had personal possession of the note, or recognized its possession by his firm, or that he took part in or knew of its collection by Dodson. On the contrary, as the receipt itself would seem to indicate, the truth of the matter probably was that Dodson traded to Hall a note payable to himself, and which he held in his individual capacity; and, as an inducement to Hall to purchase the same, undertook by the receipt to bind the firm of Dodson & Moon to collect the note free of charge. If the effect of giving the receipt was to obligate that firm to perform the service indicated, it is obvious that it would make no difference that Moon never took any active part in, or even knew of, the collection and misapplication of the money due on the note, for he would be responsible and liable for every act of Dodson while acting within the scope of his authority as a member of the partnership. Therefore the question presents itself whether Dodson, by virtue of his general authority to represent his firm, could, in a transaction such as that disclosed by the record now before us, make a contract binding alike upon his partner and himself as composing the firm of Dodson & Moon. We do not see how it can be seriously contended that it is within the scope of the authority of one member of a partnership, in a private transaction between himself and another, and in consideration of a benefit bestowed upon himself alone and not shared in by his partner, to undertake to bind his firm to any agreement whatsoever. In a transaction of this kind, he would be acting solely in his individual capacity, and not as a member of his firm. We had thought it a very universally recognized fact that lawyers are in the habit of charging their clients for services, and that the main object of forming law partnerships was the avowed purpose of reaping a goodly harvest of fees. In fact, complaint has frequently been made that lawyers are sometimes too diligent and overzealous reapers. But in all seriousness it would defeat the very object for which a law partnership was form-

ed if one of its several members were allowed, without the express assent of the others, to undertake to bind the firm to perform legal services without compensation either for the actual time and labor necessary to be expended or for the responsibility and liability the firm would incur by the undertaking. Certainly it is the right of an attorney, acting for himself alone, as a matter of charity or friendship, to collect a paper for another without charging a fee for his services; but the present case sufficiently demonstrates how serious and unjust a matter it would be if an attorney were permitted to thus bind his partner, without his consent, and with no remuneration for the risk incurred. We have yet to see the rare spectacle of an attorney at law, or a firm of them, rendering professional services gratuitously as a recognized and customary incident of the business in which they engage. We have long ago departed from the honorarium from which our ancient ancestors in this noble profession either wholly or partially derived their means of subsistence.

Under the facts shown on the trial, therefore, we have no hesitancy in saying the plaintiff failed utterly to make out a case. It was contended by counsel, however, that in the light of certain evidence, shown to have been discovered since the trial, a different result would be inevitable if a new trial were granted. The evidence relied on was a certain contract purporting to have been entered into between Dodson and Payne, and explaining how the former came into possession of the note sold to Hall, as follows: "This agreement made the 1st day of March, 1886, witnesseth: That Larkin Payne has this day given E. M. Dodson his note for the sum of fifteen hundred dollars, which is to become due one year after date, and has made a deed of trust on his lands in Dade Co., Ga., to secure the same. The agreement between us is that said Dodson is to negotiate said note to the best advantage possible, and for this purpose is to indorse the same, if necessary, and is to apply the proceeds of the note as follows: A judgment of about the sum of \$350.00 in the superior court of Dade Co. in favor of the estate of E. W. Forester, dec'd, now controlled by M. A. B. Tatum; whatever interest may be found in settlement to be due from me (Payne) to Wm. Glass on the mortgage heretofore given to him, if any; any balance of fees that I may be owing to said Dodson or to Dodson & Moon; and the balance he will pay over to said Payne. Nothing will be paid to William Glass until further order from said Payne. This 1st of March, 1886. E. M. Dodson. Larkin Payne." Instead of being impressed that this paper would aid the plaintiff's case, we are the more strongly convinced that in no sense, either legally or morally, is Moon liable for the misapplication by Dodson of the money which the latter collected upon the note intrusted to him by the plain-

tiff's testator. Under this contract, it is plain that Dodson, in his individual capacity, became the trustee of Payne to raise money upon the note, and apply it as directed. Certainly, it was not an undertaking on the part of the firm of Dodson & Moon, and Payne could not have held that firm liable in the event Dodson violated the trust. The mere fact that Dodson & Moon were named among the beneficiaries thereunder amounts to nothing, for it might as well be said that either of the other beneficiaries named in the instrument thereby became responsible for Dodson's execution of the trust, simply because a benefit would be conferred upon him by its faithful performance on the part of Dodson. The only effect of this paper upon the present case is to show that Dodson, instead of owning absolutely and in his own right the note he traded to Hall, at that time simply held it in trust for Payne for the purpose of negotiation, etc. With the performance of the personal and private obligations of Dodson his firm had nothing to do; so we think the newly-discovered evidence is favorable to the defendants rather than to the plaintiff, for it clears up the last doubt as to whether Dodson & Moon owned the note at the time it was traded to Hall, or had any interest in that transaction. Judgment affirmed.

ATKINSON, J., not presiding.

(96 Ga. 60)

PATTILLO v. ALEXANDER.

(Supreme Court of Georgia. April 1, 1895.)

COMMON LAW—PRESUMPTIONS—DEFAULT IN PAYMENT OF NOTE—NOTICE TO INDORSER—LIABILITY FOR ATTORNEY'S FEES.

1. In a suit upon a contract made and to be executed in the state of Tennessee, in the absence of any evidence to the contrary, this court will presume that the rules of the common law prevail there.

2. According to the rules of the common law, the indorser of a promissory note is entitled to have the same duly presented for payment, and of a failure or refusal to pay he is entitled to notice; and a failure of the holder to present for payment, or to give notice of nonpayment, discharges the indorser from liability.

3. Where, upon a promissory note executed and payable in the state of Tennessee to a named payee, or order, and containing no stipulation for the payment of attorney's fees, suit was brought by a holder against the payee, who had indorsed upon the note the following undertaking, signed by him: "I guaranty attorney's fees up to ten per cent. if this note has to be collected by law, on (and?) its prompt payment,"—there being no other indorsement of the paper by the payee: *Held*, that by the terms of this agreement, it having been made for the purpose and in the course of negotiation, the payee became and was an indorser thereof, and liable as such, with a superadded liability for such reasonable sums, not exceeding 10 per cent., as might be expended for attorney's fees by the holder in the collection of the note. *Held*, further, that, in order to bind the payee for the payment of the note, it was incumbent upon the plaintiff to prove presentment and notice of nonpayment. *Held*, further, that, in order to charge the payee with the payment of attorney's fees, it must appear that in the effort to re-

cover from the maker the sums due on the note the holder had incurred a liability, or had expended, for attorney's fees, the amount sought to be recovered from the payee, not exceeding 10 per cent. of the debt due.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action by W. I. Alexander against R. M. Pattillo. Brought forward from the last term. Code, § 4271a-4271c. Judgment for plaintiff, and defendant brings error. Reversed.

J. W. Akin, for plaintiff in error. J. B. Conyers and Graham T. Holtzclaw, for defendant in error.

ATKINSON, J. Except as controlling those matters which are so essentially local in their nature as to be at all times the subject of special statutory regulation, and which, by reason of this peculiar characteristic, are embraced within the term "local idiosyncrasies" of the law, the rules of the common law have been adopted in most of the states of the Union; and the property rights of the citizens of such states have been adjusted with reference to, and the laws governing the same administered in accordance with, its doctrines. This is the reason of the rule that, as to such matters concerning which there is no such recognized variance between the laws of another state and that law which is the common source of all our jurisprudence as will afford to the courts of different states a basis for judicial cognizance of such difference, the courts of one state will presume, in the construction of contracts executed and to be performed in another, that the rules of the common law prevail there, and will determine the rights of litigants accordingly. This is a salutary rule, and one which has been adopted in this state (see *Woodruff v. Saul*, 70 Ga. 271), and is one of such general acceptance as to be recognized by the courts of last resort in most of the states of the Union (1 Whart. Ev. § 314 et seq.; *Rape v. Heaton*, 9 Wis. 328; *Sherrill v. Hopkins*, 1 Cow. 103; *Monroe v. Douglass*, 5 N. Y. 447; *Brimhall v. Van Campen*, 8 Minn. 13 [Gil. 1]; *Newton v. Cocke*, 10 Ark. 169; *Seaborn v. Henry*, 30 Ark. 469; *Martin v. Powder Co.*, 2 Colo. 596; *Johnson v. Chambers*, 12 Ind. 102; *McAnally v. O'Neal*, 56 Ala. 290).

2. The contract of the indorser is not that he will at all events pay a bill which he has by the act of his indorsement transferred to another, but his agreement, by the common law, is to pay upon demand by the holder upon the drawer, and notice of nonpayment or of dishonor to him. The rule which requires notice to the indorser of nonpayment, as a prerequisite to his liability, is based upon the implied undertaking of the indorsee that he will use due diligence in the prosecution of his demand against the maker; that he will present the paper for payment immediately upon its maturity, and will not, by his negligence, expose the indorser to a hazard of loss, against which he, in case of notice of dishonor, might be

able otherwise to protect himself. And, if he fail to perform this duty to give timely notice of nonpayment, the law presumes injury to the indorser, and discharges him. A formal protest for nonpayment, though now, in this and many other states, required by statute, in certain cases, was not necessary by the law merchant, save only as to foreign bills of exchange; and as the present case involves only the application of the rules of the law merchant to the contract now under consideration, formal protest for nonpayment was not necessary here in order to bind the indorser. Protest was deemed necessary only as a certain and simple means of proving presentment of the paper, and the fact that the same was dishonored, and the rule requiring it was applicable only to foreign bills of exchange; and, as we have seen, except where required by statute, this formality is not requisite in order to bind an indorser. Notice to him of nonpayment, however, is nevertheless indispensable, as that is one of the conditions upon which he becomes liable upon his contract of indorsement. The time within which such notice was to be given was not fixed by any unvarying rule, under the common law. It was only requisite that demand be made immediately upon maturity of the paper, and that notice of nonpayment should be given within a reasonable time; and a reasonable time would depend to a great extent upon the means of transportation, and the facilities existing at the point where the paper was presented for payment for the transmission of that class of intelligence. In most of the states of the Union, by adjudged cases, where no statute prescribes the time within which notice shall be given, the term "reasonable time" has been defined with such certainty and precision as to afford almost a fixed rule upon that subject. This case being referable to common-law principles for its solution, as to whether or not this indorser received notice at all, and, if so, whether he received it within a reasonable time, taking into consideration the means of communication between the places where the paper was presented for payment and the residence of the indorser, would, if at all doubtful, present questions of fact for a jury, it being borne in mind that notice itself was indispensable to his liability. Chit. Bills, star page 443; *Daniel*, Neg. Inst. §§ 970, 971, 1035 et seq. But where the matter of fact, in the very nature of things, is not doubtful, the court may adjudge, as a matter of law, that in the particular case the notice is not given within such a time as legally to impose a liability upon the indorser. Of course, no rule can be framed by which it can be stated, as a matter of law, within what time, generally, a notice of nonpayment must be given in order to bind an indorser, for that would depend upon the particular facts of each case; but where the facts are undisputed, and the time allowed to elapse is manifestly unreasonable, it may be pronounced with perfect confidence that in a certain case

the notice was not timely given. The question then becomes one of law, and not of fact, and the court may and should pronounce thereon without submitting it to a jury. *Whitaker v. Morrison*, 1 Fla. 25; *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Sice v. Cunningham*, 1 Cow. 397, 1 Term R. 167; *Furman v. Haskin*, 2 Caines, 369. In the present case, according to the evidence in the record, some four months elapsed after the note became due before it was presented for payment, and a half a month more elapsed before notice of nonpayment was given. Surely, in this day of fast mails, instant communication by telegraph, and other equally effective means for transmitting intelligence, it can be with certainty said that a delay of 4½ months in giving notice of nonpayment upon a demand which should have been made, both maker and indorser living in populous cities, between which there is daily communication by telegraph and by mail, with a distance of not more than 100 miles intervening, is unreasonable, as a matter of law. The trial judge should have so directed the jury, and if they, though not so instructed, found to the contrary, the verdict was wrong.

3. The note sued upon in this case was executed in the state of Tennessee, and was made payable to the order of the present defendant, at the city of Chattanooga, in said state. Upon it the defendant made the following indorsement: "I guaranty attorney's fees up to ten per cent. if this note has to be collected by law, on (and?) its prompt payment. [Signed] R. M. Pattillo." Afterwards, suit was brought by the plaintiff, as the holder, upon this note, against the payee alone, upon this indorsement, as a contract of guaranty; and the defendant answered that, if liable at all, his liability was that of an indorser, and not as a guarantor, merely, and the holder having failed to demand payment promptly at maturity, and give him notice of dishonor, he was therefore discharged. The court ruled the contract of the payee not to be one of indorsement, and a verdict was rendered for the plaintiff. In order to determine the liability of the payee to the holder,—he being the only person against whom this action is brought,—it is necessary to inquire what is his true relation to this paper, according to the understanding and intention of the parties at the time. The note passed into the hands of the plaintiff, who was the immediate indorsee. In arriving at the intention of the parties, it is competent, necessary, and proper to inquire somewhat into the history of the transaction out of which this indorsement of this paper grew. The original maker had delivered the paper to the payee, and by the payee it had been negotiated, or was in process of negotiation, to the present holder. It was necessary, in order to invest the holder of this paper with such a title thereto as would enable him to demand its payment of the maker,

that there should be an assignment of the payee's interest to the holder. This might have been accomplished by an ordinary assignment, without liability over upon account of the paper to the holder at all, or it might have been accomplished by an indorsement by the payee, either in blank, or to this holder. A simple indorsement by the payee of his name upon the paper would have served the double purpose both of transferring the title to the holder, and of charging the payee with the obligation to pay in the event the maker, upon presentation, declined to honor it. Such an indorsement would have served to have fixed absolutely the liability of the indorser for the amount of the note. In the contemplated contract and plan of negotiation there was another element of risk, not provided for in the note, and against which the purchaser desired to protect himself; and there was therefore in contemplation of the parties a necessity for some guaranty beyond the point of mere redemption of the note in the event it was dishonored. The purchaser did not desire to incur the expense of a collection by law, and the note itself containing no stipulation for the payment of attorney's fees, in order to protect the holder against possible expense on that account, it was necessary in some way to charge the indorser with the superadded obligation to pay attorney's fees; and hence the form of indorsement employed by them. Negotiation and transfer of title was as much the object designed to be accomplished by the parties to this transaction as was the guaranty of ultimate redemption by the maker. To accomplish the fact of negotiation, and to effectuate this primary purpose, it was necessary to treat this entry upon the back of this note as an indorsement; otherwise, there was nothing which gave to the holder the right to demand payment of the maker. If, independently of this indorsement, there had been another simple indorsement by the payee upon the back of this paper, this simple indorsement would have had the effect to transfer the title to the paper, and, in addition, would have bound the payee to the same obligation under which he is now held, save only as to the attorney's fees; and such a condition of affairs might have afforded some ground for treating the indorsement now under consideration as a contract of guaranty only. Treating this indorsement as a guaranty only for the prompt payment of the note at its maturity, it would impose no greater obligation upon the payee than would a simple contract of indorsement; for the effect of a simple contract of indorsement is to transfer the title to the paper, and give, in addition, an implied guaranty of the solvency of the maker. The form of words employed in making this contract is not specially important, except in so far as it serves to throw light upon the nature of the undertaking upon the part of

the payee who signed it. It is the purpose designed to be accomplished, and which is legally accomplished by the fact of indorsement, which must at least determine the nature and character of the contract. The effect of indorsement upon a promissory note in the form employed by the parties to this transaction, made by one not a party to the paper, might be an entirely different thing than when employed by the payee, who designs to guaranty, not only the solvency of the maker, but likewise to transfer the title. In the former case,—that is, in the case of a stranger to the paper,—such a contract would import nothing more than a contract of guaranty, for the reason that he would have no title which he could transfer, and therefore the only object which he could legally accomplish by making such indorsement would be to guaranty the solvency of the maker. But in the case of the payee, who in the delivery of the paper may have a dual purpose to accomplish, and in a case where, in the course of the negotiation of the paper, and as a part of the transaction which resulted in a complete change of ownership, that interpretation is the more natural one which gives to this entry such force as an indorsement as will serve, not only to transfer by that act the title, but at the same time guaranty the solvency of the maker, with an enlarged and extended liability, resulting from the special guaranty of attorney's fees. Such a construction gives effect to every word contained in the special indorsement, and at the same time gives full expression to the intention of the parties, as manifested by the whole history of this transaction. This guaranty of attorney's fees was, as we have seen, necessary, or deemed such by the holder, as the ordinary contract of indorsement—the note itself not stipulating for the payment of attorney's fees—would not bind the payee, in the event of default, to the payment of expenses of collection, whereas, aside from this guaranty, the mere indorsement would otherwise fully bind the payee. Whatever seeming ambiguity may be involved in the terms "on" or "and" its prompt payment is instantly dispelled upon a careful analysis of the words employed in this special indorsement. The contract of guaranty imposed in this indorsement, by its very terms, whether read "on" or read "and" its prompt payment, committed the payee only to the payment of attorney's fees; the guaranty being to pay attorney's fees up to 10 per cent. if the note had to be collected by law, and its prompt payment. In the mere act of transferring the title, treating this as an indorsement, the payee had already guaranteed the prompt payment of the note at its maturity; and therefore there was nothing upon which the words "on its prompt payment" or "and its prompt payment," could operate, save only upon the payment of attorney's fees. It could not have been design-

ed to guaranty attorney's fees up to 10 per cent. "If this note has to be collected by law, on its prompt payment," because, if the note were promptly paid according to its tenor, it could not be collected by law; and therefore the words "on [if the doubtful word be so read] its prompt payment" cannot be construed to apply to the prompt payment of the note, for such a construction would impute to the parties a purpose to provide against a contingency which by no possibility could arise. Therefore, to give effect to the guaranty at all, the word must be read "and"; and the effect of this construction is to guaranty the prompt payment of the 10 per cent. attorney's fees in the event the note had to be collected by law.

The question then arises, does the word "and," as employed, operate to extend the contract of guaranty to the note, or is it confined in its operation to the attorney's fees only? The use of the words "and its prompt payment," instead of "on its prompt payment," could not be applied to the note, because such a guaranty would be wholly superfluous; for if, in the act of negotiation, the payee, aside from the special contract with respect to the prompt payment of the note, binds himself to the prompt payment of the note, it were idle to say that the words "and its prompt payment" were used with reference to the note itself, for by the act of indorsement, which involves, not only the physical act of signing his name, but delivery for the purpose of negotiation, being already bound to the payment of the note, and not bound to the prompt payment of attorney's fees, the words "and its prompt payment" must of necessity refer to the payment of attorney's fees, and not to the note. The evident object of this guaranty was to embody in the indorsement a feature of liability which would not inhere in the simple contract of indorsement itself; but the fact that the independent guaranty of attorney's fees accompanies the indorsement of the paper does not in any sense militate against the fact of indorsement. The contract of indorsement is not consummated by the mere signing of one's name upon the back of the paper. This is one of the constituent elements of a contract of indorsement, but, in addition to this, there must be a delivery of the paper. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of a mutual understanding with which the delivery was made by the indorser and received by the indorsee. Byles, Bills, 154. Let us test the effect of this paper by another illustration: It will be admitted that title in a chose in action is necessary to authorize the holder to maintain an action thereon against another. Suppose, instead of this being an action against the indorser of this paper to bind him as a guarantor or indorser upon this contract of indorsement, the action had been by the holder (suing in his own name)

against the maker of this paper. Suppose the maker had objected to its introduction in evidence upon the ground that it was made payable to a named payee, and had not been by him indorsed so as to vest title in the holder. It would have been competent to establish the contract of indorsement, and the consequent assignment of the title of this paper to the holder, by showing the actual signing of the indorsement now under consideration, and by showing, in addition thereto, that this contract was made in the course of the negotiation of this paper, and that in pursuance of its negotiation, under this indorsement, the paper was actually delivered by the payee to the present holder. The fact of delivery would have to be proven by extrinsic testimony. It might be presumed from the possession of the holder, but the purpose for which the delivery was made could likewise be established by parol evidence. There could be little doubt, under such circumstances, that, for the purpose of a transfer of title, this indorsement would have been held to be an indorsement by the payee. *Upham v. Prince*, 12 Mass. 14; *Blakeley v. Grant*, 6 Mass. 386; *Myrick v. Hasey*, 27 Me. 9. As another illustration, let us suppose that, instead of having sued the payee upon this paper as upon a promissory note, the plaintiff had sued him specifically as an indorser thereon, but in the same action with the maker, and in the county of the latter's residence, if within this state; and let us suppose that the payee had filed a plea to the jurisdiction, setting up that he was not an indorser upon the paper. It would have been competent for the holder of the paper to have established his liability as an indorser, and the consequent jurisdiction of the court, by showing that the payee, being the owner of this paper, made this indorsement in the course of its negotiation for the purpose of passing the title, and, in pursuance of this contract, delivered the same to the holder. Proof of the purpose for which he signed it, and that the delivery was made in order to effectuate the purpose to transfer the title, would bind him as an indorser. The plaintiff in the present case brings this action upon this promissory note and this alleged contract of guaranty, without undertaking to state distinctly how or wherein the payee would be liable to him upon the paper. There is no possible theory upon which, upon the paper itself, the defendant could be liable to the plaintiff, except upon the theory that this alleged guaranty by the payee was really operative as a contract of indorsement. If the promissory note in question had been delivered in pledge, merely as collateral security to a main obligation, and had been by the payee indorsed in the form here under discussion, there would have been great force in the assumption that this was a mere guaranty by the payee of the solvency of the maker of this note; for, if not intending to negotiate it at all, but merely to deliver it

in pledge, this guaranty had been made, it would not have had the effect to pass the title, but merely to guaranty the solvency of the maker of the note, and if, as ancillary to a suit for the recovery of the main debt, this action had been brought against this payee as a guarantor, this entry could not be treated as an indorsement of the paper, because the delivery in pledge is entirely consistent with the form of indorsement here employed, and, upon proof that by the act of delivery it was not designed to negotiate the paper, the idea of a design to enter into the technical contract of indorsement would be rebutted. Thus, at last, we see that the intention of the party, as manifested in the act of delivery, is the real key to the solution of whatever legal difficulties may surround the construction of this contract.

This discussion has proceeded, of course, upon the idea that this controversy is at first hand,—it is between the original parties to this transaction. The nature of the indorsement may be explained, as between these parties, by showing the purpose of the delivery. If the controversy had arisen upon a paper which was by its own terms negotiable, or which by subsequent indorsement in blank by the payee had been thus rendered negotiable, and upon such a paper this special indorsement had been entered by a holder other than the payee, and the issue had been thus between such an indorser, or an original payee of a paper negotiable by delivery only, and an innocent third party, different rules would prevail. To negotiation of a paper not by its own terms negotiable, indorsement or assignment is absolutely essential, and a contract of guaranty merely of the solvency of the maker could not amount either to an assignment or indorsement. The payee or a subsequent indorsee alone can enter into the technical contract of indorsement, because they in succession alone have power to transfer or assign the paper; but any person may guaranty the solvency of the maker, and be liable as a guarantor. In *Manufacturing Co. v. Jones*, 90 Ga. 307, 17 S. E. 81, Chief Justice Bleckley uses this significant language, in dealing with a case in which the following indorsement was made upon the note sued upon by a person other than a party to the contract: "For a consideration not herein named, we guaranty the payment of this claim" to the Gelser Manufacturing Company. In discussing this the chief justice says: "Had the Gelser Manufacturing Company, the payee of these notes, signed a contract upon them with a third person, in the terms of that placed thereon by Jones & Toll [who were the third persons making the indorsement], and had afterwards negotiated them to a third person, the Gelser Company could, under our law, be sued and made answerable as indorsers." He cites, as authority for this proposition, *Vanzant v. Arnold*, 31 Ga. 210. In the latter case it was held by this court that, notwithstanding a superadded obligation in some re-

spects similar to the one under consideration in this case, a contract of indorsement was nevertheless complete. It has been questioned somewhat whether the view here presented as to the character of the contract made by this indorsement is not in conflict with the view taken by the supreme court of the United States in the case of *Trust Co. v. National Bank*, 101 U. S. 68. It will be seen upon examination of that case that the indorsement signed by the payee was intended as a simple guaranty of the solvency of the maker. It was not the form of indorsement usually employed in the transfer of negotiable paper in strictly commercial transactions, and this guaranty by the payee itself indicates that the trust company discounted it, not upon the faith of the credit of the original maker, but upon the faith of the guaranty alone. The form of the contract of guaranty, accompanied by a delivery thereunder, would of itself serve to charge the trust company with notice of any defenses the maker might have had, and thus take it out of the rule which protects innocent purchasers without notice against pre-existing defenses. In order for a transfer or assignment to confer upon an indorsee the benefit of this rule, it must be accomplished according to the law merchant; that is, by indorsement. No transfer by any other method accomplishes this result, and the decision now under review is only authority for the proposition that the form of indorsement then under consideration, when employed in the transfer of paper, was not such an indorsement, according to the strict technical significance of that term, as would cut off the defenses of the maker. In that case the question was not whether the trust company was such an indorsee as to acquire a title to the chose in action, but whether, under the form of indorsement employed, it was such an indorsee as to cut off equitable defenses of the maker. So the question in this case is not whether the contract under consideration is such an indorsement, in its strict technical sense, as cuts off defenses of the maker, but whether the payee is such an indorser as entitles him to notice. He may be the latter, and not the former. We think he falls within the latter class. The mere guaranty of a paper does not involve the idea of negotiation, nor negotiation necessarily the idea of guaranty, unless the contract of assignment be of such a character as to operate as a guaranty of the solvency of the maker; and the mere fact that the contract of the indorser may contain a stipulation for a guaranty which extends his obligation beyond that of a mere indorser does not affect his legal relation to the paper. *Partridge v. Davis*, 20 Vt. 499; *Deck v. Works*, 18 Hun, 266. A contract in the following form, indorsed upon a promissory note: "We guaranty payment of this note, waive demand and notice of nonpayment,"—was held to be an indorsement with an enlarged liability. *Robinson v. Lair*, 31 Iowa,

9. A guaranty indorsed on a note by the payee thereof may operate as well as an indorsement as a guaranty, and may make the party signing liable as an indorser. *Green v. Burrows*, 47 Mich. 70; *Heard v. Bank*, 8 Neb. 10. As between the original parties, in considering the effect of contracts of guaranty, the court will look to all the surrounding circumstances, and will not be necessarily controlled by the use of the word "guaranty," according to its technical acceptation. We think that the principle that a guaranty indorsed on a note by a third person would amount to a contract of guaranty only, while a similar guaranty indorsed on a note by the payee thereof in the course of and for the purpose of negotiation constitutes an indorsement, is sustained by the principle decided in the *Geiser Case*, supra, and likewise in *Tuttle v. Bartholomew*, 12 Metc. (Mass.) 452. In the case of *Prosser v. Luqueer*, 4 Hill, 420, Chancellor Walworth, in the New York court of errors, having under review an indorsement upon a promissory note in the following words: "For value received, I guaranty the payment of the within note, and waive notice of nonpayment,"—held that such guaranty amounted to an indorsement, and that, under a statute authorizing indorsers and makers to be sued in the same action, the action was properly brought against the guarantor as an indorser. In defining the nature of this contract he uses this language: "But a general guaranty like this, upon a note payable to bearer, is in law a general indorsement of the note, with a waiver of the condition precedent of a notice of nonpayment by the drawers. It is true that in the present case the note was not payable to bearer, but there is a stronger reason why the indorsement in the present case should be construed to be a regular contract of indorsement, in a strict commercial sense, inasmuch as, the paper not being negotiable by delivery alone, an indorsement must have been made by the payee in order to transfer the title. In *Buck v. Bank* (Neb.) 45 N. W. 776, the following words were written upon the back of a negotiable note, and signed by the payee: "Demand, notice, and protest waived, and payment guaranteed." This was held to constitute a valid contract of indorsement by the payee, with an enlarged liability. In other words, this decision simply means that without the guaranty of payment, and waiver of notice and protest, the liability would have been simply that of an indorser in blank,—that is, a liability dependent on demand and notice,—and the waiver of notice of nonpayment served simply to extend the liability of the indorser, by making him liable upon the nonpayment of the paper. To the same effect is *Heard v. Bank*, 30 Am. Rep. 811. In the case of *Jaffray v. Krauss* (Sup.) 29 N. Y. Supp. 987, it was held that where a married woman was the payee in a promissory note, and made and signed thereon the following indorsement:

"I hereby charge my separate estate with the payment of this note,"—this constituted an indorsement, only, in the strict commercial sense, and, though the effect of the indorsement was likewise to charge her separate estate with the ultimate redemption of the paper, it was nevertheless an indorsement, and that she was entitled to notice of nonpayment, as an indorser, in order to bind her and her separate estate to the payment of the paper. It was insisted in that case that, inasmuch as the indorsement was made to give an additional credit to the transferee of the paper, she became and was thereby only a surety to the maker, and was not, therefore, entitled to notice as an indorser. It will be observed that she was the payee in this paper. The legal title to the promise of the maker was in her. The indorsement was entered for the purpose of negotiating the paper, and that fact gave her her character as indorser. If, on the contrary, she had not been the payee, and the memoranda had been placed there simply for the purpose of strengthening the credit of the maker, her position then would have been that of a guarantor, simply, and she would not have been entitled to notice. The court say: "It is to be observed that the notes were payable to her order, and indorsed by her, as far as the transfer of the notes was concerned, in blank, and she simply made the special provision in order to charge her separate estate. It was clearly intended to be an indorsement by this married woman, and there was no intention upon her part of assuming any other liabilities than any payee, by indorsing a promissory note, usually intends. The payee of a note, who indorses the same for the purpose of giving credit to the maker, does not thereby become a simple surety, although such indorser knows that the indorsement is asked for for the purpose of giving credit to the maker upon the purchase of goods, and that the note will be used for such purpose. That is the whole transaction as alleged in the complaint, and such allegations in no way alter the rights of the defendant, or change the character of her contract." So, in the present case, the note sued upon was made payable to the order of the defendant, and was indorsed by him, as far as the mere transfer of the note was concerned, in blank, and he simply made a special provision in order to charge himself with liability for attorney's fees upon the happening of the contingency therein provided for. This latter undertaking in no way affected his character as an indorser. So far as that element of liability is concerned, it remained unchanged and wholly unaffected by his additional undertaking. Inasmuch, then, as this contract of indorsement was made for the purpose of passing title to this promissory note to the present holder, and was made in the course of its negotiation, the payee's true relation to the paper was that of an indorser; and, in order to bind

him to its ultimate redemption, it was necessary for the plaintiff to have shown notice to him of its nonpayment. The refusal of the court to charge to the effect that he was entitled to notice, as an indorser, of nonpayment, was error, and a new trial upon that ground should have been awarded.

In addition to principal and interest, the jury found for the plaintiff a certain amount of attorney's fees. Treating this as a contract of guaranty, and giving to the plaintiff the most favorable view that could be taken of it, this finding was wholly unsupported by the evidence. The contract of this indorser was conditioned to pay attorney's fees, not exceeding 10 per cent., which might be incurred by the holder in the collection of the amount due on the note by law. The record was wholly silent as to any expense incurred, or as to the value of the service of any attorney; and therefore it was absolutely necessary, before the plaintiff could recover upon that account, that he should prove either that he had incurred a certain amount of expense, and that it was reasonable, and within the limit of 10 per cent., or that the service of an attorney for that purpose, within that limit, was reasonably worth the sum sought to be recovered. There was no proof, nor offer to prove either, and the finding of the jury for attorney's fees was therefore wholly unsupported by the evidence.

We do not deem it necessary or material to inquire further into the commission of any errors alleged as resulting from rulings by the court upon the trial, inasmuch as the main question determined in this case, to the effect that this defendant was an indorser, and entitled to notice, practically disposes of the litigation in his favor. Judgment reversed.

(95 Ga. 715)

FRENCH et al. v. BAKER et al.

(Supreme Court of Georgia. April 1, 1895.)

CONVEYANCE BY EXECUTOR UNDER POWER—
LAND HELD ADVERSELY.

Although section 2564 of the Code, declaring that an administrator cannot sell property held adversely to the estate by a third person, may, by virtue of section 2448, be applicable to such sales as are usually made by executors in due course of administration for the purpose of raising money to pay debts or for distribution, yet, where a will conferred upon an executrix full power to sell, either publicly or privately, or for cash or on credit, any property of the testator, and also power to make advancements to, and settlements with, the testator's legatees and devisees with respect to their shares in the estate, and she, after settling in full with all of them except two, conveyed to the latter, "for the purpose of paying to" them "their interest in said estate," property of various kinds, including an undivided half of certain realty, the conveyance was not void because at the time it was made third persons were in possession of a portion of such realty, and claiming title to the whole of the same adversely to the estate.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action by Mary C. French and another against Baker & Hall. Plaintiffs were nonsuited, and bring error. Brought forward from last term. Code, §§ 4271a-4271c. Reversed.

J. W. Akin, for plaintiffs in error. J. M. Neel, for defendants in error.

LUMPKIN, J. This was an action for the recovery of an undivided half interest in a lot of land, brought by Mrs. French and Mrs. Tarver against Baker & Hall. The plaintiffs, after showing title in William Solomon, their father, claimed under a deed from their mother as executrix. They were nonsuited on the ground that the evidence showed the premises in dispute were held adversely to the estate of Solomon at the date of the last-mentioned deed. The court evidently rested its judgment upon sections 2564 and 2448 of the Code, the first of which provides that "an administrator cannot sell property held adversely to the estate by a third person; he must first recover possession," and the latter of which probably extends the provisions of the former to sales made by executors. To sales made by administrators in the ordinary course of administration for the purpose of raising money to pay debts, or for distribution, section 2564 of the Code is undoubtedly applicable; and, as already mentioned, when read in connection with section 2448, it may be alike applicable when such sales are made by executors. In the present case, however, the deed from Mrs. Solomon, as executrix, to her daughters, the plaintiffs, was not made in pursuance of a sale of this kind, but by virtue of a special power conferred upon by her by the testator in his will. Under the will, she had authority to do whatever she might think necessary for the best interests of the testator's children, "and to rent, sell, and dispose of the property, or any part thereof, either real or personal, * * * at public or private sale, for cash or on a credit, on such terms and conditions, and in such way and manner, as [she might] think is best for [the] estate, and without obtaining an order of court for the purpose." Also "to make such advancements to any of [the] children as she may think best out of [the] estate; but in no event * * * to make any advancement out of [the] estate to either of [the] children that will give him or her more than an equal share of [the] estate, according to the provisions of this * * * will." It appears that after settling in full with all the testator's children except the plaintiffs in the present case, Mrs. Solomon, as executrix, conveyed to the plaintiffs, "for the purpose of paying to" them "their interest in said estate," property of various kinds, including the premises in dispute, which consisted, as already stated, of an undivided half interest in a certain lot of land. We do

not think section 2564 of the Code is, in any event, applicable to a "sale" of this character, even if, at the time it was made, third persons were in possession of a portion of the lot in question, and claiming title to the whole lot adversely to the testator's estate. The transaction between Mrs. Solomon and her daughters, properly construed, was really no sale at all, it was merely an execution by the executrix of a portion of the will itself. Certainly, Solomon, in his lifetime, could have made a valid conveyance to another of land to which he had a good title, although it may have been held adversely to him by a third person; and under the will Mrs. Solomon's power to deal with the estate was quite as ample as that which the testator himself had ever possessed. Moreover, the policy of the law, as expressed in section 2564 of the Code, was to prevent a sacrifice of the estates of deceased persons by forbidding sales of land held adversely to such estates, because, under such circumstances, these lands would almost inevitably fail to bring their full value. This must be the controlling reason upon which this law is based, and it is undoubtedly a good one. No such reason, however, should invalidate a conveyance of the kind with which we are now dealing. All the persons interested in Solomon's estate had been settled with and satisfied, except the two ladies who are the plaintiffs here. They simply took what was left, and accepted it in satisfaction of their shares in the estate. No person in the world could be injured by what was done, and we are therefore quite clear that the court erred in holding, under the facts appearing, that a nonsuit should be granted. Judgment reversed.

(95 Ga. 714)

HEYWARD v. FIELD et al.

(Supreme Court of Georgia. April 1, 1895.)

JUSTICES OF THE PEACE—PLEADING—AMENDMENT.

Since the passage of the act of October 16, 1891 (1 Acts 1890-91, p. 111), it is not, in a justice's court, essential to the right of amending a plea and making a defense to a suit upon an unconditional contract in writing that the defendant should, in writing, at the first term, file his defense. Appearance, and marking the name of himself or counsel on the docket, is in that court equivalent to filing the general issue, and thereafter any other proper matter of defense may be set up by amendment.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action by Field Bros. against Mary B. Heyward in a justice-court case appealed to the superior court. Judgment for plaintiffs. Defendant brings error. Brought forward from last term. Code, §§ 4271a-4271c. Reversed.

The following is the official report:

It appears from the docket of the magistrate that names of attorneys for plaintiffs and for defendant were entered on the docket, and that the case was continued from the

April term to the November term, 1892, by the defendant, for providential cause. The defendant filed a plea November 3, 1892. The case was taken by appeal to the superior court, where it was agreed that the same should be heard before the judge presiding, without the intervention of a jury. When the case was called plaintiffs' attorney moved to strike the plea, upon the ground that the same was not filed at the first term of the justice's court to which the suit was returnable. The above facts appearing, the judge struck the plea and rendered judgment for plaintiffs. To this action defendant excepted. It does not appear what the plea was.

W. I. Heyward, for plaintiff in error. J. H. Wikle and A. S. Johnson, for defendant in error.

ATKINSON, J. In the case of *McCall v. Tufts*, reported in 85 Ga. 619, 11 S. E. 886, it was decided that when a suit is brought in a justice's court upon an unconditional contract in writing, if there be a defense thereto it must be filed at the first term; that, if not filed at that term, the defendant lost his right to make any defense to the suit. This decision was based upon an act approved September 26, 1883 (see Acts 1882-83, p. 103), and in that decision this act was construed as requiring that a plea should be filed, and it was accordingly held that a plea could not be filed in a justice's court, except it be in writing. Subsequently to the rendition of that decision, however, the general assembly passed an act, of date October 16, 1891 (see Acts 1890-91, p. 111), amending the act of 1883 above referred to by striking therefrom the words "plea is filed," and inserting in lieu thereof the words "defense is made," thus leaving the law as it stood prior to the passage of the act of 1883, in so far as it required formal written pleas to be filed in the justice's court at the first term as essential to the making of other defenses at a subsequent term. Therefore the rule of practice established by the act of 1883, as announced by the decision in *McCall v. Tufts*, supra, was repealed by the act of 1891, so that now no formal plea need be filed at the first term in a justice's court. If the defendant, in response to the summons, appear and mark his name, or the name of his counsel, on the docket in that court, it is equivalent to filing the plea of the general issue. It is a making of his defense at the first term, and thereafter he may plead any other matter appropriate to his defense. Let the judgment of the court below be reversed.

(95 Ga. 727)

ROBERTS v. DICKERSON.
(Supreme Court of Georgia. April 1, 1895.)
WIDOW'S ALLOWANCE—VALIDITY—RIGHTS OF
WIDOW THEREUNDER.

1. Where, prior to the passage of the act of 1885, amending section 2573 of the Code, and providing for the publication of a citation in case

of an application for a year's support, a widow applied for a year's support for herself and one minor son, which was duly set apart by the appraisers, and their return, to which no objection was ever filed, was made and remained on file in the ordinary's office for more than six months before the minor became of age, the title to the property embraced in the year's support, including a tract of land, vested in both the mother and son, and the interest of the latter was not divested because the ordinary delayed the actual recording of the appraisers' return until after the son became of age.

2. Where, in such case, the son, after reaching his majority, died, his administrator could not, while the mother remained upon the land, using it for the purpose of obtaining a support, sell or otherwise administer an undivided one-half of the land as the estate of the son.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Action by R. M. Dickerson against Mary Y. Roberts. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Copeland & Jackson and R. M. W. Glenn, for plaintiff in error. Lumpkin & Shattuck, for defendant in error.

LUMPKIN, J. Prior to the passage of the act of October 9, 1885 (Acts 1884-85, p. 50), section 2573 of the Code required appraisers appointed to set apart a year's support to file their return with the ordinary, to which return any person interested might, at any time within six months, make objections; but where none were so made, or, if made, disallowed, it was the duty of the ordinary to record such return in a book kept for that purpose. This section was amended by the act above mentioned so as to require the ordinary, upon the filing of the appraisers' return, to issue and publish a citation notifying all persons concerned to show cause why the application for the year's support should not be granted, etc. In the case with which we are now dealing, the year's support was set apart long before this change in the law was made, and therefore the proceedings were had under the law as it then stood. It appears that when the widow of Elijah Moore, Sr., made an application for a year's support out of his estate, she had one minor son, and the application was made for the benefit of herself and him. The order appointing the appraisers was dated November 3, 1873, and their return was filed in November or December of that year. Included in the year's support set apart was a tract of land. This return remained on file for more than six months before the minor son became of age, and no objections to it were ever made, but it was not actually recorded by the ordinary until October 20, 1874. At that time the son had attained his majority.

1. The first question presented for our determination is whether or not, under these facts, the son had any interest or title in the land embraced in the year's support.

The ruling of this court in *Lowe v. Webb*, 85 Ga. 731, 11 S. E. 845, following section 2574 of the Code, recognizes as sound law the proposition that a minor child, for whose benefit, in part, a year's support is granted, shares with the mother in the title. Indeed, the section last cited distinctly declares that the property "shall vest in the widow and child or children; and if no widow, in such children, share and share alike." If, therefore, the son in the present case had been a minor at the time the year's support was actually recorded, there could be no doubt that he would have been entitled to an undivided half interest in the land. It was insisted, however, that as he was of full age at the time this record was made, he had no interest in the property. We do not think the question of his interest is to be determined merely by reference to the date when the ordinary actually put the return of the appraisers on the record book. After this return had been on file for more than six months without objection, the year's support became valid and binding upon all the world, and the son's interest in it became vested; he being, when the six months expired, still a minor. It was the duty of the ordinary to record the return as soon as the six months expired. The mere fact that he failed to perform this clerical work certainly could not divest the minor's title. As to him, the matter stands as if the ordinary had done what he ought to have done. To hold otherwise would result in manifest injustice, and occasion injury to an innocent party because of official negligence, which it was neither his duty, nor within his power, to prevent.

2. The remaining question to be disposed of is, whether or not the administrator of the son could, under the facts above stated, sell or otherwise administer an undivided half of the land as his estate while the mother remained upon, and derived a support from, the land. We think not. In *Whitt v. Ketchum*, 84 Ga. 128, 10 S. E. 503, this court decided that where land was set apart as a year's support for the benefit of a widow and minor child, and was not consumed during the year, it would stand over for the support of the widow and also the minor so long as they were members of the family and filled this description, but that after attaining majority the minor could not, while the widow remained upon the land, coerce a partition of the land, the whole of it being charged with the support of the family. In accordance with this principle, we hold in the present case that the son's administrator could not break up or destroy the mother's use and enjoyment of the land as a year's support so long as she remained upon it. The question as to what may be the rights of this administrator after her death is not now before us for determination. Judgment reversed.

ATKINSON, J., not presiding.

(95 Ga. 747)

LEAKE et al. v. LACEY.

(Supreme Court of Georgia. April 8, 1895.)

GARNISHMENT OF MUNICIPAL CORPORATION.

A municipal corporation is not subject to be garnished for money due by it to a contractor for constructing a sewer or other public work, although such work had been fully completed before the time when the garnishment was served, and the indebtedness of the municipality was for the balance then due the contractor. Public policy requires that such corporations shall be exempt from the process of garnishment.

(Syllabus by the Court.)

Error from superior court, Polk county; O. G. Janes, Judge.

Action by Leake & Vandivander and others against D. B. Lacey. Judgment for defendant, and plaintiffs bring error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

Thompson & Ramsaur and W. F. Turner, for plaintiffs in error. Sanders & Davis and Irwin & Bunn, for defendant in error.

LUMPKIN, J. This case turns upon the question whether or not a municipal corporation is subject to the process of garnishment sued out for the purpose of reaching a sum of money due by the mayor and council to a contractor who had constructed a public sewer. It could scarcely be doubted that if the public work was uncompleted a creditor of the contractor could not, by garnishment, cut off payments which would otherwise be made by the municipal authorities to the contractor as the work progressed. It is obvious that if this were allowed it might, and in most cases would, seriously interfere with the performance by the contractor of his undertaking, and thus the public would be subjected to inconvenience and delay at the instance and for the benefit of a party in whose affairs it had no interest or concern whatever. It very frequently happens that a contractor actually needs partial payments in order to be able to carry on his work. We deem it unnecessary to consume further time in endeavoring to show that in a case of this kind it would never do to hold that municipal authorities could be subjected to the process of garnishment. The protection of the contractor might be a matter of no great concern, and there is, perhaps, no special reason why the law would favor him; but the welfare of the public requires the prompt and speedy completion of works in which the community at large is interested, and forbids the delaying of the same for the sake of a mere individual. In the present case, however, it was insisted that the reason for the rule above stated would not apply, because the sewer in question had been actually completed, the public were receiving the benefit of it, and nothing remained to be done except for the mayor and council to pay over a balance due the contractor. There is, of course, some distinction between cases of the class first above in-

stanced and the case in hand; but still we are decidedly of the opinion that public policy forbids that a municipal corporation should be subject to garnishment in any case where its indebtedness arose on account of the exercise by it of governmental functions, which include, of course, the prosecution of public works and improvements for the benefit of the body politic. It is not to the municipal authorities, after the work has been completed, a matter of the slightest concern to whom the money due for the work should be paid. The municipality has no interest in aiding a creditor to collect his debt, or in shielding the debtor from paying it, and therefore there is no reason why it should be drawn into litigation pending between these parties, but many good reasons why it should not. It necessarily requires time, labor, and oftentimes expense in the employment of counsel and otherwise, to answer and defend garnishment suits, attend courts, and otherwise give attention to litigation, and these burdens should not be imposed upon public servants, whose time and attention ought to be given to the discharge of their official duties. Even if the municipality should be compensated in money for the loss of the time of its officials and the expenses of litigation, it by no means follows that all the evils would be relegated. The failure of a city or town official to answer a garnishment; the filing of an answer too late; the making therein, through inadvertence or otherwise, of an untrue statement; and many other conceivable things,—might subject the corporation to great loss and damage, with no corresponding benefit for a complete and accurate performance of everything necessary in answering the garnishment and giving attention to the case. Again, while the officials were engaged in answering the garnishment or in looking after the litigation, they would be compelled to neglect the duties properly devolving upon them, and this very neglect, it is easy to perceive, might result in subjecting the municipality to loss, damage, and inconvenience in many different ways. We deem it unnecessary to prolong this discussion, and will conclude it by referring to the case of *Connolly v. Thurber Whyland Co.*, 92 Ga. 651, 18 S. E. 1004, to which this court gave thoughtful consideration. The decision in that case, in principle, controls the present one, and the authorities there cited amply support the proposition that the public policy requires the exemption of municipal authorities from the process of garnishment. Judgment affirmed.

ATKINSON, J., not presiding.

(95 Ga. 742)

MORGAN et al. v. WILLIAMS.

(Supreme Court of Georgia. April 8, 1895.)

SETTING APART HOMESTEAD.

As the plaintiff's right to recover necessarily depended upon the validity of the alleged

homestead, and as the evidence, taken all together, showed conclusively that the homestead had never been finally allowed and set apart, but that the plaintiff's application for the same, while pending in the superior court on appeal from the court of ordinary, had been dismissed, the verdict was not supported by the evidence, was contrary to law, and ought to have been set aside.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Orlena Williams against Samuel Morgan and D. E. Morgan. Judgment for plaintiff, and defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Dabney & Fouché and J. S. Fouché, for plaintiffs in error. Dean & Dean, for defendant in error.

LUMPKIN, J. This was an action for the recovery of land, brought by Mrs. Orlena Williams against Samuel Morgan and D. E. Morgan. The plaintiff's right to recover depended entirely upon whether or not a homestead had been duly and lawfully set apart for the benefit of herself and her daughters out of land belonging to her husband. The facts are somewhat complicated, and numerous questions were raised at the trial; but, in the view we take of the case, a detailed statement and discussion of the same is unnecessary. It appears that Mrs. Williams applied for a homestead out of her husband's land, and that the same was allowed and set apart by the ordinary over the objections of various creditors, who entered an appeal to the superior court. In that court an order was passed, with the consent of all parties at interest, reciting that the "appealed case from ordinary" was thereby dismissed. The parol evidence introduced without objection on the trial of the present case, taken all together, and fairly construed, showed conclusively that the real meaning of this order was, not that the appeal alone was dismissed, the effect of which would have been to affirm the judgment of the ordinary allowing the homestead, but that the entire case was dismissed, and, consequently, that the homestead application itself went out of court, and was never finally allowed. It was conceded that, if the homestead was not valid, there could be no lawful verdict for the plaintiff. It will be seen from the above condensed recital of the facts that the plaintiff never in fact obtained a valid homestead, the action of the ordinary in primarily allowing it having been practically set aside and annulled by the final order entered in the superior court. It follows that the verdict and judgment in favor of the plaintiff were contrary to law, and ought to have been set aside. Judgment reversed.

ATKINSON, J., not presiding.

(95 Ga. 743)

LITTLEJOHN v. DRENNON et al.

(Supreme Court of Georgia. April 8, 1895.)

**DECRET—PLEADING—ALLEGATIONS AS TO
LIABILITY.**

The action being based upon alleged fraud and deceit on the part of the joint defendants, and the allegations of the declaration not showing any liability at all on the part of one of them, or any liability arising ex delicto on the part of the other, the demurrer was properly sustained.

(Syllabus by the Court.)

Error from city court of Rome; W. T. Turnbull, Judge.

Action by Martha A. Littlejohn against W. T. Drennon and John D. Moore. Judgment for defendants, and plaintiff brings error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

Geo. & Walter Harris, for plaintiff in error.
Halstead Smith & Son, for defendants in error.

LUMPKIN, J. Mrs. Littlejohn brought an action against W. T. Drennon and John D. Moore, as joint defendants, to recover damages alleged to have been sustained by her upon substantially the following state of facts: She purchased from Drennon two houses and lots in the city of Rome, giving her promissory notes for the purchase money, and taking from him a bond for titles. Moore was present when the purchase was consummated, and prepared the papers. At that time he was the secretary of a building and loan association which had a mortgage upon the property, and he did not disclose its existence to plaintiff, though it was in his possession, but, on the contrary, by his conduct, led her to believe that the title to the property was good. She afterwards made a considerable payment upon the purchase of the property. After so doing, she learned of the mortgage being upon the property, and thereupon made inquiry of Moore, who was still secretary, as above stated, and he then informed her of the existence of the mortgage. She asked him to whom she must make other payments upon the purchase, and he, in addition to his "wrongful silence" in the first instance, told her it would be all right to pay Drennon; and she, having full faith and confidence in Moore, obeyed his directions, and made other large payments to Drennon. At the time the arrangement was made by her with Moore to continue payments to Drennon, the latter then intended to defraud her, and, by the aid of Moore, was enabled to cheat, wrong, and defraud her out of the entire sums paid to Drennon. It was Moore's duty, under the circumstances, to inform her of the existence of the mortgage, and his conduct in advising her to continue payments to Drennon was fraudulent, and she was misled and deceived thereby. After her payments to Drennon, the mortgage was foreclosed, and one of the houses and lots was sold under the execution issued upon the judg-

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ment of foreclosure, and by reason of these facts she sustained loss in an amount stated. Her prayer for recovery was based upon the alleged fraud and deceit practiced upon her by both the defendants. On demurrer her declaration was dismissed, and she excepted.

We think the court was right in sustaining the demurrer. In our opinion, the declaration states no cause of action whatever against the defendant Moore. No facts are set forth showing the existence of any confidential relations between him and the plaintiff, or any reason why she had a right to expect from him any disclosure as to the existence of the mortgage. At the time of the purchase she made no inquiry of him, and he simply kept silent concerning a matter about which he was not asked to make any statement. It is true, the declaration does say, in loose terms, that his conduct at that time led her to believe the title to the property was good, but it fails entirely to state in this connection of what this conduct consisted. Later on in the declaration it is characterized as his "wrongful silence," and this is about all it amounted to. It will be noted that there is in the declaration itself a significant "silence" as to whether or not the mortgage held by the building and loan association had been recorded at the time the plaintiff completed her contract of purchase with Drennon. If it was recorded, she was bound to take notice of its existence. If not, it was a very simple matter to inquire if the property was unincumbered. Had she done this, and received a false answer, the case would be entirely different. Again, it appears that, when Mrs. Littlejohn did inquire of Moore as to the mortgage, he told her the exact truth about it; but she complains that he went further, and advised her to continue making payments upon the purchase money to Drennon. Even if this advice was given with a fraudulent intent, it could hardly have been misleading. To follow it, and thus become subjected to loss, was the veriest folly, from the consequences of which the courts could not give protection.

What has been said above as to Moore is, for the most part, applicable to the plaintiff's case as against Drennon, and therefore we think no cause of action arising ex delicto is set forth against him. It is true, he actually sold property subject to a mortgage, without disclosing its existence. To do this, however, was not necessarily, and per se, fraudulent. But, even if Drennon's silence amounted to a fraud, it was one which could have resulted in no injury to the plaintiff if she had exercised the slightest degree of diligence. In these days, it is not consistent with the least degree of prudence to buy real estate without asking the seller if it is unincumbered, or at least examining the records as to the condition of the title. It may be that Drennon is both morally and legally responsible to Mrs. Littlejohn for what she

lost on account of being deprived of the property by reason of the sale under the mortgage execution, but there can be no recovery for the same in this action, which, as we have seen, was based alone upon the alleged fraud and deceit of both defendants. Upon this line, the facts alleged do not make a cause of action against either. Judgment affirmed.

ATKINSON, J., not presiding.

(96 Ga. 736)

EAST TENNESSEE, V. & G. RY. CO. v. GREEN.

(Supreme Court of Georgia. April 8, 1895.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

The circumstances attending the infliction of the injuries sued for, as detailed by the plaintiff's testimony, showing that no negligent act of the defendant's servants was the cause of these injuries, the verdict was contrary to law, and a new trial should have been granted upon that ground.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Fannie Green against the East Tennessee, Virginia & Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

McCutchen & Shumate, for plaintiff in error. O. N. Starr and R. J. & J. McComy, for defendant in error.

ATKINSON, J. It appears from the evidence in this case that the plaintiff was a passenger upon one of the defendant's trains; that she had in her possession, as part of her personal belongings, two or three small bundles; and that when she entered the train, finding that the receptacles fastened to the side of the car above the seats for holding packages and bundles of passengers were beyond her reach, she stood upon a seat, and placed her bundles in the receptacle herself. No servant of the company saw her do this, nor did she ask any assistance in so doing. When she reached a point on her journey where it was necessary to change cars, she arose, stood upon the seat, and attempted to take down the bundles; and while in this position the cars suddenly moved, and she was thrown from the seat on which she was standing, to the floor, and injured. It appears that the train safely reached its destination, stopped at the usual place for passengers leaving the cars, remained there long enough for all of the passengers to alight, saving this plaintiff, and then moved down a few steps, where it stopped again. It does not appear that in the movement of the train there was any unusual jerk. It does not appear that this plaintiff called the attention of any servant of the defendant to

the situation of her bundles, or requested any assistance from them in her efforts to remove them from the place where she had deposited them. The servants of the company were outside the car, assisting the passengers who were alighting. None of them saw her attempt to get up on the seat. In consequence of her fall she was injured, and brought this action. We do not think the facts make a case which authorizes a recovery. Railroad companies, in the transportation of passengers, are bound to extraordinary care. They are not bound to take the greatest possible degree of care in the discharge of duties towards passengers, but the extraordinary care required of them is defined by the Code to be "that extreme care and caution which very prudent and thoughtful persons use" in and about similar matters. It is true, the presumption of negligence arises when the fact of injury is shown, but in the very circumstances out of which the presumption arises it may likewise be rebutted. This plaintiff was in a perfectly safe situation. The company had provided her with a means of transportation which afforded every possible immunity against injury, as long as she enjoyed it in the manner usual to passengers, and in the manner designed by the company. The seats were made for the accommodation of passengers sitting upon them. It was not designed that they should be employed as footstools. The company had the right, reasonably, to expect that the passenger would not so use these contrivances, designed for his comfort and convenience, as to expose himself to danger; and, in moving its cars, it had the right to presume that the passenger would not employ these seats, designed for his convenience, and as well for the security of the company, in such a way as to expose himself to hazard and the company to loss. Its agents could not anticipate that at the time when this passenger was supposed either to have left the car, or to have been seated within it, she would be standing in a dangerous position upon one of the seats in the car. We do not think that this injury, therefore, can be attributed to any act of negligence upon the part of the company. The evidence points out no duty imposed by law or contract, the performance of which was omitted by the agents of the company, and it points out no act of negligence committed by them. This occurs to us to have been one of that class of injuries against the infliction of which no reasonable degree of human foresight could have made provision, and, so far as the company was concerned, it may be stated as resulting from pure accident. If not an accident, it is saved from that classification only by reason of the negligence of the passenger in exposing herself unnecessarily, in a hazardous position, to dangers against which the exercise of ordinary care and prudence upon her part would have afforded perfect immunity. Let the judgment of the court below be reversed.

(95 Ga. 731)

WARING v. GASKILL.

(Supreme Court of Georgia. April 8, 1895.)

PLEDGE—SALE OF COLLATERALS—CONVERSION BY
PLEDGER—RECOUNPMENT.

1. Where, in a promissory note, the payment of which was secured by the deposit of specified collaterals, it was stipulated that in case of the nonpayment of the note at maturity the payee might sell the collaterals after giving at least 10 days' notice to the maker of the note, and the creditor sold the collaterals without giving such notice, the act of sale was a conversion; and especially so when the seller also became the purchaser of the securities.

2. Where a suit was brought for the recovery of the balance due upon the note after giving credit for the net proceeds of the sale of the collaterals, it was the right of the defendant to plead in recoupment the conversion; and, in adjusting the account between the parties, he was entitled to credit for the actual value of the collaterals at the time of the sale. This defense could be made without demanding restitution of the collaterals, or tendering payment of the debt thereby secured.

(Syllabus by the Court.)

Error from city court of Cartersville; S. Ataway, Judge.

Action by C. R. Gaskill to the use of the Fourth National Bank of Chattanooga, Tenn., against George Waring. Judgment for plaintiff, and defendant brings error. Brought forward from last term. Code, §§ 4271a-4271c. Reversed.

The following is the official report:

Gaskill, cashier, suing for the use of the Fourth National Bank of Chattanooga, Tenn., by his declaration alleged: George H. Waring owes him \$427 principal, besides interest and attorney's fees, evidenced by three promissory notes, copies of which are attached. These notes were executed and delivered by him to plaintiff, and for a valuable consideration. The first note is dated May 8, 1893, due 90 days from date, and is for \$375; the second dated June 8, 1893, due 60 days thereafter, is for \$75; and the third, dated June 14, 1893, due 60 days after date, is for \$200. Each note bears interest from maturity. The \$375 note is credited with \$231.57, of date of October 4, 1893. This is all that has ever been paid on any of the notes, and is the only credit defendant is entitled to. Defendant is justly indebted to petitioner 10 per cent. attorney's fees, because the consideration of the notes was and is a Tennessee contract. The notes were executed and delivered in Chattanooga, Tenn., and to be paid there. Payment was demanded of defendant after the notes became due at this place of payment, and he failed and refused to pay the same. In the notes, defendant contracted to pay reasonable attorney's fees incurred in the prosecution and collection of the notes, and under the laws of Tennessee such contract is binding and valid. Petitioner prayed judgment for principal and interest, and for his attorney's fees as aforesaid, which he alleged he had incurred in the collection of the notes. The \$375 note, copy of which was attached, contained the following: "Having

deposited or pledged as collateral security for, the payment of this note certificates Nos. 1 and 2, Howard Hydraulic Cement Co. stock, two shares, \$1,000 each, and hereby give the holder thereof full power and authority to sell or collect at my expense, including half of 1 per cent. for selling, and reasonable attorney's fees for service or advice, all or any portions thereof at said bank in the city of Chattanooga, at public or private sale, at his option, on the nonperformance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving to me more than 10 days' notice. In case of public sale the owner may purchase without being liable to account for more than the net proceeds of such sale; and it is hereby agreed and understood that any excess of security upon this note shall be applicable to any other note or claim against me held by the holder of this note." Upon it was the entry that the stock held as collateral was sold October 4, 1894, between 10 and 11 o'clock a. m., as per advertisement attached, to the Fourth National Bank of Chattanooga, for \$240, which amount, less cost of advertising and interest to October 4, 1893, left a balance of \$231.57 to be applied as a credit on the note. The other two notes had no unusual provisions, and no credits, but contained an agreement to pay all attorney's fees and costs attending their collection.

Defendant, by his plea, denied that he was indebted to the bank \$427 principal, with interest and attorney's fees, as hereinafter more fully stated. He admitted that he executed and delivered the notes to plaintiff, and for a valuable consideration. He admitted that the dates, amounts, and time of maturity, and that each of the notes bore interest from maturity, were correctly stated in the petition. He neither admitted nor denied the allegation as to the credit of \$231.57 on the \$375 note. He denied, for the reasons hereafter mentioned, that he was liable for attorney's fees as claimed. He further alleged: The reason he does not owe the amount claimed to be due by him is because, when he executed the \$375 note, he then delivered to plaintiff, the Fourth National Bank, as collateral to secure the payment of it and any other note he may thereafter have discounted at said bank, certificates of stock Nos. 1 and 2 of the Howard Hydraulic Cement Co., of the value of \$1,000 each, upon the express conditions set out in the note to sell, either at public or private sale, said stock, upon failure to meet the note when it became due and the giving to him of more than 10 days' notice of said sale, whether private or public; that on October 4, 1893, without giving him any notice, plaintiff sold, at public outcry the certificates of stock to the highest bidder, for \$240, and became itself the purchaser; that he had no notice of the intended sale, and when informed of the sale refused to ratify, and claimed that it was not in accordance with the contract under which

the stock was placed in defendant's custody as collateral, as above mentioned; that the sale was an illegal one, and was a conversion of the stock by plaintiff, contrary to said contract and to law, and by such conversion he has been damaged \$2,000, the value of said stock, for had he been given the notice, of more than 10 days, as the contract was he should have, he could and would have, either by himself or friends, prevented the stock being knocked down to the highest bidder for \$240, as the same was worth, at face value, \$2,000; that by this illegal conversion of his stock he has been damaged \$2,000,—its value,—which he pleads by way of recoupment against plaintiff's demands, and prays judgment against said bank for the full amount of the value of the stock, less the amount due by him on the notes, but not attorney's fees, as the notes, under the facts above stated, should not have been sued, as plaintiff, by the illegal sale mentioned, had damaged him more than the amount due on the notes.

To this plea plaintiff demurred, because said plea nowhere alleges that said defendant ever demanded of said plaintiff said certificates of stock set out in said plea, upon the tender of said plaintiff their principal and interest, before offering to recoup their damages for said alleged conversion, plaintiff insisting that said tender and demand of said stock is a condition precedent to said defendant's setting up a conversion in said case; and also on the ground that there was no cause of action set out in the plea which would authorize judgment in favor of defendant. The demurrer was sustained, and there then being no plea filed under oath, and no jury demanded, judgment was rendered by the court for \$422.80 principal, with interest and attorney's fees. To the judgment sustaining the demurrer defendant excepted.

W. I. Heyward, for plaintiff in error. T. C. Milner, for defendant in error.

LUMPKIN, J. The material facts are stated by the reporter. It was error to strike the defendant's plea. The sale of the stock pledged as collateral security for the payment of one of the notes in suit, without giving the 10 days' notice to the defendant, as required by the contract, was illegal. Under such circumstances, the sale was neither more nor less than a conversion of the property by the plaintiff, the more especially when he himself became the purchaser at his own sale. This being so, we think it clear that it was the right of the defendant, in his defense to the action brought against him upon this and the other notes, to plead in recoupment the damages occasioned him by this conversion. In adjusting the account between the parties, he was entitled to credit for the actual value of his stock at the time it was sold, and if such value exceeded the entire amount of his indebtedness to the

plaintiff, he could recover the balance shown to be in his favor. Nor was it essential to the making of this defense that the defendant would have previously demanded a restitution to him of the stock in question, or that he should have tendered payment of the debt thereby secured. The questions involved in the present case were practically settled by the decision of this court in *Van Arsdale v. Joiner*, 44 Ga. 173. Judgment reversed.

(95 Ga. 733)

EAST TENNESSEE, V. & G. RY. CO. v. MILLER.

(Supreme Court of Georgia. April 8, 1895.)
CARRIERS—INJURY TO PASSENGER—PRESUMPTION OF NEGLIGENCE—DEGREE OF CARE.

1. As railroad companies are bound to exercise extraordinary care and diligence for the safety of passengers, the presumption of negligence which the law raises in favor of a passenger in case of injury will not be rebutted by the company's showing the exercise of only ordinary care and diligence.

2. The "extraordinary" diligence due by railroad companies to passengers is "that extreme care and caution which very prudent and thoughtful persons" exercise under like circumstances; and it was error to charge, without qualification, that such companies "are required by law to observe the utmost care and diligence" for the safe carriage of passengers, and for their delivery at destination. Even if the word "utmost" is synonymous with the word "extreme," the omission from this charge of any reference to the standard of diligence observed by "very prudent and thoughtful persons" rendered it too strong a statement of the law against the company.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by C. H. Miller against the East Tennessee, Virginia & Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

McCutcheon & Shumate and Hoskinson & Harris, for plaintiff in error. Fouché & Fouché, H. M. Wright, and M. R. Wright, for defendant in error.

LUMPKIN, J. 1. Under section 2067 of the Code, carriers of passengers are required to exercise extraordinary care and diligence to protect the lives and persons of their passengers, and are not liable for personal injuries after having used such diligence. Under this section there certainly can be no doubt that, if a railroad company fails to exercise this degree of diligence for the safety of its passengers, it will be liable for injuries occasioned, because of such failure, to a passenger who himself exercised the proper care for his own protection. Section 3033 of the Code makes a railroad company liable for any damage done to persons, stock, or other property, by the running of its locomotives, cars, or other machinery, unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and dili-

gence, and further provides that the presumption in all cases shall be against the company. In the present case the court, after instructing the jury that this presumption was raised by law against the company, charged, in substance, that it might defend by showing it had exercised all ordinary and reasonable care to prevent the injury, and added, "I charge you that that means, in case of a passenger, extraordinary care," etc. It was insisted that this was error, because, even in case of injury to a passenger, the company could rebut the legal presumption of negligence by showing only that it exercised ordinary care and diligence. We do not think this contention is well founded. It has been frequently held by this court that a passenger injured by a railroad company was entitled to the benefit of the presumption of negligence raised by this section; and, after considerable deliberation, we have reached the conclusion that, in arriving at what the company should do in such cases to rebut this presumption, this section should be read and construed in pari materia with the section first above cited. It will be observed that it is incumbent upon the company to make it appear, not only that its agents have exercised all ordinary care and diligence, but also all reasonable care and diligence. The question therefore arises, what is "reasonable" care with reference to the safety of passengers? The obvious answer is, "extraordinary" care; for this is the plain and unequivocal meaning of section 2067 of the Code, which applies to all carriers of passengers, and uses the emphatic language that they are bound to extraordinary diligence to protect the lives and persons of passengers. When, therefore, a passenger is injured, and the legal presumption arises in his favor, the company fails entirely to rebut that presumption unless it shows that it used extraordinary diligence,—this, and nothing short of it, being, in such a case, the "reasonable" diligence required by law.

2. In enumerating the several degrees of care to be expected of bailees, according to the nature of the particular bailment, the Code, in section 2062, defines "extraordinary diligence" to be "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." Applying this definition to the terms "extraordinary diligence," as used in section 2067 of the Code, the diligence to be expected of railroad companies in caring for their passengers would be "that extreme care and caution which very prudent and thoughtful persons" would observe in discharging that duty, if devolving upon them. The court charged that railroad companies were required by law "to observe the utmost care and diligence" for the safe carriage and delivery of their passengers. Exception was taken to the unqualified use of the word "utmost" in this connection, and we think the exception well taken. To the mind of the

writer, the term just quoted conveys a stronger and more significant meaning than the word "extreme." This view, however, may not be sound; for there is much reason for holding that, according to the recognized authorities, these two words are synonymous. The mere substitution, therefore, of the word "utmost" for the word "extreme" would not, perhaps, render the charge erroneous. Its real vice consists in laying down the doctrine that a railroad company is bound to use the highest possible degree of diligence in caring for the safety of its passengers; this being the real meaning of the words "utmost diligence" when used alone, and without qualification, whereas, the legal measure of extraordinary diligence recognized by our Code is, as above shown, only that extreme care and caution which very prudent and thoughtful persons exercise under like circumstances. In giving to the jury the standard of diligence by which the company was to be bound, the court should have used the language prescribed by law for this purpose, and, in failing to do so, made too strong a statement of the law against the company. The jury were authorized to infer that the company must, to protect itself, have shown that it exercised that degree of care which would have been observed by the most prudent and thoughtful persons in the world, whereas, it was enough for the company to show that it did all that, under the circumstances, would have been done by very prudent and thoughtful persons. This distinction is not hypercritical, for a little reflection will suffice to show that there is a substantial difference between the highest possible degree of human foresight and care and that degree of diligence which is actually observed by even very prudent and thoughtful persons, especially under the stress of sudden emergency. It was in overlooking this difference that the error in the charge complained of consisted. As, at best, it is extremely doubtful whether the plaintiff is entitled to recover at all in this case, we do not hesitate to order a new trial because of this error, which must have operated very prejudicially against the defendant. Judgment reversed.

ATKINSON, J., not presiding.

(96 Ga. 89)

M. A. THEDFORD MEDICINE CO. v. CURRY.

(Supreme Court of Georgia. April 8, 1895.)

INFRINGEMENT OF TRADE-MARK—ACTION FOR DAMAGES.

The declaration, as amended, alleging, in substance, that the plaintiffs were profitably engaged in the manufacture and sale of a certain valuable medicine; that the defendant fraudulently, deceitfully, and with intent to injure the plaintiffs' business, did manufacture, under a similar name, a spurious and inferior medicine, in imitation of that made by the plaintiffs, and, by simulating the wrappers used by the plaintiffs in putting up their medicine, did deceive

the public, and thus sell large quantities of the spurious medicine as the genuine, all of which was to the plaintiffs' injury and damage,—a cause of action was set forth, and the demurrer to the petition should not have been sustained. (Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by the M. A. Thedford Medicine Company against D. W. Curry. A demurrer to the declaration was sustained, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

The following is the official report:

To the petition of the M. A. Thedford Medicine Company against Curry, and to the declaration as amended, the defendant demurred. The demurrer was sustained, and to this ruling plaintiff excepted.

The petition alleged, in numbered paragraphs, after being amended, as follows: "(2) Petitioners have been in business in Rome, Ga., since November, 1890, in manufacturing and selling medicines now called 'M. A. Thedford's Black Draught,' which they prepared and sold for profit long before January 1, 1894. (3) Curry, a wholesale and retail druggist of Rome, intending to injure petitioners in the sale of their said medicine, and to deprive them of their profits from the sale thereof, has been and is selling said medicine since January 1, 1894, up to the filing of this writ, as being of petitioners' manufacture,—said medicine being deceitfully and fraudulently prepared and made in imitation of that of petitioners' manufacture, which was not so, but was in fraud of petitioners' rights,—and is doing this both in Rome and the country adjacent. The medicines so sold by him have printed and inscribed on the wrapper thereof certain words, names, etc., which bear so close a resemblance to the name, words, etc., on the wrappers of petitioners' medicine that this is calculated to and does deceive the public generally as to the character of such medicine, using the words 'Thedford' and 'Black Draught' on said wrappers, which he had and has no right to do. (4) Curry is and has been selling said medicine without petitioners' consent or authority, against their protest, and to their damage \$2,000. For a long time before January 1, 1894, and at the time of the committing of the grievances charged in this declaration, petitioners prepared and sold for profit large quantities of a medicine called 'M. A. Thedford's Black Draught,' which they then and since used, and were accustomed to sell, having printed on the wrappers thereon the words 'M. A. Thedford's Black Draught.' Petitioners have acquired fame and reputation with the public on account of said medicine so by them prepared and sold, and great profit and gain; yet defendant, well knowing the premises, but willfully, subtly, and unjustly intending to injure petitioners in the sale of their said medicine, and to deprive them of the gain and profit which they would otherwise have acquired by preparing and selling it, on January 1, 1894, and at other

times between then and the beginning of this suit, did wrongfully, knowingly, fraudulently, etc., against the will and without the consent of petitioners, sell some 2,000 packages of certain articles, represented and termed by him to be medicine, in imitation of the said medicine, inclosed in wrappers with words printed on them similar to those so prepared and sold by petitioners; and said Curry did sell said packages of medicine, so prepared and sold by him, in packages having printed on the wrapper in which they were inclosed, among other words, the words 'M. A. Thedford & Co.'s Black Draught,' in order to denote that the medicine was the genuine medicine prepared and sold by petitioners. And he, on the several days mentioned, did knowingly, deceitfully, etc., sell for his own gain said last-mentioned packages of the said articles, represented and termed by him to be as of medicine by the name and description of 'M. A. Thedford's Black Draught,' which had been prepared and sold by petitioners, whereas, in fact, petitioners had never been the preparers or sellers thereof, or any part thereof. By reason of which petitioners were fraudulently, etc., hindered and prevented by defendant from selling and disposing of divers large quantities of medicine, to wit, some 2,000 packages of the said medicine, which they would otherwise have sold and disposed of. And they were also deprived of divers large gains and profits which would otherwise have accrued to them from the sale of their own medicine, called and marked 'M. A. Thedford's Black Draught,' and were otherwise greatly injured in the selling and vending of their said medicine. (5) By reason of these said sales by defendant, they have been defrauded of large profits which they would have otherwise realized. (6) Their credit has been greatly injured by these sales by defendant, who has realized large profits from the sale of said medicine under the circumstances before related. (7) They were greatly injured and damaged also in their reputation, by reason of this medicine, etc., sold by defendant without right and contrary to law; the said medicines thus sold by defendant being inferior in quality to the genuine medicine manufactured and sold and put upon the market by petitioners. (8) And defendant has, by his action as aforesaid, damaged petitioners by circulating injurious letters and reports among their customers, in that defendant sent a letter to Pope & Co., of Fayetteville, Alabama, who were customers of petitioners, and who received said letter from defendant, dated February 8, 1894, in which were the following words: 'We have no interest in either company, but, from the best information we can get, Thedford sold out years ago, and has no moral or legal right in the premises,'—which was deleterious to petitioners' business standing and character, to the extent of over \$500. (9) All of which above acts and doings of defendant have been done with the intention fraudulently, deceit-

fully, etc., of injuring and defrauding petitioners; and defendant knowingly, fraudulently, etc., defrauded them by making said sales and delivering said medicines as aforesaid, and thereby not only deprived them of the advantage which they would have derived from the sales of their own medicine manufactured by them, but by reason of his fraudulent and deceitful conduct, which he willfully and knowingly perpetrated. (10) They have also been damaged \$1,000 by the loss of profits which they would have realized by the sale themselves of said medicines of their own manufacture, a spurious and counterfeit kind of which was sold by defendant, purporting to be of petitioners' manufacture, by the means already related, which he calculated to, and did, deceive the public. (11) By means of all which petitioners have been injured and damaged \$2,000." The prayer was for process to defendant to answer an action on the case for damages.

The demurrer was: "The petition, as a whole, sets forth no cause of action. (2) The petition in none of its paragraphs sets forth a cause of action against defendant. (3) Paragraph No. 2 of the petition, and also the entire petition, are insufficient, because it is not shown when the medicine of plaintiff was first called 'M. A. Thedford's Black Draught,' and it is not shown that it was so called before the medicine alleged to have been sold by defendant was so called, and it is not shown that plaintiff has any exclusive right to manufacture or sell the medicine mentioned in said paragraph No. 2. (4) In paragraph No. 3 of the petition no facts are stated showing why defendant has no right to use the word 'Thedford' or 'Black Draught,' nor why plaintiff has that exclusive right, nor is it shown that plaintiff had acquired or had an exclusive or prior right to the use of its wrapper, or any part thereof, or that its wrapper, Exhibit A, was made or used prior to the using or making of the wrapper marked 'Exhibit B.' (5) In paragraph No. 4 it is not shown why petitioners' consent or authority was necessary. (6) In paragraph No. 5 it is not shown how plaintiffs have been defrauded of profits, nor how said profits could have been realized. (7) In paragraph No. 7 no facts are stated showing that defendant has sold medicine without right, or contrary to law. (8) In paragraph 8 it is not shown what the reports were, nor were the contents of the letters stated, nor does it appear to whom, or when, said letters were addressed."

C. Rowell, for plaintiff in error. Fouché & Fouché and John L. Hopkins & Sons, for defendant in error.

LUMPKIN, J. The reporter's statement sets forth in brief the substance of the plaintiffs' declaration, as amended, and of the demurrer filed to the same. While the declaration is, perhaps, unnecessarily volu-

minous, and contains numerous allegations which would not, of themselves, show any right of recovery, we think that, as a whole, it sets forth a cause of action, and that it was error to sustain the demurrer. The most material allegations of the declaration are summarized in the headnote. It would seem that if the plaintiffs were engaged in a profitable business, which consisted of the manufacture and sale of a really valuable medicine, and the defendant fraudulently, deceitfully, and with the intent to injure that business, manufactured under a similar name a spurious and inferior medicine in imitation of that made by the plaintiffs, and for the purpose of carrying out the fraudulent intent already mentioned, and unjustly making money upon the reputation which the plaintiffs had established for their medicine, simulated their wrappers, and thus deceived the public into buying large quantities of the spurious medicine as the genuine, and in consequence reducing the plaintiffs' sales and causing them injury and damage, a wrong was committed for which the law should afford a remedy in damages. What the proof may disclose at the trial we cannot, of course, anticipate; but if the defendant did all that the plaintiffs charge, for the purpose and with the result alleged, the case is one which should be passed on by a jury. The principle upon which we think the case should have been retained for a hearing is intimated by Chief Justice Lochrane at the conclusion of his opinion in the case of *Ellis v. Zellin*, 42 Ga. 95. After stating that the court did not think there was equity in the bill filed in that case, on the mere question of similarity in the trademarks, he added, "But as the demurrer admits that what was done was done intentionally, to take advantage of the reputation of his Simmons' Liver Medicine, we cannot hold the judge below erred in retaining the bill for a hearing to let the whole matter be determined upon its merits." It was strongly insisted in the present case, however, that under the allegations of the plaintiffs' declaration, and in view of the exhibits thereto attached, purporting to be the two wrappers in question, the defendant did not really simulate the plaintiffs' wrappers, and that there was no such similarity between them as would deceive persons of ordinary observation. Whether there was or was not a fraudulent simulation of the plaintiffs' wrappers was, as remarked by Chief Justice Bleckley in *Foster v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284, at bottom, a question of fact, rather than of law. At any rate, the declaration distinctly alleged there was such a simulation, that its intent was fraudulent, and that its results were, as matter of fact, highly injurious to the plaintiffs' business. On the whole, we think that the question whether or not the label or device used by the plaintiffs had become such a badge of origin and ownership as to

be the subject of protection against a colorable imitation likely to deceive the public and injure the proprietors in their trade was one for determination by a jury, and not for final solution by the presiding judge. Judgment reversed.

ATKINSON, J., not presiding.

(96 Ga. 126)

GLOVER v. GREEN et al.

(Supreme Court of Georgia. April 15, 1895.)

ALTERATION OF NOTE—RIGHTS OF MAKER—RESCISSI-
ON OF CONTRACT—RETENTION OF BENEFITS.

1. While the intentional alteration of a promissory note in a material part, if made by a person claiming a benefit under it, or by his agent with his consent, with the intent to defraud the maker, will give the latter, at his option, the right to treat the note as void, in order to avail himself of this right he must elect to rescind the whole contract of which the note forms a part. He cannot enforce for his benefit a portion of that contract, and repudiate another portion of the same.

2. Even if a promissory note given for the purchase of land was afterwards fraudulently altered by the insertion therein of a promise to pay attorney's fees, and the maker would consequently have been entitled to rescind the contract of purchase, yet, where interest upon the note, as originally executed, was past due and unpaid, and suit was therefore brought for the recovery of the land, the defendant could not, without paying anything, absolutely defeat the plaintiff's action on the ground that the note was void. In order to keep the land, the purchaser would be obliged to comply with the terms of his contract of purchase, as expressed in the note, with the fraudulent alteration eliminated therefrom.

3. The verdict in this case was an absolute non sequitur from the pleadings and evidence, under any view of the law applicable, and a new trial must be granted.

(Syllabus by the Court.)

Error from superior court, Jones county; W. F. Jenkins, Judge.

Actions by William O. Glover against Lucy J. Green, and by the same plaintiff against Lucy J. Green and husband. The actions were consolidated. The decree was rendered for defendants, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

R. V. Hardeman and Hardeman, Davis & Turner, for plaintiff in error. W. Dessau, R. L. Berner, and R. Johnson, for defendants in error.

LUMPKIN, J. In 1886 F. F. Green was indebted to N. S. Glover upon promissory notes given for borrowed money, and secured by a mortgage upon a tract of land upon which Green and his wife resided. In November, 1888, Green having failed to pay any part of the principal or interest due on the notes, and being unable to do so, he and Glover had an accounting and settlement between themselves, by which it was ascertained and agreed that Green owed Glover something over \$1,800; and, in consideration of that sum, Green then sold outright to Glover the land

covered by the mortgage, executed and delivered to him a warranty deed to the premises, and took up and canceled the notes and mortgage above mentioned. The price thus paid for the land was its full value. Immediately after this transaction, Green proposed to buy the land for his wife at the same price, and Glover sold it to her; taking her note, payable in 10 years, but stipulating that interest at 8 per cent. should be paid annually as rent, and at the same time delivering to her a bond conditioned to make her titles to the land upon her complying with her contract as expressed in the note. In this note was an interlineation of an agreement to pay 10 per cent. attorney's fees for collecting the same. N. S. Glover died in 1889. Mrs. Green made default in paying the interest, and W. O. Glover, as administrator of N. S. Glover, brought an action against her for the recovery of the same, to which action Mrs. Green, in addition to the general issue, pleaded non est factum, and also that the note in question was given by her in settlement of a debt due by her husband, and was therefore void. There was no issue as to the fact that Mrs. Green really signed the note, and the plea of non est factum related entirely to the interlineation above mentioned; Mrs. Green claiming that the same was made after the execution of the note, by N. S. Glover, or his agent, without her knowledge or consent. After filing of these pleas the case was continued, and subsequently Glover's administrator filed an equitable petition against Green and his wife, praying for a recovery of the land itself, or that it be sold, and the proceeds applied to the debt due his intestate. Mrs. Green then changed front, and took the position that she had purchased the land on her own account, and repudiated the plea to the contrary filed in the former case. These two cases were consolidated and tried together. Without going further into detail, it would seem from the record that at the trial Mrs. Green's contentions were: First, that the note she had given for the purchase of the land, having been fraudulently altered, was not binding upon her, and therefore there could be no recovery in money by the plaintiff; and, second, that the plaintiff could not recover the land itself, because the note, the evidence of her indebtedness for its purchase, having been rendered void, the plaintiff had no standing whatever in court. In other words, that she could keep the land without paying for it, simply because the note given for its purchase had been fraudulently altered by the deceased, N. S. Glover, or his agent. The jury returned the following verdict: "We, the jury, find for the defendant, upon the plea that the note was altered with intent to defraud defendants. We find, further, that the defendant has never repudiated her contract for purchase of said land on the ground that it was the debt of her husband, but that it is her debt." Upon this verdict there was a decree for the de-

fendants. Thus it has transpired that the deceased, Glover, has been deprived of his land, and yet neither he nor his administrator has ever received a single cent of the purchase money. Such a result is surely not legally possible, in any fair view of the pleadings or the evidence, and, moreover, is utterly inconsistent with every idea of justice. The preponderance of the evidence would seem to indicate that the alteration in the note was not fraudulently made, but that the interlineation was inserted before the execution of the note by Mrs. Green. Accepting, nevertheless, as correct, the finding of the jury on this question, it by no means follows that, because of the fraud, N. S. Glover's estate must lose both the money and the land. We think there can be no doubt that if the note was altered by the deceased, Glover, or his agent, with intent to defraud Mrs. Green, she would, under section 2852 of the Code, have the right to repudiate the entire contract; but, in order to do so, she would necessarily have to surrender the land. While, under the facts, the administrator could not enforce payment of the note, she could not refuse to pay, and also keep the land. The fraudulent changing of the note would render the entire contract, of which it formed only a part, voidable, at the option of Mrs. Green; but, if she elected to rescind that contract, she would have to rescind the whole of it. She could not rescind it in part, and enforce it in part. Even upon the assumption that the facts were as contended by Mrs. Green, the exact measure of her legal rights in the premises would be either to give up the land, and thus avoid liability on the note, or, if she desired to keep the land, comply with the terms of her note just as it stood before the fraudulent alteration in it was made. The propositions above announced are obvious, without elaboration. Judgment reversed.

(95 Ga. 770)

NALL v. FARMERS' WAREHOUSE CO.
et al.

(Supreme Court of Georgia. April 15, 1895.)

LIABILITY OF AGENTS—WHEN CONSIDERED PRINCIPALS—CONVERSION BY WAREHOUSEMEN.

1. Where certain persons, intending to act for and on behalf of others, do in fact, in the execution of a written agreement for the rent of a warehouse, contract not only for and on behalf of their several principals, but also each for and on behalf of himself, they thus bind themselves personally to the performance of the covenants therein stated. All of the parties are principals, and if they subsequently, in pursuance of the contract, engage in the business of warehousemen, and, as such, receive the property of another, the persons engaging in such business are personally answerable for the faithful execution of the contract of bailment, and cannot excuse a nonperformance by showing by parol that, in the conduct of the warehouse business, they were acting for their principals and not for themselves.

2. The evidence showing that all the parties to the agreement—both the alleged principals and the alleged agents—engaged in the warehouse business, and, as warehousemen, received

the cotton of the plaintiff, and refused either to deliver the same or to account therefor on demand, the grant of a nonsuit was error.

(Syllabus by the Court.)

Error from superior court, Spalding county; C. C. Smith, Judge.

Action by Thomas Nall against the Farmers' Warehouse Company and others. Judgment for defendants, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Thomas Nall brought suit against the Farmers' Warehouse Company, J. H. Mitchell, B. N. Barrow, J. J. Elder, H. T. Patterson, and F. M. Scott, to recover the value of four bales of cotton. The court granted a nonsuit, on the ground that there was not sufficient evidence to authorize the plaintiff to recover against any of the defendants. The evidence shows that on May 7, 1889, a written contract was made between "the committee of the County Alliance of Spalding County, to wit, J. H. Mitchell, B. N. Barrow, J. J. Elder, H. T. Patterson, and F. M. Scott, each for himself and for the order he and they represent, of the one part, and Thomas Nall and R. A. Thompson, proprietors and owners of the brick warehouse on Solomon street, Griffin, Ga., of the other part," whereby the parties of the first part leased from the parties of the second part said warehouse "for the term of one year, with the privilege of same from year to year for five years, if they so elect," for the rent of which they were to keep the property insured, pay all taxes, and pay to R. A. Thompson \$200 for each year; the parties of the first part to have entire and exclusive control of the warehouse business, including weighing, storing, buying, and selling cotton, etc. It was further agreed that Thomas Nall, of the second part, should be permitted to truck into the rear of the warehouse such cotton as he might purchase elsewhere. This was signed by the seven individuals named. It was indorsed: "Transferred, by order of County Alliance, to the Farmers' Warehouse Company. July, 1891. [Signed] W. E. H. Searcy, Chairman Warehouse Committee." Plaintiff also introduced four receipts, all alike save as to name of person to whom issued, date, number, marks, and weights. One of these was as follows: "Alliance Brick Warehouse, Griffin, Ga., Nov. 1, 1890. B. N. Barrow, Manager. Received from W. S. Head one bale cotton, marks, numbers, etc., as per margin, subject to the presentation of this receipt only, on paying customary expenses and all advances, acts of Providence and fire excepted. * * * [Signed] Mitchell, for the Manager." Plaintiff testified: "The lease contract was executed by the parties whose names appear thereto. The parties of the first part carried on warehouse business at said warehouse during the cotton season of 1890 and 1891. B. N. Barrow was the manager, and J. C. Williams and Mitchell were

the salesmen or weighers of cotton. I bought the cotton from the persons to whom and in whose names the receipts in evidence were given, during the season of 1890-91; and before or about March 1, 1891, I demanded of Barrow, as manager and personally, the cotton described in these receipts; he failed to produce or deliver it, and I have never been able to get it. The four bales were worth \$165. When defendants came to negotiate for the rent of the warehouse, they came as a committee from the Alliance, and it was for the purpose of running an Alliance warehouse. I thought it would be to my advantage to have an Alliance warehouse there; and I agreed to and have paid part of the rent to Thompson, and paid H. C. Burr \$50 each year for the rent of his fourth interest in the warehouse. The lease under the contract will not expire until September 1, 1895."

J. S. Boynton, for plaintiff in error. R. T. Daniel, Hammond & Cleveland, and T. E. Patterson, for defendants in error.

ATKINSON, J. It is only necessary to add, by way of explanation to the headnotes and the official report in this case, that it will appear from the latter that in the execution of the contract of rental the defendants personally sued in this case contracted not only as a committee from the County Alliance of Spalding County, but each for and on his own account and for and on account of the order he and they represent. It will be observed that the contract of rental, as executed, was executed by the parties sued in this case, not only in their representative, but in their personal, capacity. The undisputed evidence is that the parties of the first part to this contract of rental carried on a warehouse business upon the rented premises. During the time they so conducted this business the plaintiff committed to their keeping the property for and on account of which this suit is brought. The court granted a nonsuit, and we think this was error. The bailment had been established, a refusal of delivery upon demand likewise shown, and the damage proven. This makes the plaintiff's case, and, uncontradicted, he was entitled to recover. Let the judgment of the court below be reversed.

(95 Ga. 759)

HOME INS. CO. OF NEW ORLEANS v. HARRINGTON et al.

(Supreme Court of Georgia. April 15, 1895.)

PAROL EVIDENCE TO VARY CONTRACT.

1. Where the terms of a written contract are perfectly plain and unambiguous, the intention of the parties is to be ascertained from the language of the contract itself, and not otherwise; and, in such case, parol evidence is inadmissible to add to, vary, or explain the meaning of the contract.

2. In this case the language of the insurance policy as to the question at issue was plain,

and its meaning clear and unambiguous. The court therefore erred in admitting parol evidence as to the intention of the parties at the time the policy was issued.

(Syllabus by the Court.)

Error from city court of Newnan; A. D. Freeman, Judge.

Action by Harrington Bros. against Home Insurance Company of New Orleans. Judgment for plaintiffs, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Jackson & Leftwich, for plaintiff in error. Atkinson & Hall, for defendants in error.

LUMPKIN, J. The Home Insurance Company of New Orleans issued to Harrington Bros. a policy of insurance, whereby they were insured for eight months, to an amount not exceeding \$1,000, "on cotton in bales * * * contained in the buildings, sheds, platforms, and yards, and also in cars, at Newnan Compress," also on all cotton held by the insured for account of certain named railroad companies; loss, if any, payable to such companies "as their interest may appear, while contained in the buildings, sheds, platforms, or yards of the Newnan Compress, situated on said roads at Newnan, Ga." In the conditions inserted in the policy were the following stipulations: "It is understood and agreed * * * that this company shall be liable only for such proportion of the whole loss as this insurance bears to the cash value of the whole property hereby insured at the time of the fire." "This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property." Within the period covered by the insurance a fire occurred by which cotton to the value of \$7,649.07 was destroyed or injured while upon the platform of the compress. No cotton inside of the compress building was injured or destroyed. At the time of the fire there was inside the building cotton of the value of \$83,910.80, upon which there was "specific" insurance to the amount of \$83,500; and on the platform was cotton of the value of \$38,231.03, upon which there was "floating" insurance to the amount of \$23,000. The insured brought an action against the insurance company, claiming an indebtedness under the policy of \$197.95, and obtained a verdict accordingly.

It will be observed that the total value of the property insured in part by this policy was \$122,141.83, and the whole amount of insurance covering this property was \$106,500. The company limited its liability by the two stipulations above quoted, neither of which is in the least degree doubtful or uncertain in its meaning. On the contrary, the terms of the contract are perfectly plain and unambiguous. It is a thoroughly well

settled rule of law that in the interpretation and enforcement of contracts the cardinal rule is to ascertain and carry out the intention of the parties; but it is also an equally well settled rule that this intention is to be arrived at from the language of the contract itself, and not otherwise, when the meaning of that language is absolutely clear and free from doubt. Consequently, in such case, parol evidence cannot be resorted to either for the purpose of ascertaining the actual intention of the parties, if different from that plainly expressed in the contract, or of varying or explaining the plain meaning of the contract itself. We deem it entirely unnecessary to fortify these propositions either by reasoning or the citation of authority. Applying the law as above stated to the facts of the present case, it will readily be seen that the company had the right to limit the amount it would have to pay on account of loss by invoking the provisions of either of the two above-quoted stipulations; and, naturally, it would choose to adjust its liability under that one which would make its loss the less. How this would work will be at once perceived by stating two proportions under the old "rule of three," as laid down in arithmetic. Thus, under the first stipulation, the proportion would be: As face of policy (\$1,000) is to the whole value (\$122,141.83), so is proportion of loss (\$62.62+) to whole loss (\$7,649.07). And under the second stipulation it would be thus: As face policy (\$1,000) is to whole insurance (\$106,500), so is proportion of loss (\$71.82+) to whole loss (\$7,649.07). Therefore, the loss falling upon the company under the first stipulation would be \$62.62, and under the second stipulation, \$71.82. The former, being the lesser amount, fixes the exact measure of the company's liability according to the contract. The court, over the defendant's objection, admitted evidence, the tendency of which was to show an intention on the part of the parties to the contract differing from that above indicated, and which consequently, in its effect, really varied the terms of the policy. This, for the reason already stated, was error. The exact amount of the company's liability was as above shown, and it was easily ascertainable from the terms of the policy itself, in connection with the other facts herein stated. The verdict should have been for precisely that amount. Judgment reversed.

(96 Ga. 111)

SARGEANT et al. v. BURDETT.

(Supreme Court of Georgia. April 15, 1895.)

TRUST IN BEHALF OF GRANTOR—VALIDITY.

A person cannot, by deed, create out of his own property, upon his own behalf, a trust estate. A deed executed for such a purpose is void, and passes no interest, legal or equitable, to the trustees named. In such a case the whole title remains in the grantor, and the property so

sought to be conveyed is subject to the payment of his debts.

(Syllabus by the Court.)

Error from superior court, Coweta county; S. W. Harris, Judge.

Claim by H. B. Sargeant and others, as trustees, for the possession of land levied on in an action by A. R. Burdett against H. J. Sargeant. Brought forward from the last term. Code, §§ 4271a-4271c. Judgment for Burdett, and Sargeant and others bring error. Affirmed.

W. A. Turner, for plaintiffs in error. Atkinson & Hall and A. D. Freeman, for defendant in error.

ATKINSON, J. According to the record in this case, the defendant in execution, H. J. Sargeant, being the owner of the property levied on, previous to the rendition of the judgment against him, conveyed the same by deed to the claimants, the same to be held by them as trustees, the incomes, rents, and profits of the property to be applied to the support and maintenance of the grantor and his wife. The grantor was *sui juris*,—in the full possession of his mental faculties,—else he could not convey by deed at all, and the only reason assigned by him for the creation of this alleged trust in his own behalf was, in the language of the deed, "that he is far advanced in life, being more than sixty-nine years old, and, by reason of great bodily affliction, has become much enfeebled physically, and is now unable to manage, superintend, and protect his estate." The statute of uses was designed to discourage the practice of creating trusts, it being thereby declared to be the settled policy of the English law, accepted and incorporated by us in our system of jurisprudence, that the title to real property should follow the use, and therefore express trusts are the exception to the general rule, and are capable of creation only in cases provided for by express statutory enactment. Our Code provides for the creation of trusts only in favor of certain specified classes of persons, viz. minors, persons non compos mentis, and such persons who, on account of mental weakness, intemperate habits, wasteful and profligate habits, are unfit to be put in the management and right of property. Since the passage of the woman's enabling act of 1866, though prior thereto it could be done, a trust cannot now be created in favor of a woman because of her sex alone, because, whether she be *feme sole* or *feme covert*, she is capable to take in law the absolute fee, free from the debts and control of her husband, and therefore, inasmuch as a trust attempted to be created in favor of a woman, married or single, stands executed *eo instanti* with its creation, it is incapable of being created. Upon this reasoning, it has been held in *Gray v. Obear*, 54 Ga. 231, that a trust estate cannot be created in property in this state for the sole benefit of a full-grown man who is *sui juris*, and be

conveyed to a trustee, for the purpose of protecting it against his creditors, or for the purpose of depriving him of the free use and enjoyment of such property as the owner thereof. This general statement is, of course, with the qualification that if there be limitations over and restrictions in favor of other persons for whose use a trust is capable of being created the trust estate would be upheld. By section 2314 of the Code, in case of an executed trust for the benefit of a person capable of taking and managing property in his own right, the legal title is merged immediately into the equitable interest, and the perfect title vests in the beneficiary, according to the terms and limitations of the trust. The words "capable of taking and managing property" relate to the mental and not to the physical capacity; for, whatever may be the physical condition of a cestui que trust, if he labor under no mental infirmity which prevents the management and control of his estate, a trust in favor of such a person is, nevertheless, executed. The section of the Code (2306) which undertakes to define for what persons trust estates may be created takes no account of physical infirmities. The only considerations which enter into the classification of those persons for whom trust estates may be created are those which relate to mental, and not physical, disabilities; for instance, minors, and persons non compos mentis, and persons who, on account of mental weakness, intemperate habits, wasteful and profligate habits, are unfit to be intrusted with the right and management of property. For a person so situated and so constituted mentally a guardian may be appointed for the preservation and protection of his estate. Such persons are deemed non compos mentis in so far as the same concerns the appointment of guardians for the management of their estates (see sections 1658 and 1852 of the Code); and, if necessary to the protection of their estates, they may have them placed in the hands of guardians (Gray v. Obear, 59 Ga. 679). It will be observed that it is the mental imbecility, and not the physical weakness, resulting from old age, rendering one incapable of managing his estate, which makes him subject to have a guardian appointed to take charge of and manage his estate. So it is the mental weakness, and that intemperance, wastefulness, and profligacy of habit which indicate the existence of an unsound and unbalanced mind, and which exist to such an extent as to unfit one to be intrusted with the management and control of property, which enables him to be the subject of a trust. Unless these conditions exist, then he cannot be a cestui que trust under a trust estate created for his benefit alone, upon the conveyance of a third person. If being already possessed of an estate as of his own right, holding the legal title and as well the beneficial use, it would seem a strange anomaly in the law which would enable the owner of the property to convey to trustees for his own use his

own estate, with no limitations over in favor of third persons whose interests might in future attach. Eo instanti with the execution of such a conveyance there would be a merger of the title with the beneficial interest. The legal effect of such an instrument would be to convey no title, legal or equitable, out of the grantor, but leave it where it was before the execution of the deed. In the case now under consideration there is no suggestion of an impaired intellect by reason of advanced age as the inducement to the execution of this conveyance. A man in the full possession of all his intellectual faculties simply undertakes to convey to trustees his own estate, to be held for his own use. Whether it be the original object designed to be accomplished by this trust deed or not, it appears in this case to have brought about one of the exact results intended to be defeated by the statute of uses when it declared that trusts of the character now under consideration should stand instantly executed, and that was to prevent such a conveyance of one's property as would enable the alienee to hold it for the beneficial use of the grantor as against the creditors, and free from the debts and contracts of the latter. Inasmuch as the trust sought to be declared stands executed upon the instant of its creation, the deed is void and passes no title, legal or equitable, into the persons named as trustees. The jury having found the property subject, and the trial judge having denied a new trial, his judgment is affirmed.

(96 Ga. 766)

HARVEY v. MILLER et al.

(Supreme Court of Georgia. April 15, 1895.)

JURISDICTION IN EQUITY — CARRYING OUT PROVISION IN WILL.

Upon the facts appearing in the pleadings, and upon which the case was submitted to the presiding judge without a jury, there was no error in passing the order appointing partitioners to divide the land temporarily among the parties at interest, the division to continue only until the youngest of the tenants in common should become of age. The granting of this order was not only in harmony with the scheme of the will under which these tenants hold, but, in view of all the facts, the order provided the best practical method of carrying the will into effect.

(Syllabus by the Court.)

Error from superior court, Campbell county; S. W. Harris, Judge.

Bill by R. Miller and others against M. P. Harvey. Judgment for complainants, and defendant brings error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

Roan & Golightly, for plaintiff in error. T. W. Latham, for defendants in error.

ATKINSON, J. According to the record in this case, it became impracticable to carry literally into execution the will of the testator. His estate being involved, a consid-

erable portion of his property had first to be appropriated to the extinguishment of his debts, leaving only the lands described in the petition. The respondent applied for letters of guardianship for the minor children of the testator, and as such, for a number of years, has had the use of the land. In its operations it appears that he has incurred indebtedness of some kind for and on account of the estate committed to his care as guardian. Whether upon competent authority such debts were incurred, we are not called upon to answer. Upon the coming of age of some of his wards, he appropriated towards the extinguishment of such indebtedness the proceeds of their labor, and was continuing so to do. They are entitled, jointly with the minor heirs, under the will, to share in the profits of the estate as tenants in common. They allege that their earnings upon the property are appropriated wrongfully by the guardian to the extinguishment of the debts incurred by him, and they pray a partition of the premises. A literal execution of the will being impossible, under existing conditions, it was the duty of the chancellor, in the execution of its beneficial purposes, to frame a decree which, as nearly as might be, would approximate to the general testamentary scheme. The great purpose designed to be accomplished by the testator being to keep his estate intact until the youngest child attained its majority, and at the same time, out of the estate, to provide a support for the maintenance of them all, it occurs to us that no better plan could have been devised for carrying into effect the real purpose of the testator with respect to his estate than for the chancellor, as he did in this case, to render a decree, directing a temporary apportionment of the estate amongst the minors as they each severally attained their majority, that they might severally enjoy each his just proportion until the time when, upon the majority of the youngest child, a final apportionment of the estate could be made. To the point that the chancellor has competent authority to make such temporary apportionment where difficulties of the character that occur in this case present themselves, we cite *Rutherford v. Jones*, 14 Ga. 526, and *Wikle v. Woolley*, 81 Ga. 106, 7 S. E. 210. Let the judgment of the court below be affirmed.

(85 Ga. 757)

PICKETT v. SMITH.

(Supreme Court of Georgia. April 15, 1895.)

JUSTICES OF THE PEACE—JURISDICTIONAL AMOUNT
—LEVY OF ATTACHMENT—WAIVER OF
OBJECTIONS.

1. Even though a promissory note may contain a stipulation for the payment of attorney's fees in the event of its collection by suit, if the principal sum specified in the note, exclusive of the attorney's fees, be \$100 or less, an attachment sued out for the recovery of the specified principal only, with no claim for attorney's fees, is within the jurisdiction of, and properly returnable to, a justice's court, although the speci-

fied principal and agreed attorney's fees would, in the aggregate, exceed the sum of \$100.

2. If the levy of an attachment returnable to a justice's court was void because made by the son of the plaintiff, yet where the defendant in attachment entered an appeal to the superior court, appeared therein at the first term, and filed a plea to the merits, he thereby waived all right of objection to the legality of the levy, and could not, at a subsequent term, either by plea or motion, call the same in question.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by J. C. Pickett against Nathan Smith. From the judgment, both parties bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

W. E. Spinks, Bartlett & Washington, and J. J. Northcutt, for plaintiff in error. Mozley & Morris, for defendant in error.

LUMPKIN, J. Two questions were made for determination by this court,—one by the main bill of exceptions, and the other by a cross bill.

1. In *Almand v. Almand*, 95 Ga. 204, 22 S. E. 213, this court, following its previous adjudications, held that where an action was brought in a justice's court upon a promissory note for so much principal debt and attorney's fees, the sum of which aggregated more than \$100, the case was not within the jurisdiction of the court. In *Ashworth v. Harper*, 95 Ga. —, 22 S. E. 670, the above ruling was adhered to; and it was further decided that where such a suit had been brought for the principal and attorney's fees, as stipulated in the note, the fact that at the trial the claim for attorney's fees was abandoned, and judgment rendered for the principal only, which did not exceed \$100, would not cure the defect resulting from the infirmity in the original suit,—the jurisdiction of the court depending upon the amount claimed in the action, and not upon that for which the plaintiff obtained his judgment. The case now under consideration, which was an action originating in a justice's court, differs from both of the cases just cited in the following essential particular: Although the note sued upon stipulated for the payment of attorney's fees, which, added to the principal specified in the note, amounted in the aggregate to more than \$100, the attachment sued out was for the recovery of the specified principal only, which was exactly \$100, and there was no claim whatever for attorney's fees. We do not think the plaintiff was obliged to claim or sue for both principal and attorney's fees, these being distinct and severable demands; and, as he did not choose to sue for attorney's fees, we are of the opinion the case was within the jurisdiction of, and properly returnable to, the justice's court. Accordingly, there was no occasion to amend the attachment by making it returnable to the superior court.

2. The other point raised was that the levy

of the attachment was void because made by the son of the plaintiff. In view of the facts appearing in the record, it is unnecessary to determine whether, as an abstract proposition of law, this objection to the levy would or would not be good. The defendant in attachment, after judgment was rendered against him in the justice's court, entered an appeal to the superior court, appeared in the latter tribunal at the first term, and filed a plea to the merits. It was too late, after this, for him, either by plea or motion, to call in question the legality of the levy. If his objection to it was good at all, it ought to have been made and insisted upon long before the case had reached the stage to which it had progressed when this objection was for the first time presented. We think that by originally recognizing the validity of the levy the defendant waived all right of subsequent objection to it. Judgment on both bills of exceptions reversed.

ATKINSON, J., not presiding.

(95 Ga. 661)

CONWELL v. CARITHERS.

(Supreme Court of Georgia. March 18, 1895.)

APPEALABLE JUDGMENT—REFUSAL TO CONSIDER MOTION.

It is the duty of the judge of the superior court to entertain and consider all causes which may be pending in that court, and at some time or other to determine and finally adjudicate or otherwise properly dispose of the same, but a mere failure or refusal of the judge of the superior court at a particular time to entertain and consider a pending motion is not such action or such a final judgment thereon as is the subject of review by writ of error.

(Syllabus by the Court.)

Error from superior court, Elbert county; H. McWhorter, Judge.

Action between Frances L. Carithers and Sallie V. Conwell. From the refusal to determine a motion for new trial, Conwell brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Dismissed.

A. G. McCurry and P. P. Proffitt, for plaintiff in error. J. N. Worley and J. P. Shannon, for defendant in error.

SIMMONS, C. J. So far as appears, the motion for a new trial in this case is still pending in the court below. The judge did not dismiss it, but simply declined to entertain or consider it. While it is the duty of the judge of the superior court to entertain and consider all cases which may be pending in that court, and at some time or other determine and finally adjudicate or otherwise properly dispose of the same, a mere failure or refusal of the judge at a particular time to entertain and consider a pending motion is not such action or such a final judgment thereon as is the subject of review by writ of error. The writ of error must therefore be dismissed. Code, § 4250. Writ of error dismissed.

(95 Ga. 661)

ASHWORTH v. HARPER.

(Supreme Court of Georgia. March 18, 1895.)

JUSTICES OF THE PEACE—JURISDICTIONAL AMOUNT.

The principal debt stated as such in a promissory note, and the amount of attorney's fees agreed thereby to be paid, both constitute an aggregate principal debt; and where both are sued for, and the gross sum exceeds \$100, a judgment for any portion thereof in a justice's court is void for want of jurisdiction.

(Syllabus by the Court.)

Error from superior court, Hart county; H. McWhorter, Judge.

Action by W. J. Harper against Joel Y. Ashworth. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Jas. H. Skelton, for plaintiff in error. W. L. Hodges, for defendant in error.

ATKINSON, J. The jurisdiction of a justice's court is fixed by the principal sum claimed in the summons; and where the summons claims upon a promissory note a principal debt therein stated, and in addition thereto 10 per cent. for attorney's fees, both sums constitute a part of a principal debt; and if the amount of the principal debt stated as such in a promissory note be such as that, with the amount of attorney's fees stipulated and sued for added thereto, the aggregate would exceed \$100, the justice's court would be without jurisdiction to render a judgment in the case. The fact that after suit was brought for the principal debt and the attorney's fees, as stipulated in the note, the claim for the latter was abandoned, and judgment rendered only for the amount of the principal debt, with interest thereon, without attorney's fees, would not cure the defect resulting from the infirmity in the original suit. The jurisdiction of the court being dependent upon the amount of principal claimed in the original suit, and not upon the sum for which plaintiff finally obtained a judgment, the recovery of a less sum, as expressed in the judgment, leaves that judgment, nevertheless, void. See *Almand v. Almand* (decided by this court Dec. 21, 1894) 95 Ga. 204, 22 S. E. 213. See, also, *Bell v. Rich*, 73 Ga. 240. Judgment reversed.

(95 Ga. 762)

WELCH et al. v. STIPE.

(Supreme Court of Georgia. April 15, 1895.)

OPINION EVIDENCE—INSANITY—STATEMENT OF REASONS—NEW TRIAL.

1. A witness who is not an expert upon the subject of insanity cannot testify to an opinion that a given person was insane, without stating the facts upon which this opinion is based. Even a mother will not be permitted to testify that her deceased daughter was of unsound mind, although it appeared from other evidence that the two had lived together during the entire lifetime of the daughter, the mother herself not giving any reason whatever arising from their relationship or the long association

between them, or stating any fact upon which her opinion as to the daughter's mental condition was based.

2. The evidence was sufficient to warrant the verdict, and no reason appears why this court should overrule the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Campbell county; S. W. Harris, Judge.

Action by Sarah Welch and others against J. A. Stipe to set aside a will. Judgment for defendant. Plaintiffs bring error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

P. H. Brewster, W. A. Turner, and Dorsey, Brewster & Howell, for plaintiffs in error. W. Y. Atkinson, L. S. Roan, and J. F. Goightly, for defendant in error.

ATKINSON, J. The questions made in this case arose upon the trial of a caveat filed to the probate of a will. A verdict was rendered sustaining the will. The caveators moved for a new trial upon the general grounds that the verdict was contrary to law, evidence, etc., and upon the ground that the court, upon objection to its competency, excluded certain testimony of one of the witnesses offered by the caveators, the testimony offered and repelled being that of the mother of the testatrix, she testifying: "I do not think she had her mind at all times" (referring to the testatrix). "I do not think Mary's mental condition was right all the time. I was not with her when she made the will, but do not think she was in her right mind." The objection to the competency of such testimony was that it was an expression of opinion as to the mental condition of the testatrix, and that the witness gave no facts upon which the opinion was based. The court overruled and denied the motion for a new trial, and we are now to consider whether its judgment is in accordance with law.

It is necessary to a fair consideration of the court's ruling excluding the evidence objected to to state that the witness whose testimony was repelled was the mother of the testatrix, that the latter was about 40 years of age, and it was shown by the testimony of certain witnesses, but not by that of the mother, that the testatrix had lived with her mother all of her life. We understand the rule to be that, with respect to the opinions of nonexpert witnesses, they are admissible in evidence where the question under consideration is one of opinion, and where such witnesses state the facts and circumstances upon which the opinions expressed by them in their testimony are predicated. The probative value of all opinions is ultimately a matter which the jury must determine for itself; but whether an opinion is so far supported by the actual existence of circumstances which lead to its formation as entitles it to be considered at all is a question of law which the courts must determine. A bare opinion of a nonexpert witness, without detailing the circumstances

and facts upon which it is predicated, if permitted to go to the jury, would amount virtually to a substitution of the opinion of the witness for the opinion of the jury, and it is the mental conclusions of the latter, and not of the former, which are invoked by courts to assist them in arriving at correct conclusions with respect to matters of fact which they are called upon to consider. Before the opinion of a nonexpert witness can be considered it must appear not only that the witness has the opportunity of learning the facts upon which the opinion is predicated, but it must appear that the opinion was in fact based upon the facts and circumstances so ascertained, and not upon bare conjecture; and, in addition to this, it must appear that the witness, in the expression of the opinion, speaks with reference to the facts upon which it is predicated. Hence, whatever opinion a nonexpert witness might be willing to express, such opinion cannot be received unless it appears that it is based upon some knowledge of the matter out of which the mental conclusion of the witness arose, and that in the deliverance of the opinion he speaks with reference to such knowledge as the basis of its formation. The parent of this testatrix doubtless had an admirable opportunity to form a correct estimate as to the mental condition of her daughter. A long life spent in close and intimate association with her would have enabled her to observe all her eccentricities of habit and thought. If she had stated the extent of her observations, detailed any of the peculiarities, mental or otherwise, of her daughter, and placed the opinion which she did express upon such observations, then it would have been competent,—its reasonableness to be judged of by the jury. If, without stating any of the minor incidents which came under her observation during the long association with her daughter, she had stated the fact of such association, and distinctly referred her opinion to that for its basis, by saying that it was her opinion, derived from such association, that her daughter was of unsound mind, such opinion might have been competent; but, where she neither states the facts coming under her observation nor states that the opinion expressed is the result of such observation, there is no possible theory upon which it can be received in evidence. The mere fact that other witnesses, in the progress of the cause, might have stated facts which were within the knowledge of the mother, and which might have served as a basis for an opinion by the latter, would not make such an opinion admissible; it not appearing that the mother, in the expression of the opinion, spoke with reference to, or based the opinion expressed upon, such facts thus detailed. Of course, if she herself be without knowledge of the existence of the facts detailed by the other witnesses, she would not be entitled to express an opinion of her own, based upon the facts thus recited, for the effect of that would be to change the whole character of

her testimony from that of a nonexpert to that of an expert witness; and there is no foundation laid for the expression of an opinion by her as an expert witness, admitting even that the question involved such matters of science, trade, or art as authorized the acceptance of an opinion by experts. The opinion is admissible in connection with a general assignment of reasons for its formation, in order to give effect to those impressions made upon the mind of a witness resulting from observation, but which are incapable otherwise of exact expression or definition. Those impressions which we feel, the existence of which we realize, but for the existence of which we are unable to assign a perfectly clear and logical reason, when supported by the facts upon which they are based, may be submitted to the jury, and they are to judge to what extent the opinion is well founded. In cases like the one under consideration it must appear that the witness not only had opportunities to observe the circumstances which are the basis of any opinion which she might have formed upon the subject, but it must likewise appear that the opinion represents the mental result of such observation. It is one thing to have the opportunity, by observation, to have formed an opinion, and quite another to express an opinion based upon such observation. If no foundation for an opinion is stated, then no standard is established by which the jury can judge of its reasonableness; and, there being no means by which the jury could tell whether it was reasonable or unreasonable, it should not be submitted for their consideration. We think, therefore, the court properly excluded the opinion offered. *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533; *Insurance Co. v. Rodel*, 95 U. S. 232.

The only other exception is that the verdict is contrary to the evidence. It would serve no profitable purpose to state here in extenso the evidence submitted for the respective parties in the trial of this case. We have carefully and critically examined it with a view determining what should have been its just and appropriate probative force. We find that the verdict is amply supported by the evidence in the case and we have no disposition, therefore, to disturb it. We are the more readily persuaded to this conclusion by the assurance that the eminent circuit judge who presided upon the trial of this case, after his usual painstaking and careful review of the verdict, has seen proper, in his discretion, to approve the finding of the jury. Let the judgment of the court below be affirmed.

(95 Ga. 436)

BLOCK et al. v. TINSLEY.

(Supreme Court of Georgia. Feb. 27, 1895.)

BAIL TROVER—NONSUIT—LIABILITY ON BOND.

Where, in a bail-trover action, the plaintiffs were nonsuited, and a judgment against them was rendered in favor of the defendant for

the value of the property as recited in the bond which had been given by the plaintiff to acquire possession of the property, the defendant having failed to give bond, to which judgment no exception was taken, there was no error in dismissing, on demurrer, an equitable petition to restrain the collection of an execution issued upon that judgment, although, after the nonsuit had been granted, and pending action by the court upon a motion to enter the money judgment, the plaintiffs had surrendered the property to the levying officer, and renewed their action of bail trover.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Action of bail trover by A. & N. M. Block against Minnie Tinsley. Judgment of nonsuit, and judgment against plaintiffs on their bond. Plaintiffs bring equitable petition to reopen the proceedings. Dismissed, and plaintiffs bring error. Affirmed.

Freeman & Griswold, for plaintiffs in error. Harris & Harris and Hardeman, Davis & Turner, for defendant in error.

LUMPKIN, J. A. & N. M. Block brought an action of bail trover against Minnie Tinsley for the recovery of certain personal property. The defendant failing to replevy the same, the plaintiffs gave bond, as provided in section 3420 of the Code, and took possession of the property. This case was tried on the 13th day of June, 1894, and resulted in a judgment of nonsuit. Thereupon, counsel for the defendant asked leave to enter a judgment against the plaintiffs and their surety for the value of the property as recited in the bond, and the judge announced that he would reserve his decision upon this motion. The clerk having failed to enter the judgment of nonsuit on the minutes upon the day it was rendered, an order was passed on June 23, 1894, directing that such judgment be so entered nunc pro tunc. On the same day another order was passed, and entered on the minutes, adjudicating that the defendant recover of the plaintiffs and their surety on the bond the sum of \$200, which was the value of the property, as stated in the bond. This last order recited the motion which had been previously made by the defendant for this judgment, and the fact that the court had reserved its decision upon the same. It appears that on June 19, 1894, the plaintiffs had surrendered the property to the deputy sheriff who had originally seized it, and on June 21, 1894, had brought another action of bail trover for its recovery against the defendant, Tinsley. An execution was issued upon the judgment which she had obtained as above stated, and thereupon the Blocks brought an equitable petition, alleging, among other things, the foregoing facts, and the insolvency of Tinsley, and praying that the enforcement of her execution be restrained until their rights in the second bail trover action could be heard and finally determined. This petition was dismissed on demurrer alleging that it set forth no equita-

ble cause of action. The ruling by the court in this regard presents the only question for review. In passing upon this question, we will first call attention to the fact that if, for any reason, the judgment of nonsuit was erroneously or improvidently granted, it was, nevertheless, fully binding upon the Blocks, they never having in any manner excepted to it. That the court was right in allowing the defendant Tinsley to enter up judgment against the Blocks and their surety for the restitution of the property, or its value, is settled by the decision of this court in *Thomas v. Price*, 88 Ga. 533.¹ This judgment, though not in fact entered upon the minutes on June 13, 1894, has the same force and effect as if it had been then entered; and, even if it was not rightly granted, it was binding upon the Blocks, for the reason that they never excepted to it. It makes no difference that the order allowing this judgment to be entered on the minutes was granted in the absence of their counsel. The motion by defendant's counsel for the allowance of such judgment was made in open court, in the presence of counsel for the plaintiffs, and at the proper time. The judge thereupon signified that he would entertain the same, but would reserve his decision upon the question thus presented. For aught that appears in the record, counsel for the plaintiffs made no resistance to the motion whatsoever. At any rate, they had notice that the court had undertaken to pass upon the motion, and might at any time thereafter render judgment thereon against their clients. This being so, they were bound to take notice of any action the court might thereafter take upon the motion in open court, as the case was still undisposed of, so far as this motion was concerned. Indeed, it would seem, even in the absence of express notice of the fact that the defendant had moved to enter up judgment upon the forthcoming bond, that the plaintiffs, in the exercise of diligence, would still have to look after their case, to the extent, at least, of resisting a judgment against them upon their bond. They certainly must have known that, after nonsuit in their action of trover, they no longer had any right to the possession of the property; and, if they made no effort to voluntarily restore its possession to the defendant, they surely had reason to anticipate that the defendant would ask for a judgment against them upon their bond. This, as was decided in *Thomas v. Price*, *supra*, the defendant could do by motion in open court immediately after the plaintiffs were nonsuited in their action, and they certainly would not be justified in abandoning their case at that stage of the proceedings. Nor does it make any difference that, before the judge announced his decision upon the defendant's motion, the Blocks had already surrendered the custody of the property to the deputy sheriff who made the original levy, and had begun a new action of trover

against the defendant. Pending the action of the court upon the defendant's motion, the plaintiffs acted at their peril in surrendering the property to any one whomsoever, as so doing could in no way protect them, as against any judgment the court might afterwards render in the defendant's favor. When the judgment of nonsuit was rendered, and the defendant elected to take a money judgment for the value of the property, that property, so far as she was concerned, became the property of the Blocks; and when that money judgment was legally entered, as was done, and was acquiesced in by the Blocks, by failing to except to it, the question of title to the property originally in dispute was forever settled between these parties. The Blocks gained nothing whatever by returning it to the officer, nor could they by this means wipe out all that had been done, and begin anew. The rights of all the parties having become fixed by the judgment finally entered in the original ball-trover action, it was too late, after the time for excepting to that judgment had expired, to reopen the proceedings by an equitable petition. The court below was therefore right in dismissing the same. Judgment affirmed.

(95 Ga. 754)

THOMPSON-HILES CO. et al. v. DODD et al.

(Supreme Court of Georgia. April 15, 1895.)

INSOLVENT TRADERS' ACT—FILING PETITION—EFFECT ON UNRECORDED MORTGAGE.

While the insolvent traders' act provides that mortgages made by the debtor after the filing of the creditors' petition for the purpose of securing existing debts shall be vacated, the lien of a valid mortgage executed by him before such filing is not affected thereby; and nothing in the registry act of 1889 deprives such a mortgage of its priority over the claims of the unsecured creditors as to the property covered by the mortgage, or the proceeds thereof, although the mortgage may not have been filed for record until after the filing of the creditors' petition.

(Syllabus by the Court.)

Error from superior court, Polk county; O. G. Janes, Judge.

Action by the Thompson-Hiles Company and others against one Dodd. J. R. Barber was appointed receiver under the insolvent traders' act. From an order of distribution of the assets, Thompson-Hiles Company and others bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Blance & Fielder, Sanders & Davis, and Colville & Noyes, for plaintiffs in error. Irwin & Bunn, for defendants in error.

SIMMONS, C. J. On August 5, 1893, the Thompson-Hiles Company and others, unsecured creditors of Dodds, a merchant, filed a petition against him under the insolvent traders' act (Code, § 3149a), and a receiver

¹ 15 S. E. 11.

was appointed, who took charge of his stock of goods, and sold them. Prior to the filing of the petition, to wit, on May 27 and June 3, 1893, two mortgages on the goods had been given by Dodds to the First National Bank of Cedartown; and, upon a petition to distribute the fund in the hands of the receiver arising from the sale of the goods, the mortgagee, who had been made a party plaintiff to the petition, claimed priority over the unsecured creditors. It appears that the mortgages were not recorded or properly filed for record within 30 days from the date of their execution, nor until after the petition had been filed and a receiver appointed; and for this reason the unsecured creditors claimed that, as against them, the mortgages were not a lien on the property. The court awarded priority to the mortgages, and this judgment was excepted to. We think the court was right in so holding. Section 3149d of the Code, which was relied on by the plaintiffs in error, reads as follows: "Upon the appointment of a receiver, no creditor shall acquire any preference, by any judgment or lien, or any suit or attachment under proceedings commenced after the filing of the bill, and all assignments and mortgages to pay or secure existing debts made after the filing of said bill, shall be vacated, and the assets divided pro rata among the creditors, preserving all existing liens." This section, it will be seen, deals with mortgages made after the filing of the petition, and does not refer to mortgages made before that time, except in so far as it provides for the preservation of existing liens. It was insisted, however, that, under the registry act of 1889, mortgages made but not filed for record before the filing of the petition stand upon no better footing, as against the petitioning creditors, than if made subsequently, the act providing that "deeds, mortgages and liens of all kinds which are now required by law to be recorded in the office of the clerk of the superior court of each county within a specified time, shall, as against the interests of third parties acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record in the clerk's office." Acts 1889, p. 106. In our opinion, it would be giving the act a strained construction to hold that unsecured creditors, by the filing of a petition of this character, and by the receiver's taking charge of the property, acquire such a transfer or lien, within the meaning of this section of the act, as to give them priority over a mortgagee whose mortgage on the property was given prior to the filing of the petition, though not recorded, or filed for record, until afterwards. Before the adoption of the act of 1889, the effect of failure to record a mortgage within the time prescribed by law was to postpone it "to all other liens created or obtained or purchases made before the actual record of the mortgage." Code, § 1957. But

it was never held that the effect of such failure was to postpone the mortgage to the claim of an unsecured creditor who had not obtained a judgment against the debtor. We know of no reason for holding that the act of 1889 was intended to place creditors on any better footing in this respect than that occupied by them before. Judgment affirmed.

ATKINSON, J., not presiding.

(95 Ga. 775)

ALMAND v. GEORGIA RAILROAD & BANKING CO.

(Supreme Court of Georgia. April 29, 1895.)

CARRIERS—LIABILITY AS WAREHOUSEMEN—DELAY—NEGLIGENCE OF CONNECTING LINE.

1. According to the decision of this court in the case of *Railroad Co. v. Felder*, 46 Ga. 433, approved in the case of *Railroad Co. v. Camp*, 53 Ga. 599, where goods are shipped by rail and arrive at destination within the usual time required for transportation, and are there deposited by the railroad company in a place of safety, and held ready to be delivered to the consignee on demand, the company's liability as a common carrier, in the absence of a contrary custom of trade as to delivery, ceases, and its liability as a warehouseman begins.

2. Where goods are shipped by rail over the connecting lines of different railroads, and are delayed in arriving at their final destination, and there is no evidence showing upon what contract the shipment was made, or that the company completing the transportation had any connection with such contract, nor any evidence showing when, where, or by which one of the companies the delay was in fact caused, upon these facts alone a finding that the delay in question was chargeable to the fault or negligence of the last company receiving the goods would not have been warranted.

3. There being one or more questions of fact involved in this case which, even upon the theory that the railroad company was liable as a warehouseman only, ought to be passed upon by the jury, it was error, in sustaining the certiorari, to also render final judgment in favor of the defendant.

(Syllabus by the Court.)

Error from superior court, Hancock county; Seaborn Reese, Judge.

Action by J. S. Almand against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

J. A. Harley, T. L. Reese, Jordan & Burwell, and R. H. Lewis, for plaintiff in error. Jos. B. & Bryan Cumming and M. P. Reese, for defendant in error.

SIMMONS, C. J. Goods consigned to the plaintiff over the defendant's railroad were unloaded into its depot at the point of destination on the afternoon of their arrival, and on the following morning were consumed in a conflagration which destroyed the depot; and this action was brought, in a justice's court, to recover for their value. Judgment was rendered in favor of the plaintiff, and upon certiorari by the defendant the judge

of the superior court sustained the certiorari and rendered final judgment in favor of the defendant; whereupon the plaintiff excepted, alleging that the court erred (1) in holding the defendant not liable, and (2) in rendering final judgment, and not sending the case back for a new trial in the justice's court.

1. 2. If the relation of the railroad company to the consignee at the time the goods were destroyed was still that of a common carrier, the company was liable as an insurer, and no excuse would avail it, the loss not having been occasioned by the act of God or the public enemies of the state (Code, § 2066); but, if the relation of the company had changed to that of a warehouseman, it was not liable unless it failed to exercise ordinary diligence for the protection of the goods. Under the evidence in the record, the defendant could not, according to the rule laid down in *Railroad Co. v. Felder*, 46 Ga. 433, be held liable as a common carrier. In that case it was held that where goods shipped by rail arrive at destination within the usual time required for transportation, and are there deposited by the railroad company in a place of safety, and held ready to be delivered to the consignee on demand, the company's liability as a common carrier, in the absence of a contrary custom of trade as to delivery, ceases, and its liability as a warehouseman begins. See also *Railroad Co. v. Camp*, 53 Ga. 599. It was contended that the shipment in the present case did not fall within the operation of this rule, because the goods did not arrive within the usual time required for transportation. It appears, however, that they were shipped from a point beyond the defendant's railroad, and it does not appear upon what contract they were received by the initial carrier, or that the defendant had any connection with such contract; nor was there any evidence showing when or where the delay was in fact caused. Upon these facts alone, a finding that the delay was chargeable to the fault or negligence of the last company receiving the goods would not be warranted. *Railway Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809.

3. But, even upon the theory that the defendant's relation to the consignee at the time of the loss was merely that of a warehouseman, the burden was upon it to show that it exercised due diligence as such (Code, § 2064), and there was evidence from which it could be inferred that the loss was occasioned by negligence on the part of the defendant. There being, therefore, issues of fact involved, which ought to be passed upon by a jury, it was error, in sustaining the certiorari, to also render final judgment in favor of the defendant. The judgment of the court below is reversed, with direction that the case be remanded for a new trial in the justice's court.

ATKINSON, J., concurring for special reasons.

(95 Ga. 778)

McCRARY v. CLEMENTS et al.

(Supreme Court of Georgia. April 29, 1895.)

RESULTING TRUST—PRESCRIPTION—WHEN STATUTE BEGINS TO RUN.

1. Where a father causes a deed to land, for which he has himself paid the purchase money, to be made to himself, as guardian of his minor son, for whom he is neither a testamentary nor (because of his not having given bond as such) a statutory guardian, the legal effect of such conveyance is the creation of a trust in the land in favor of the minor son, and the position of the father with reference to this estate is really that of a trustee, and not, technically, that of guardian.

2. If, in case of such a trust, the father, during the minority of the son, conveys such land, as his own property, to another, who takes without actual notice of the trust, and the trust estate be, until the son attained his majority, represented by the father, then, inasmuch as the trust itself becomes executed by the majority of the son, the interest of the son is thus at all times represented by a person competent to sue, and prescription runs in favor of the purchaser, continuously, from the beginning of possession under the conveyance from the father; and if the purchaser, in good faith, goes into possession thereunder, and continues for a term of seven years before the institution of a suit by the son for the recovery of the property thus conveyed, he acquires, as against the son, a good title by prescription.

(Syllabus by the Court.)

Error from superior court, Marion county; W. B. Butt, Judge.

Action by William McCrary against R. E. Clements and others. Judgment for defendants. Plaintiff brings error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

Lumpkin & Dunham and Wimblish, Worrill & McMichael, for plaintiff in error. Miller & Miller, W. D. Crawford, and Brannon, Hatcher & Martin, for defendants in error.

ATKINSON, J. 1. While the present plaintiff was yet a minor, his father purchased the premises in dispute, and caused them to be conveyed to himself, as guardian of the plaintiff. As a matter of fact, he was neither a testamentary guardian of the plaintiff, nor the guardian of his property under the statute. While he was the natural guardian of the person of the plaintiff, he had never given bond so as to constitute himself a guardian of the property of the plaintiff. Not being a guardian of the plaintiff at all, the plaintiff himself being then an infant, in order to make the instrument operative, it is necessary to treat the conveyance as creating a trust, by means of which the legal title was vested in the parent, and the beneficial interest in the minor son. By the terms of our Code, no formal words are necessary to create a trust estate, and, whenever a manifest intention is exhibited that another person shall have the benefit of the property conveyed, the grantee shall be declared a trustee. As we have seen, this parent was in no sense, legally or technically speaking, a guardian of the

plaintiff's property. He did take the legal title. The beneficial interest was vested in the son. We think, therefore, that the effect of the transaction was the creation of a trust, and the nomination of the parent to be the trustee.

2. It appears from the record in this case that, after the execution of this deed to the father as guardian, the son removed to the state of Florida, and remained there until after he attained his majority; that in 1884 the father conveyed this property to the persons under whom the present defendants acquired their title; that the persons to whom the father conveyed went into possession, and, jointly with the present defendants, remained continuously in possession (the property being previous to that time unoccupied) until after more than seven years had elapsed from the time of their first entry; that the purchasers from the father had no actual notice of how he claimed the title or right of possession to the premises, though the deed to him as guardian was recorded in time; that the father's death occurred after the majority of the son, but before the institution of the suit. It will be observed from this statement of facts that the legal title to the premises in dispute (treating the conveyance to the father as the creation of a trust, and this is necessary in order to give effect to it at all, as conveying an interest to the son) resided until the majority of the son in the father, and he at any time might have brought an action of ejectment, in his character as trustee, to recover the premises conveyed by him. There were no limitations over beyond the son, the present plaintiff, to be protected by the father in his capacity as trustee, and therefore the naked trust in favor of the minor son was executed by the majority of the latter. So that, at all times from the date of the first entry of the lessors of the present defendants, there was some person representing the legal title to this estate, who was competent to sue. Yet, nevertheless, the defendants and those under whom they claim, buying in good faith, without actual notice of any equity in the plaintiff, were permitted to remain in the undisputed possession of the premises until after the expiration of more than seven years, from the date of their first entry to the institution of the suit. That prescription runs in favor of such a possessor is not now open to question. This court, in *Knorr v. Raymond*, 73 Ga. 758, states the doctrine upon that subject to be: "It is conceded as the well-settled law that time does run against the equitable estate of minors, if the legal estate reside in one competent to assert their rights;" citing *Pendergrast v. Foley*, 8 Ga. 3; *Wingfield v. Virgin*, 51 Ga. 139; *Brady v. Walters*, 55 Ga. 25; *Varner v. Gunn*, 61 Ga. 54; *Sparks v. Roberts*, 65 Ga. 571; *Merritt v. Merritt*, 66 Ga. 324; *Ford v. Cook*, 73 Ga. 215. The trust being

executed by the majority of the son, and he failing to sue within seven years from the first entry by the purchasers from the father, the defendants have acquired a good title by prescription. The judgment of the court, therefore, confirming their prescriptive title, must be and is affirmed.

(96 Ga. 159)

HANKS v. PEARCE et al.

(Supreme Court of Georgia. April 29, 1895.)

DORMANT JUDGMENT—ENTRY ON EXECUTION—SUFFICIENCY.

1. Unsupported by some such action or motion, in a judicial proceeding, as serves to manifest a purpose upon the part of a plaintiff in execution to insist upon the enforcement of his judgment, or by some other bona fide conduct on his part asserting the lien thereof, such as placing the execution in the hands of a levying officer and claiming money thereon, a mere entry by an officer upon the execution is not sufficient to save the judgment from dormancy, unless the entry be made by an officer authorized to execute and return the writ, and unless it likewise contain such a statement by the officer of some material fact responsive to the mandate of the process as would tend either to charge him with, or discharge him from, responsibility to the plaintiff.

2. An entry in the following words: "May 19, 1875. Directions from plaintiff's attorney, L. T. Downing, received for the collection of this fi. fa.,"—though made by an officer authorized to execute and return the writ, is a simple statement by him of a merely irrelevant fact, and is neither responsive to the mandate of the process nor tends to charge him with, or discharge him from, liability to the plaintiff; and, there having been no other entry upon or action under the execution within seven years from the date of the last preceding lawful entry thereon which would serve to keep it alive, the judgment upon which it issued was dormant.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by S. I. Hanks against T. J. Pearce and others. Judgment for defendants, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

McNeill & Levy and Francis D. Peabody, for plaintiff in error. J. H. Worrell and Peabody, Brannon, Hatcher & Martin, for defendants in error.

ATKINSON, J. Section 2914 of the Code, which declares how and in what manner and by what means a judgment may be saved from dormancy, has always heretofore received a liberal and equitable construction, the judges early departing from the letter of the statute, and interpreting it according to its reason and spirit. Hence, during the long period of its existence as a statute, many occasions have arisen for its application to the facts of particular cases, and accordingly the decisions of this court have taken a wide range in treating this statute and applying it so as to give full force and effect to its remedial intent. While the statute itself says that to prevent dormancy of a

judgment it is requisite that within periods of seven years each an entry upon the execution shall be made by some officer authorized to execute and return it, it has been held by this court that, pending an issue upon the validity of such an execution, in a court wherein the same is called in question, the execution does not become dormant until after the expiration of seven years from the determination of this issue, even though in the meantime no entry be made thereon. It has accordingly been held that where the execution is placed in the hands of an officer while yet alive, for the purpose of claiming money raised under other process, the judgment does not become dormant, though more than seven years elapse between the date of the last entry thereon and the final judgment of distribution of the funds claimed under the execution. This serves to establish the principle that wherever the plaintiff in execution is engaged in a bona fide effort, through the agency of the courts, to subject to the lien of his judgment a fund which is being there administered, or the property of the defendant upon which it has been levied, such purpose upon the part of the plaintiff, manifested by the judicial proceeding, would of itself serve to keep alive his judgment. But where, aside from judicial proceeding looking toward the enforcement or satisfaction of the judgment, a mere entry is relied upon to prevent its dormancy, then the entry must be made by some officer who is charged by law with the execution of the process, and it must express some such action upon his part as, being responsive to the mandate of the writ, would tend to charge him with, or discharge him from, responsibility to the plaintiff. With whatever liberality this court may have construed the section of the Code now under review, it has never yet held that an entry by an officer not authorized to make it, however relevant or material, would prevent dormancy of a judgment; nor has it ever yet decided that an entry containing a statement of facts wholly irrelevant to, and disconnected from, the mandate of the process, however competent might be the officer who made it, would save an execution from dormancy. While it has been stated generally to be the rule that any bona fide action of the plaintiff which shows that he intends to keep the judgment alive will prevent its dormancy, those words are to be taken in the sense in which they were intended to be employed. They do not mean that any private personal assertion of an intention upon the part of the plaintiff to keep alive his judgment would serve to accomplish that result; but they mean such bona fide conduct upon the part of the plaintiff, made manifest upon the public record by the official action of some person charged with the duty of executing the process, or by an appeal to the courts, with the object of realizing upon such process. Such an intention, so manifested, puts the world on notice that the judgment

is being enforced, and it is such conduct, so manifested, as serves to keep the judgment alive. It will be observed that, in both of the cases—*Smith v. Rust*, 79 Ga. 519, 5 S. E. 250, and *Gholston v. O'Kelley*, 81 Ga. 19, 7 S. E. 107—which are cited to the proposition just stated, there was an effort upon the part of the plaintiff, through the instrumentality of the courts, to enforce his judgment, and it was such conduct which the court had in view at the time the principle above stated was announced. The question then is, what is the character of entry which will serve to keep a judgment alive, assuming that there has been no other assertion of the judgment lien through judicial process so as to save it from the statute of limitations, and assuming that the entry is made by some officer authorized to execute and return the process? The rule stated in 49 Ga. 578, in the case of *Hatcher v. Gammell*, it seems to us, is the correct one, which is to the effect that any entry is sufficient which will serve to charge or discharge the officer whose duty it is to execute the process. This is the real test, and ought to be, of the relevancy of an entry. The officer is charged by the mandate of the writ that, of the goods and chattels, lands and tenements, of the defendant, he make the amount of money stated in the execution. Any return is a relevant one which tends to establish his responsibility to the plaintiff for a failure to observe the mandate of the court. Any entry would be a relevant one which, on the other hand, would serve to discharge him from responsibility to the plaintiff; and hence we hold the true rule to be that where an entry alone, unsupported by judicial action, is relied upon to save from dormancy an execution, that entry must be made by some officer whose duty it is to make the money upon the writ, and of some fact which would tend to charge or discharge him with or from responsibility.

In the present case the dormancy of the judgment is to be determined by the sufficiency of an entry made in the following words: "Directions from plaintiff's attorney, L. T. Downing, received for the collection of this *fi. fa.*" This entry was made by an officer authorized to execute and return the writ. It was made in time to have saved the judgment from dormancy. If it is a sufficient entry, it saves the judgment. If it is insufficient in law, the judgment is dormant. In determining the sufficiency of this return it will be necessary to inquire whether or not it imposes upon the sheriff any duty in addition to that to which he was already bound. By the mandate of the process he was directed, under the seal of the court, immediately to proceed with the collection of the money due thereon. No more positive direction could be given to an officer to proceed than that contained in the words of the execution: "We command you that, of the goods and chattels, lands and tenements," etc., "you cause to be made," etc. There-

fore, the execution being in his hands, he had already received instructions from a higher source than plaintiff's attorney to proceed with the collection of the money. His obligation to proceed with the collection of the *fi. fa.* after he received the instructions from the plaintiff's attorney was no greater than it was before. Hence, the instructions given by the plaintiff's attorney were entirely gratuitous and wholly unnecessary. They imposed no additional duty upon the officer, charged him with no additional responsibility, and therefore the entry of such direction upon the execution could neither serve to charge him with, nor discharge him from, responsibility to the plaintiff. It was cumulative of, and not responsive to, the mandate of the writ. Unlike the case of *Hatcher v. Gammell*, 49 Ga. 576, the return now under consideration only acknowledged the receipt of directions from the plaintiff's attorney to proceed with the collection of the *fi. fa.* In the *Hatcher Case* the return was in these words: "Received this *fi. fa.* of L. T. Downing for collection." In the present case, the receipt is of directions to perform the very act which the officer had been directed to perform by an authority superior to that of the plaintiff's attorney. In that case, the execution not being in the hands of the sheriff, he had received no instructions from the court, and therefore, when he acknowledged receipt of the execution for collection, he admitted that from the instant of its receipt he became and was liable to the plaintiff for a due execution of the process. Thus, by his entry, he was charged with responsibility to the plaintiff. That was a relevant entry. In the case of *Gholston v. O'Kelley*, 81 Ga. 19, 7 S. E. 107, the question arose upon the dormancy of an execution issued from a justice's court, and turned upon the competency of the officer to make the return. Upon the rendition of a judgment in a justice's court, executions were issued, and thereafter they were placed in the hands of the sheriff to claim a fund realized by him from a sale of the defendant's property under other process. No return was made by the sheriff upon these justice's court executions; but, upon the distribution of the fund, the sheriff paid over to the justice of the peace, to be credited upon the executions, a certain sum of money, and the latter, upon the executions, made an entry acknowledging receipt upon one of the executions of the sum of \$26, and on each of the others a receipt to the sheriff for the costs on the same. This was adjudged to be a sufficient entry to prevent the dormancy of these executions. A justice of the peace, under our law, while a judicial officer in a certain sense, is nevertheless a collecting agent. It is his duty to see to the collection of processes in his court, and to make returns to the plaintiff. The execution issues, directing the officer to collect from the property of the defendant the

principal debt, with interest, usually, and costs. The plaintiff is entitled to demand from the defendant his principal, interest, and costs. Upon the failure of the magistrate to collect the money, he may be liable to rule. *Hitch v. Lambright*, 68 Ga. 223. Upon this rule, if made absolute, the plaintiff is entitled to have a judgment for his principal and costs. Therefore, to the extent of the costs due to the plaintiff for the use of the officers of court, an acknowledgment of the receipt thereof by the justice of the peace serves to discharge him from the rule. Thus it will be seen that the entry made in the *Gholston Case* is a valid entry, a relevant one, and is responsive to the writ. In all of these cases the public act of the plaintiff, manifested through relevant official returns made by officers competent to execute and return the writ, demonstrates in point of fact that the plaintiff is endeavoring to collect his money. There is no slumbering by the wayside, there is no rainbow chasing, but he is steadily, through the instrumentality of these agents appointed by the law, insisting upon the collection of his money. It will be observed that in the present case, had the sheriff acknowledged the receipt of the execution instead of merely acknowledging receipt of instructions to proceed with the collection of an execution already in hand, the entry would have been such a relevant one as would have served to keep the execution alive. These considerations lead us to the conclusion, that the entry now under review was insufficient in law to prevent the dormancy of the judgment; and, the judgment of the court being in accordance with the principles here declared, the same is affirmed.

(95 Ga. 439)

PITCHER et al. v. LOWE.

(Supreme Court of Georgia. Feb. 27, 1895.)

CONTRACT OF SALE—BREACH—DAMAGES—ATTACHMENT—GENERAL JUDGMENT—STATUTE OF FRAUDS.

1. An agent, in behalf of his principal, having sold goods to another at a specified price, the sale being conditioned upon the principal's having the goods in stock when the order reached him (the goods, in case the order was accepted, to be shipped when requested by the buyer), and the principal, upon receiving the order, which was signed by the agent, having sent a letter to the buyer, acknowledging its receipt, and, without stating that the goods were not in stock, asking for references as to the buyer's financial standing, which the latter, in a letter recognizing the validity of the order, gave, and thereafter the principal, by his conduct, having allowed the buyer to believe that his financial references were satisfactory, and that the order was duly accepted, and to act upon that belief, the buyer had the right to treat the contract of sale as complete, to insist upon its fulfillment, and to recover damages for a breach of the same, although, in point of fact, the goods in question were not in stock at the time the order was received as above stated.

2. Where a letter in evidence, construed with reference to its subject-matter, was entirely free from ambiguity, and the court correct-

ly instructed the jury what meaning and effect should be given to the same, so doing is not cause for a new trial.

3. The defendants in an attachment case, served by garnishment, having appeared and filed a plea to the merits, they became liable, under section 3328 of the Code, to the rendition of a general judgment against them, although, in the beginning of their plea, it was recited that they made "an appearance in said case solely and only for the purpose of defending the same to the extent of the amounts held up by the garnishment."

4. Where, in an action for damages for the breach of a contract, there was nothing in the plea filed by the defendants with reference either to fraud or inadequacy of consideration, section 2742 of the Code was not applicable in determining the amount of damages which should be awarded to the plaintiff.

5. This case was not within the statute of frauds. The verdict, under the evidence, was right, and no cause for a new trial appears.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Action by B. H. Lowe, doing business as the Lowe Seed Company, against Pitcher & Manda. Plaintiff died, and Elizabeth Lowe, administratrix, was substituted. Judgment for plaintiff. Defendants bring error. Affirmed.

Hill, Harris & Birch, for plaintiffs in error.
L. D. Moore, for defendant in error.

LUMPKIN, J. B. H. Lowe, doing business under the name of the Lowe Seed Company, proceeded by attachment against Pitcher & Manda, who were nonresidents of this state, for an alleged indebtedness upon a breach of contract to ship 100 barrels of seed Irish potatoes. The attachment was served by garnishments. While the case was pending here, Lowe died, and his administratrix was made a party in his stead.

1. It appeared from the evidence that on September 12, 1892, one Russell, a traveling salesman of the defendants, sold to Lowe a bill of seeds of various kinds, including the potatoes, the sale, as to the latter, being conditioned upon the defendants having the same in stock when the order reached them; and it was further agreed that, in case they accepted the order, the potatoes were to be shipped whenever requested by Lowe. After thus concluding the bargain with Lowe, Russell forwarded to Pitcher & Manda an order, signed by himself, for the goods he had sold to Lowe, as above stated. Upon receipt of this order, Pitcher & Manda, on September 15th, sent a communication to Lowe, of which the following is a copy: "United States Nurseries, Short Hills, N. J., Sept. 15 1892. Messrs. Pitcher & Manda acknowledge, with thanks, the receipt of your esteemed order for potatoes through Mr. C. R. Russell." On the 21st of September they also addressed to Lowe a letter, the material portions of which are as follows: "We are in receipt of your esteemed order for seeds and potatoes through Mr. Russell, but, as we have never had any previous business, we

would thank you to send us addresses to whom you would refer us as to your standing. You will understand that this is always necessary before credit is extended, and trust that you will see it in this light, and favor us with the necessary information by return of mail." To this letter, Lowe, on September 24th, made answer as follows: "Replying to yours of the 21st inst., we refer you to any wholesale firm here, Exchange Bank, and Merchants' National Bank. The latter is where we do our business. We also refer you to D. Landreth & Son, Philadelphia; Johnson, Robbins & Co., Wethersfield, Conn." Up to this time, there was no intimation whatever from Pitcher & Manda to Lowe that the potatoes he had ordered through Russell were not in stock when the order reached them. The next direct reference to the potatoes was in a letter dated December 13th, in which Lowe requested Pitcher & Manda to ship certain flower seed which had been ordered on the 12th of September, and added, "Will order the potatoes out later." It does not appear that the defendants made any reply to this letter, denying their obligation to furnish the potatoes. On December 28th the plaintiff sent a direct order for the shipment of one-half of the potatoes the first spell of weather that would admit, stating also that he was afraid to have them all shipped at that time, on account of the cold weather then prevailing. In reply to this order the defendants, on December 31st, addressed a letter to Lowe, claiming that they did not have the potatoes in stock when the original order reached them, and also claiming that Lowe's order for the potatoes had been canceled in a correspondence which had previously taken place between himself and their firm with reference to certain onion seeds. In the next division of this opinion the correspondence as to the onion seeds will be more particularly noticed and it will then be made to appear that nothing said therein could, with any sort of fairness, be regarded as a cancellation by Lowe of his order for the potatoes. Leaving this matter out of consideration, therefore, we think, upon the facts stated, that Pitcher & Manda were under a binding contract to deliver the potatoes to Lowe, and that they are liable to him for any damages which resulted from a breach of that contract. Lowe certainly would have been bound to pay for them at the contract price, had they been shipped. It is true that the original order for the potatoes was not signed by Lowe, but by the agent of the defendants. Nevertheless, it is evident, from the correspondence above recited, that Lowe subsequently, in writing, more than once recognized the validity of the order signed by Russell; and therefore, although the potatoes were of greater value than \$50, he was under a legal and binding obligation to take them. Letters written by one of the parties to the other, acknowledg-

ing the making of a parol contract previously entered into between them, are sufficient to take the case out of the statute of frauds. *Foster v. Leeper*, 29 Ga. 294, cited approvingly in *Georgia Refining Co. v. Augusta Oil Co.*, 74 Ga. 508. Therefore, so far as Lowe is concerned, the statute of frauds would have been of no avail to him, had he undertaken, on his part, to repudiate the contract. When Pitcher & Manda received the original order from Russell, it was their duty, if they did not have the potatoes in stock, to immediately notify Lowe of the fact, so that he could make other arrangements to procure them. They not only failed to do this, but, by asking him for references as to his financial standing, to say the least, left him strong reason to infer that if the references were satisfactory his order would be filled. He promptly furnished the references, and it does not appear that Pitcher & Manda ever objected to the same as being in the least degree unsatisfactory. By their silence in this respect, they encouraged Lowe to believe that his order for the potatoes had been accepted, and would be filled whenever he so requested. It also appears that they shipped to him other goods included in the same order as that which referred to the potatoes; and even as late as December 13th, when, in giving direction as to the shipment of a portion of these goods, he also incidentally mentioned that he would order out the potatoes later, they made no protest nor in any way indicated an unwillingness to furnish the same. Taking the conduct of the defendants throughout the entire transaction, we think it equivalent to an express undertaking on their part to deliver these potatoes. At any rate, they certainly misled Lowe, and allowed him to act upon the belief that they would do so; and in view of this fact, and all the other circumstances, they surely are estopped from asserting that they never positively so agreed, and consequently were under no obligation so to do. This is true, although, in point of fact, they may not have had the potatoes in stock when the order from Russell was received. That order gave them the right to decline to furnish the potatoes in the event they did not have them in stock; but having then failed to exercise this privilege by notifying Lowe of their nonacceptance of this portion of his order, but, on the contrary, misleading him, by their conduct, into the belief that they had accepted his order in full, it is now too late for them to claim any benefit under the stipulation indicated, for in law they must be held to have waived it. The fact that potatoes had advanced rapidly in price may explain the conduct of the defendants in the premises. We are quite certain that if the price had declined they could, and doubtless would, have held Lowe bound to the contract.

2. We will now notice the correspondence between the parties with reference to the

onion seeds. On October 5th the defendants wrote to the plaintiff as follows: "Before shipping the Bermuda onion seed upon your order, we write to you to say that Bermuda onion seed is saved in different parts of the world, namely, California, Italy, and the island Tenerife. That saved in the two former places can be sold at the price you offer us in your order, namely, \$1.00 per lb.; but it seldom gives satisfaction, as the change of climate alters the character of the goods, and generally causes disappointment. True Bermuda onion seed can only be procured from the island of Tenerife, and that which is sown in Bermuda to produce the true Bermuda onion comes from this section. This seed cannot be sold anywhere for less than \$3.00 per lb., and, before filling your order, we would acquaint you of this fact. We have a limited quantity of seed on hand, and await your orders before shipping, but would strongly recommend your not serving your customers with the cheaper grade. We are anxious to give satisfaction in your part of the country, and would rather not sell goods at all than to disappoint either you or your customers." In response to this letter the plaintiff, under date of October 8th, wrote the following: "Replying to your favor of the 5th inst., we would say that we only gave the order to your salesman after he had shown us by a letter from you that the onion seed were direct from Bermuda Isles. We want no other, and, if you cannot live up to the order as accepted some time ago, we do not want anything as a substitute, and you can cancel our order. P. S. Send me by mail $\frac{1}{2}$ # of each, so that I may have them tested." As already stated, it was contended by the defendants that the letter of the plaintiff last above copied amounted to a cancellation of his entire order of September 12th. We do not think it could possibly admit of such a construction. It seems perfectly clear that this communication related to the onion seeds alone, and had no bearing whatever upon the order for the potatoes. The court, in substance, instructed the jury to this effect, and we hold that so doing was not cause for a new trial.

3. It was further contended by the defendants that in no event could the recovery for the plaintiff exceed the sum of the amounts held up by garnishment, because the defendants, by their plea, had endeavored to limit their defense by reciting therein that they appeared only for the purpose of defending the action to the extent of the amounts so held up. We know of no law or rule of practice which will allow anything of this kind to be done. Section 3323 of the Code explicitly provides that, when the defendant in attachment has appeared and made defense, a general judgment may be rendered against him. In the present case the defendants pleaded the general issue, the statute of frauds, that the sale was a conditional one, as already indicated, and also a set-off. This was cer-

tainly appearing and making a defense, and the defendants cannot be permitted to say that all these defenses were made simply to defeat the recovery by the plaintiff as to the sums in the hands of the garnishees. It would indeed be a strange doctrine to allow a defendant, in any case, to dictate to the court the terms upon which he was willing to make an appearance or to limit arbitrarily the legal consequences of an appearance on his part.

4. The court correctly charged the jury that, if the plaintiff was entitled to recover, the measure of damages would be the difference between the contract price and the market value of the potatoes at the time and place when they should have been delivered under the contract. At the request of defendants' counsel, the court also gave in charge the substance of section 2742 of the Code, but added that the true rule of damages was the one above stated. Complaint was made that the request to charge was thus qualified. Whatever may be the precise meaning of the section just mentioned, it certainly has no application at all to a case like the present. There was nothing in the pleas of the defendants with reference either to fraud or to inadequacy of consideration, and therefore it would not have been erroneous to have refused the request altogether. What the court did charge practically amounted to so doing. On the whole, we think the jury were properly instructed upon the measure of damages, which was all that the defendants had any right to demand.

5. It appearing from the statement of facts in the beginning of this opinion that this case is not within the statute of frauds, this subject requires no further notice.

After a careful examination of the evidence, we are satisfied that the verdict was right; and, upon a thorough review of the whole case, we see no cause for granting a new trial. Judgment affirmed.

(95 Ga. 337)

HARDISON v. STATE.

(Supreme Court of Georgia. Jan. 28, 1895.)

IMPANELING OF JURY—EXAMINATION OF WITNESS
—ILLEGAL SALE OF LIQUOR—INDICTMENT
—INSTRUCTIONS—SENTENCE.

1. Where, on the trial of a misdemeanor, one who had been summoned as a tales juror was objected to by the solicitor general on the ground that the name of the person so summoned was not upon the jury list of the county, and the court thereupon, without objection from the accused, ordered another tales juror summoned, which was done, and the jury stricken, it is not cause for a new trial that it subsequently appeared that the name of the person first summoned was in fact upon the jury list, especially when that list was accessible to counsel for the accused, and might easily have been examined when the objection to the juror was made.

2. It is within the discretion of the trial judge to allow leading questions to be asked witnesses whenever he "deems it to the interest of justice, from the manner of the witnesses."

3. Under the act of December 24, 1890, "to regulate the sale of spirituous, vinous and malt liquors in this state, to fix a penalty for the violation of the same, and for other purposes," it is a misdemeanor to sell such liquors, in any quantity, anywhere in this state, without a license. If the selling is done in an incorporated city, town, or village, the municipal authorities of which have authority to grant liquor licenses, the license must be obtained from those authorities; if elsewhere, it must be obtained from the county authorities. In view of the provisions of this act, an indictment alleging that a sale of such liquors was made "without first obtaining a license therefor from the authorities authorized by law to grant license for the sale of such liquors" is sufficient as to the matter of negating the possession of license by the accused; and, although the indictment may further allege that the sale was made "outside of an incorporated town," a failure to prove that the sale was in fact made outside of the limits of such a town is of no consequence, and this latter allegation may be treated as mere surplusage.

4. The evidence and the statement of the accused, taken together, showing beyond controversy that the alleged scheme of distilling corn into whisky for customers "on shares" was a very thinly veiled pretext for selling liquor for money, or bartering it for corn, the court was amply warranted in charging upon the hypothesis that such a pretext existed, and the jury were fully warranted in finding that it did in fact exist.

5. The sentence was not excessive; and, even if it were, this would be no cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Crawford county; J. L. Hardeman, Judge.

H. G. Hardison was convicted of selling liquor without a license, and brings error. Affirmed.

M. G. Bayne, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., and Harrison & Peebles, for the State.

LUMPKIN, J. 1. In making up the panel of 24 from which the jury for the trial of the case was to be stricken, the sheriff had summoned a tales juror. The solicitor general objected to this juror on the ground that his name was not upon the jury list of the county. Counsel for the accused, to whom this jury list was accessible, and who might easily have examined the same, heard the statement made by the solicitor general, but made no objection to its correctness. The court was therefore authorized to act upon the assumption that the juror's name was not in fact upon the list, and accordingly to order another tales juror to be summoned in his place. This was done, the jury was stricken, and the trial had without further reference to the matter. It afterwards transpired that the name of the juror who had been excused was upon the jury book of the county, and that he was, in fact, a competent juror. We are entirely satisfied that excusing this juror and substituting another in his place, under the circumstances indicated, is no cause whatever for setting the verdict aside. The exercise of very slight diligence on the part of counsel for the accused would have resulted in correcting the mistake made by the solicitor gen-

eral. Besides, the court, in effect, adjudicated that the juror objected to was incompetent, and counsel for the accused, by his conduct, practically acquiesced in this ruling. After taking the chances of an acquittal by the jury which tried him, the accused is not entitled to another hearing upon that ground of his motion for a new trial which relates to the matter above discussed.

2. At this late day no argument is necessary to establish the proposition that it is within the sound discretion of the trial judge to allow leading questions to be asked a witness, when the ends of justice would seem to so demand.

3. The penal laws of this state with reference to the sale of liquors without license have been very greatly simplified by the act of December 24, 1890 (Acts 1890-91, vol. 1, p. 128). After a careful examination of all the statutes previously passed upon this subject, and a thorough study of the act last mentioned, we have reached the conclusions, as to its meaning and effect, which are stated in the third headnote. These conclusions are there set forth with sufficient distinctness to make a repetition of them unnecessary. When the state proves a sale of spirituous, vinous, or malt liquors, it need not go further and show whether the sale took place in a city, town, or village, or elsewhere. The proof of the sale puts upon the accused the burden of producing his license, if he has one. If he shows a license authorizing him to sell in a city, town, or village, it will protect him as to sales made at such place of business within the limits of the municipal corporation as is specified in the license. A license from the proper county authorities will protect him as to sales made at any place in the country to which that license relates. If he sold any of the prohibited liquors, and produces no license at all, a conviction may be had, whether the place of sale was urban or rural.

4, 5. The pretense of the accused was that he did not sell whisky at all, but, so far as the transactions disclosed by the evidence were concerned, was simply engaged in the business of distilling corn into whisky for his customers "on shares." His own statement is quite sufficient to show that he was really selling, and intending to sell, the liquor itself; and the evidence leaves the matter absolutely free from doubt. No person of average intelligence could be deceived as to the real truth of the case. The conviction was right; the fine of \$1,000 was not excessive, and, even if it were, this would be no cause for a new trial. Judgment affirmed.

(95 Ga. 463)

WILLIAMS v. HARRIS et al.

(Supreme Court of Georgia. March 2, 1895.)
INJUNCTION—RESTRAINING SALE OF REAL ESTATE.

It appearing that no injunction was necessary to the preservation of any alleged right of the plaintiff, there was no error in refusing to

grant the injunction prayed for in his petition; nor was there any abuse of discretion in granting the injunction against the plaintiff prayed for in the defendants' answer. As the pending litigation is notice to all the world, the effect of the action taken by the trial judge will simply be to preserve the existing status until the rights of the parties, whatever they may be, can be determined at the final hearing.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Action by E. N. Williams against Morris Harris and others to set aside a decree, and for an injunction. Judgment for defendants, and plaintiff brings error. Affirmed.

S. A. Reid and Jno. R. L. Smith, for plaintiff in error. Duncan & Miller and Alex. Proudfit, for defendants in error.

LUMPKIN, J. The following is a condensed statement of the facts material to an understanding of the adjudication made in this case: Williams was a creditor of M. Nussbaum, who did business under the name of M. Nussbaum & Co. Under an equitable petition filed by other creditors of Nussbaum, all his assets were placed in the hands of a receiver. In the decree rendered in that proceeding it was, among other things, provided that a certain storehouse and lot in the city of Macon, the property of Nussbaum, should be redelivered to him as trustee for certain preferred creditors, and that he have authority to dispose of the same either at public or private sale, and, when sold, to apply the proceeds to the payment of the debts of these preferred creditors. Acting under the decree, Nussbaum sold and conveyed the storehouse and lot to one Harris by a deed which was filed for record January 5, 1894. On that day, Williams, who had never been a party to the proceedings resulting in the above-mentioned decree, obtained a judgment at law upon his claim against Nussbaum, and caused an execution issuing therefrom to be levied upon the property which had been conveyed to Harris. The latter filed a claim, upon the trial of which Williams dismissed his levy because, in the opinion of the court, he could not collaterally attack the deed to Harris in a claim case at common law. Afterwards, the execution was again levied upon the same property, and Harris interposed another claim. While this second claim case was pending, Williams filed an equitable petition against Harris and the administratrix of Nussbaum, who had in the meantime died, attacking the above-mentioned decree, as well as the deed from Nussbaum to Harris made in pursuance thereof, and praying that both be set aside, and, further, that Harris be enjoined from conveying the storehouse and lot to any other person. It is unnecessary to set forth more in detail the various facts upon which Williams claimed to be entitled to the equitable relief sought by this petition. An answer in the nature of a cross bill was

filed by Harris, and adopted by the other defendant, in which there was a prayer that Williams be enjoined from further proceeding with his execution against the property in question. The judge denied the injunction prayed for in the plaintiff's petition, and granted the injunction prayed for in the answer.

We see no cause for reversing the judgment rendered. If the decree under which Nussbaum sold and conveyed the property to Harris was not binding upon Williams, and if, for this or any other sufficient reason, the deed from Nussbaum to Harris is void, the pending litigation will affect with notice any person who may hereafter buy the storehouse and lot from Harris, and therefore such a person could not claim to be protected as a bona fide purchaser without notice of any invalidity which may exist in Harris' title. Consequently, there is no need for an injunction restraining Harris from selling the property. The injunction restraining Williams from further proceeding with his execution can do him no possible injury. Indeed, he concedes in his petition that he could not, in the pending claim case, obtain a judgment subjecting the property to his execution, without first setting aside the deed from Nussbaum to Harris and the decree under which it was made, and that, to do this, the filing of his present petition was necessary. So he can make no progress in enforcing his execution until it has been decreed upon his petition that the Nussbaum deed is not good as to him. He must, therefore, inevitably be delayed until there can be a final hearing of his equitable petition. The effect of the injunction against him is simply to preserve the existing status until such hearing can be had. The injunction, therefore, was harmless to him, and there was no abuse of discretion in granting it. All the rights of Williams are preserved; and, if he obtains against Harris and the administratrix of Nussbaum a favorable decree on the merits of the case, he can then proceed with the collection of his execution. Otherwise, he, of course, cannot. It would be improper, in advance of the final hearing of this case, for this court to intimate any opinion as to what decree should then be rendered; and, accordingly, we leave the main issues involved in the case to be passed upon and determined when that hearing takes place. Judgment affirmed.

(95 Ga. 449)

KING v. RANDALL.

(Supreme Court of Georgia. March 2, 1895.)

ATTACHMENT—GENERAL JUDGMENT—APPEAL FROM JUSTICE—DISMISSAL OF ACTION.

1. Where an attachment returnable to a justice's court was sued out under section 3293 of the Code, and the defendant appeared, and moved to dismiss the attachment on various grounds, and, after this motion was overruled,

also contested the case upon its merits, by making a motion for a nonsuit, which was likewise overruled, and the trial resulted in a verdict for the plaintiff, upon which a general judgment in his favor was entered against the defendant, who thereupon sued out a certiorari, assigning as errors the refusal of the magistrate to dismiss the attachment and his refusal to grant a nonsuit, and also alleging that the verdict was contrary to law and the evidence, it was error for the judge of the superior court to sustain the certiorari, and order the case to be dismissed from the magistrate's court; such judgment being evidently predicated upon the opinion that the attachment ought to have been dismissed, and that upon this being done the case would necessarily be at an end. Whether the magistrate erred in refusing to dismiss the attachment, or not, the plaintiff was entitled to proceed with the case for the purpose of obtaining a general judgment.

2. It is apparent from the record that the superior court did not pass upon the alleged error in refusing to grant a nonsuit, or upon the question whether or not the verdict was sustained by the evidence, and these matters are left open for consideration when the case is heard again.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Attachment by D. I. King against Lizzie Randall before a justice of the peace. Defendant brought certiorari to the superior court, which dismissed the case, and plaintiff brings error. Reversed.

Estes & Jones, for plaintiff in error. Jno. R. L. Smith, for defendant in error.

LUMPKIN, J. 1. An attachment was sued out under section 3293 of the Code, and made returnable to a justice's court. At the trial the defendant appeared, and moved to dismiss the attachment on various grounds, the merits of which it is not now material to consider. This motion was overruled, and after the plaintiff had closed his evidence the defendant then made a motion for a nonsuit, which was likewise overruled, and the trial resulted in a verdict for the plaintiff, upon which a general judgment in his favor was entered. The defendant thereupon sued out a certiorari, in which she assigned as error the refusal of the magistrate to dismiss the attachment and the refusal to grant a nonsuit, and also alleged that the verdict was contrary to law and the evidence. Upon the hearing of the certiorari the judge of the superior court passed an order sustaining the same, and directing that the case be dismissed in the magistrate's court. From an inspection of the entire record, it is evident that the judge was of the opinion that the motion to dismiss the attachment ought to have been sustained, and that, this being done, the case would necessarily be at an end. This view of the matter was erroneous. This court has frequently decided that, notwithstanding the dismissal of an attachment, the plaintiff may nevertheless proceed with his case, and obtain a general judgment against the defendant, if the latter has appeared and made defense. Section 3309 of the Code

expressly declares that, where the notice required by it has been given, "no declaration shall be dismissed because the attachment may have been dismissed"; and, while section 3328 does not so provide in terms the same rule has been followed in cases arising under it. See *Joseph v. Stein*, 52 Ga. 332; *Camp v. Cahn*, 53 Ga. 558; *Sutton v. Gunn*, 86 Ga. 652, 12 S. E. 979; *Cade v. Jenkins*, 88 Ga. 797, 15 S. E. 292. The case of *Hodnett v. Stone*, 93 Ga. 645, 20 S. E. 43, is also, in principle, very much in point. We are of the opinion that presenting and insisting upon a motion for a nonsuit is making a defense to the action on its merits. It is difficult to conceive of its being anything else. In *Hickson v. Brown*, 92 Ga. 225, 17 S. E. 1035, this court held that where a defendant in attachment traversed the truth of the affidavit upon which it was issued, and appeared at the trial to maintain this traverse, a general judgment could be rendered against him. Therefore, whether the magistrate erred in refusing to dismiss the attachment, or not, the plaintiff was entitled to proceed with his case for the purpose of obtaining a general judgment; and, unless this judgment was wrong for some other reason, it should be allowed to stand. At any rate, it was error to order the case to be dismissed from the justice's court.

2. If the verdict in that court was without evidence to sustain it, of course it ought not to be allowed to stand. As already intimated, however, it is apparent from the record that the judge of the superior court did not undertake to pass upon this question, or upon the alleged error in refusing to grant a nonsuit. We therefore leave these matters open for further consideration when the case comes up before him for another hearing. Judgment reversed.

(96 Ga. 786)

EADY et al. v. NAPIER et al.

(Supreme Court of Georgia. March 11, 1896.)

JUDGMENT BY DEFAULT — VACATING EVIDENCE — HARMLESS ERROR.

1. The fact that the plaintiffs' attorney, after a case had been continued in a justice's court, merely informed the defendants that the case would not be tried that day, but would be tried the next month, is no cause for setting aside a judgment rendered against the defendants by default at the next term, although they were ignorant and uneducated persons, and thought that they would be summoned again when wanted, or would receive further notice of the time and place of trial.

2. The trial judge was right in adjudging that the evidence introduced in support of the plaintiffs' petition did not make a case entitling them to equitable relief; and, as there was in the petition no prayer for relief of any other kind, the action could not be treated as one in which relief of a purely legal nature could be granted to either plaintiff. The question whether or not, upon the facts proved, the plaintiff who delivered to the defendants the property described in the petition could, in a proper action, recover the same, or its value, was not adjudicated by

the trial court, and is not now for decision by this court.

3. On the pleadings and evidence as they stood, there was nothing for submission to the jury, and the motion for a nonsuit ought to have been granted, but it was error to direct a verdict for the defendants. Inasmuch, however, as the plaintiffs could in no event recover in the present action, this error does not require a reversal of the judgment below, but direction is given that the same shall not be so construed as to estop the plaintiff above indicated from bringing another action in which the real merits of his case, if any there be, can be set forth and passed upon.

(Syllabus by the Court.)

Error from superior court, Bibb county; H. C. Roney, Judge.

Petition by Thomas and Jeff Eady against Napier, Worsham & Co. to set aside a judgment. Judgment for defendants, and plaintiffs bring error. Affirmed.

The following is the official report:

The petition of Thomas and Jeff Eady alleged: On January 6, 1892, Thomas Eady bought a mule from Napier, Worsham & Co. at \$150, for which he gave his notes to them or bearer, dated January 6, 1892, and due November 1, 1892, they taking a mortgage on the mule and a wagon to secure the payment thereof, and Jeff Eady signing the notes as surety. On October 27, 1892, Napier, Worsham & Co. took the mule back from Thomas Eady in full payment of the debt, and accepted the wagon for the hire of the mule, and sold the mule and wagon for more than enough to pay the debt. Petitioners are both illiterate, and never had a suit in court until sued upon these notes. In June, 1893, Napier, Worsham & Co. brought their action upon these notes in the justice's court of the 481st district, G. M., Bibb county. At the trial term of the cases petitioners were present at court, prepared to make their defense, armed with the receipt given by Napier, Worsham & Co. to Thomas Eady, which receipt was given in full satisfaction of the debt, although it recites that the mule and wagon were received on account. Neither of petitioners owed Napier, Worsham & Co. any account. Jeff Eady did not owe them anything and Thomas Eady owed a note for \$30 for supplies, given by him alone, which note is still due and unpaid. Jeff Eady signed the two notes, knowing that Thomas had given the mortgage to secure the same. In equity, the proceeds of the mule and wagon should go to pay the debt. On the day for the trial of the causes petitioners were present in court, and made known their defense to the attorneys for Napier, Worsham & Co., and, plaintiffs in said court not being present, they were notified to go home, that the case would not be tried, which they did, believing that they would be notified of any future action in the case; they having been sued on the same note in the 716th district justice court some months before, and appearing to make their defense, when they were told to go home, as in this instance, and afterwards

were sued in the 481st district, and appearing and being ready as above stated, when told that the case would not be tried, and to go home, they naturally supposed they would be served again if they were ever wanted; and, being misled by these facts, and having no counsel, they rested easy, when at the next succeeding term, they not being present, judgment was rendered against them for the \$150. This judgment was obtained by accident, mistake, and fraud, without laches on their part. They were not personally known to the justices, and acted solely upon orders from the attorney for plaintiffs. They did not know anything about the judgment having been rendered until October 26, 1893, when the bailiff levied the *fi. fa.* issued from said judgment. Since said levy Jeff Eady has offered to pay Napier, Worsham & Co. \$20 additional for the use of the mule, which offer was refused. The mule was worth \$50 more when returned than when purchased by petitioner. Napier, Worsham & Co. are indebted to Thomas Eady for the value of the mule \$200 and for the wagon \$30, and to both of petitioners \$50, for attorney's fees in bringing this suit, for bad faith and litigiousness. This petition is brought to prevent a multiplicity of suits, and to obtain an equitable set-off. The prayers were for process; that the value of the mule and wagon might be applied to the payment of the debt; for judgment against Napier, Worsham & Co. for difference in value and attorney's fees; that the judgments mentioned be set aside; for injunction; and that the note and mortgage be brought into court and canceled; and for general relief.

Upon the trial the evidence for plaintiff was to the following effect: In 1892 Thomas Eady bought the mule from Napier, Worsham & Co. for \$150, giving them the notes first mentioned in the petition, and a mortgage on the mule and a wagon to secure the note, Jeff Eady signing the notes as security. A few days before the notes became due Thomas returned the mule to Napier, Worsham & Co., and delivered to them the wagon in payment for the use of the mule. No price was agreed upon for the mule and wagon, but he was given a receipt for the same, with the understanding that they would deliver him the notes when he paid an additional note of \$30 he owed them, which was not in the mortgage, nor was Jeff Eady security upon it. The notes have never been turned over to him, he has never received any money for the mule and wagon, the value of the same has never been credited upon the notes, nor have Napier, Worsham & Co. ever accounted to him therefor. Early in 1893, he was sued in the justice court of the 716th district, G. M. He appeared, and, after being questioned by the justice, was told to go, which he did. Afterwards he was sued in the justice court of the 481st district to the August term, 1893. These

suits were against both of the petitioners, and both appeared in answer to each of the suits. When they appeared at the time and place named in the last summons they had no conversation with the justice, but the attorney for Napier, Worsham & Co. asked if they were present, and, when told they were, came to Tom and asked if Tom was going to let him have judgment against them on the notes. Tom replied he did not know what to do, as he had nothing, and had returned the mule and given the wagon for the rent of the mule, and owed them nothing. Said attorney then told him the case would not be tried that day, and he could go, that the case would be tried next month. Petitioners then went home. They believed they would be summoned again when wanted. They were not present at the next term, when the judgment was taken, and did not know the judgment had been taken until the levy was made. The mule was worth \$50 more when returned than when purchased, being in much better condition. Petitioners are illiterate, and were never sued before. They had no lawyer to represent them. When the mule and wagon were delivered to Napier, Worsham & Co., Tom Eady only owed them the two notes mentioned and the note of \$30 for supplies. Jeff Eady owed them nothing, save as security, as above mentioned. They never received any notice of the time and place of trial of the cases after the conversation with the attorney above mentioned. They did not go inside of the court room at the 481st district. Neither of them lived in the 716th district when sued there, but they lived in the 481st district when the last suit was brought. The suits in the 716th district were not only upon the two \$75 notes, but also upon the \$30 note. The judgments were rendered at the September term, 1893, of the justice court for the 481st district.

Defendants moved a nonsuit, upon the ground that the evidence for petitioners did not show any fraud upon the part of the attorney which prevented petitioners from making defense to the suits in the justice court; that the evidence showed that petitioners were in laches, and they, having failed to plead a set-off and recoupment in the transaction out of which the judgments arose, could not do so in another forum; and that, failing to sustain that part of their petition, the whole case should be nonsuited. Petitioners contended that they should be allowed to go to the jury on the evidence as to fraud; and that, as there was a separate count in their petition to recover the value of the mule and wagon, and praying that what was recovered might be applied to the payment of the judgments and balance, if any, to petitioners; and that, as they were in court, all the matters complained of should be settled in one suit. The judge held that, while petitioners might be entitled to sue and recover for the property in an in-

dependent action for the value thereof, the only ground upon which the case was in court, giving any equitable relief, was the allegation of fraud, and that not being sustained by proof the whole case must fail, and he would direct a verdict for defendants, which he did, and there was a general verdict for defendants, and judgment against petitioners for costs. To the ruling of the court and the direction of the verdict and entering the judgment petitioners excepted.

Jas. A. Thomas, for plaintiffs in error.
John R. L. Smith, for defendants in error.

PER CURIAM. Judgment affirmed, with direction.

(95 Ga. 670)

**McELHANAN v. FARMERS' ALLIANCE
WAREHOUSE & COMMISSION CO.**

(Supreme Court of Georgia. March 18, 1895.)

TROVER—PLEADING—SUFFICIENCY OF DECLARATION.

A declaration in trover for the recovery of "three thousand five hundred dollars, lawful money of the United States," is too vague and indefinite in its description of the property sued for, and ought to have been dismissed on demurrer thereto.

(Syllabus by the Court.)

Error from city court of Athens; Howell Cobb, Judge.

Action by W. A. McElhanan against the Farmers' Alliance Warehouse & Commission Company. Judgment for defendant, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Lumpkin & Burnett, for plaintiff in error.
J. J. Strickland and Geo. Dudley Thomas, for defendant in error.

ATKINSON, J. This was a suit for the recovery of personal property under the form of action prescribed by section 3390 of the Code. The action provided for by this section of the Code combines some of the characteristics of both the old common-law actions of trover and detinue, and may be made the basis for the recovery either of damages, as for a conversion, or for the recovery of a particular chattel alleged to be detained. At common law the action of trover was not designed for the recovery of the specific chattel, but was designed as an action for the recovery of damages for the thing alleged to have been converted. The action of detinue was an action for the recovery of the specific article detained, and damages could be therein awarded as well for the detention as for the article which was thus detained. But, the latter action proceeding wholly upon the idea that the person against whom the suit was brought was lawfully in the possession of the goods, much inconvenience arose, and the action of trover became substituted, to a very great extent, for this particular action. It was the evident purpose of the general as-

sembly, in prescribing the form of action now under consideration, to combine, as far as possible, the features both of an action of detinue and of trover. It allows the plaintiff to bring his action in that form and, upon the trial, make his election to recover either the specific article sued for, or its value and hire; the former being technically what he would be entitled to recover in an action of detinue, and the latter being the verdict which would have been made in a common-law action of trover. If the election precede the trial of the cause, and the plaintiff should demand in advance a restitution of the specific article, this may be and is done when he elects to sue out a bail process in aid of his action to recover personal property. It is true, this antecedent election does not commit the plaintiff irretrievably to the acceptance of the specific property sued for in satisfaction of his demand. He is entitled, nevertheless, at the trial, under section 3026 of the Code, to make his final election of a verdict in the alternative; but the prayer for the seizure of the specific article does so far commit him to this object designed to be accomplished by the suit as to require him to plead with such particularity as will enable the court to give effect to any decree which might be rendered in accordance with the prayer of his declaration. The action of trover lies generally for the recovery of personal chattels, or their value, which have been converted illegally by another; but, inasmuch as the purpose of the action is not so much to recover the specific chattels as to recover damages as for a conversion, the same particularity of description is not essential to the maintenance of that action as is requisite to the maintenance of an action of detinue. If, however, the action for the possession of personal property provided for by the section of the Code referred to be one designed rather to recover the specific chattels than damages for a conversion, and this design of the pleader be evidenced by supplementing his action with a bail proceeding, substantially the same rules of pleading prevail as would have applied to the common-law action of detinue, in so far, at least, as the same require a particularity in description of the thing sued for. In that action it was essential that the goods be described with such particularity as would enable the court to seize them, and make restitution to the owner. In the action now under consideration, it is necessary that in the action itself and the bail proceeding the goods be described with such particularity as will enable the court to seize the chattels for which the action is brought, and hold them for restitution in the event of final recovery by the plaintiff. In the old action of detinue it was early held that the action would not lie for a given quantity of money or corn generally, or any other article of like character, for the reason that such money or corn was incapable of being distinguished from any other money or corn;

but, if the action be for money or corn in a bag or sack, then, the bag or sack being itself capable of identification, the court would be enabled to distinguish thereby the particular goods for the recovery of which the action was brought. See Co. Litt. 286; Bl. Comm. bk. 3, p. 152. We think the same principle exactly applicable to the form of action employed in this case, where, supplemented by the bail proceeding, it becomes an action for the recovery of specific chattels. The test of the sufficiency of such a declaration is, and should be, is the description of the chattels sued for so definite and distinct as to enable the court to seize them for restitution to the owner? If it is not, then, clearly, the court should not proceed to judgment; for it would be a useless thing for the court to decree an act, the performance of which it would not have the power to compel. The action in this case, as set out in the declaration, was brought for the recovery of "three thousand five hundred dollars, lawful money of the United States." This property was alleged to have been in the possession of the defendant. Bail process was sued out thereon, and a seizure of the property ordered. There was no mark of identity by which this money sued for could possibly be distinguished from any other money of like character. There was no outward token by which the officer charged with seizing the money described in the bail proceeding could distinguish that from any other money which the defendant might have had in his possession. It would therefore have been fruitless to have permitted the prosecution of an action which, upon its ultimate termination, must have been utterly barren of results. The plaintiff prayed for the restitution of his property, and at the same time, upon the face of his declaration, by a failure to properly describe the chattel sued for, alleged an utter inability upon the part of the court to grant the prayer of his petition. The declaration is equally unsatisfactory when treated as an ordinary action of trover, without bail proceeding. The section of the Code to which we have hereinbefore referred simply prescribes that the form of action therein stated may be used for the recovery of personal property. This statute made the form sufficient, whatever opinion might have prevailed previous to its passage as to the necessity of technical pleading. But it does not authorize the disregard of those principles of pleading which require that the substance of the action should be stated with such reasonable particularity as will enable the defendant to prepare his defense. Hence, it is necessary that there be some description of the property alleged to have been taken from the possession of the plaintiff. The minute particularity necessary to the maintenance of a bail-trover proceeding is not vitally essential to the maintenance of an ordinary action of trover. In the former case the necessity for minute description proceeds from the nature of the relief sought. In the

latter case the requirement of particularity of description proceeds from a necessity that the plaintiff will plainly and distinctly set forth his cause of action, to the end that the defendant may know upon what account the plaintiff makes his demand. If the action for the recovery of personal property under the section of the Code now under review be designed to recover the value of the goods, rather than the goods themselves, and they be incapable of exact, or even approximate, identification by the owner, he must allege a taking under the general description, and the circumstances of the conversion, or such other circumstances as may exist, with such circumstantiality as to supply the want of a more accurate description. A plaintiff is not necessarily cut off from a recovery of money, or other article of like character, by means of the form of action set forth in this section of the Code, because, simply, of his inability to remember the particular bills and pieces of money converted, but he may supplement the general description with such circumstances of the taking as will serve to put the defendant upon notice of the nature of his demands. In the declaration before us, we are uninformed as to when or how, or under what circumstances, the plaintiff lost possession of his money. Without being able to describe the particular money, he simply says that it is in the possession of the defendant. By the very terms of the form of action prescribed by the Code, a description of the property is necessary; and we think that description must be by reference, either to some of the substantial characteristics of the chattel itself, or by such reference to the circumstances attendant upon its conversion as will serve to inform the defendant to what he is called upon to make answer. The declaration was demurred to upon the ground that there was no identification by the declaration of the chattel for which the plaintiff brought his action, and no such description of a cause of action as would enable the plaintiff to maintain his suit. There was no offer to amend, in any particular, the declaration. The court overruled the demurrer and declined to dismiss the action, and, inasmuch as we have seen that, treating this either as a suit for the recovery of damages as for a conversion, or as a suit for the recovery of the specific chattel, the declaration was wholly insufficient, the judgment of the court was erroneous, and is accordingly reversed.

(95 Ga. 668)

LINDER v. ADAMS et al.

(Supreme Court of Georgia. March 18, 1895.)

REVOCATION OF AGENCY.

Where there are mutual, conflicting claims between a partnership and a third person, involving an accounting in order to reach a settlement between the parties, an agreement by the third person for one of the members of the firm to act as his agent in making the settlement, if binding at all, is certainly

revocable at any time before such agreement has been executed and acted on to the detriment of the firm, or any member of the same. (Syllabus by the Court.)

Error from superior court, Hart county; H. McWhorter, Judge.

Action by E. P. Adams & Co. against T. J. Linder. Judgment for plaintiffs, and defendant brings error. Brought forward from the last term. Code, §§4271a-4271c. Reversed.

O. C. Brown and J. P. Shannon, for plaintiff in error. W. L. Hodges, for defendants in error.

LUMPKIN, J. E. N. Adams, M. N. Adams, and Amos McCurry were engaged as partners, under the name of E. N. Adams & Co., in the ginning business. They made a contract with Nixon, by which he was to furnish an engine and an engineer, and receive a portion of the proceeds of the business. When the business was about to be wound up, Linder took possession of four bales of cotton, which apparently represented the share of Nixon in these proceeds, and gave to Adams & Co. an obligation to account to them for the excess of the value of the cotton over and above Nixon's interest, whenever a settlement of the ginning business should be had. Afterwards, the three partners proceeded to make a settlement, at which Nixon was not present, and thereby, as claimed by them, ascertained that the cotton which Linder had taken was worth \$81.55 more than would be coming to Nixon under the settlement. They brought an action for this amount against Linder, upon his obligation above mentioned. His defense was that no settlement of the ginning business had ever been made, and therefore it had never been definitely ascertained how Nixon stood with the firm, or what his share should be. It must not be overlooked that Linder only contracted to pay whatever might appear to be in excess of the amount due to Nixon as the result of such a settlement, and the main question at issue was, had a binding settlement been made between Adams & Co. and Nixon? It did not appear that there had ever been such a settlement, other than that made by the partners themselves in the absence of Nixon, and it affirmatively appeared that he distinctly repudiated that settlement as soon as the result of it was made known to him. E. N. Adams testified that he had been authorized by Nixon to represent the latter in making the settlement. The question, therefore, is, would the authority thus conferred be sufficient to make the settlement binding upon Nixon? If it was not, the plaintiffs' case must fail. As the interests of Adams & Co. and Nixon were directly in conflict, it is, at best, exceedingly doubtful whether one of the firm could be the agent of Nixon for the purpose stated. But, granting that he could, certainly it was the right of Nixon to revoke the agency thus created at any time before

the firm, or any member of it, had been in any way injured by acting upon the settlement made as above stated. There was nothing at all in the evidence to show that Adams & Co., or any one of the partners composing that firm, had been so injured. Nixon denied strenuously that he had ever authorized E. N. Adams to make the settlement for him, but it was within the province of the jury to believe the testimony of E. N. Adams to the contrary. It is certain, beyond dispute, however, that Nixon repudiated the settlement, and refused to be bound by it, as soon as he heard of it; and it would be simply outrageous to hold that he was forever estopped by an agreement to allow his adversary to act as his agent in adjusting conflicting claims between them, when the revocation of that agreement would still leave the latter in a position to make a fair settlement, in which he could receive the full benefit of every right and advantage to which he was honestly entitled. Judgment reversed.

(95 Ga. 685)

VICKERY v. CHAMBERS.

(Supreme Court of Georgia. March 18, 1895.)

RECEPTION OF EVIDENCE—HARMLESS ERROR.

Whether the court erred in admitting evidence, or not, that evidence as to the admissibility of which there was no doubt required a finding for the plaintiff; and there was no error in the charge complained of.

(Syllabus by the Court.)

Error from superior court, Hart county; H. McWhorter, Judge.

Action by Joseph S. Chambers against James E. Vickery. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

P. P. Proffitt and A. G. McCurry, for plaintiff in error. W. L. Hodges, for defendant in error.

ATKINSON, J. The plaintiff, Chambers, sued Vickery upon a breach of warranty made in a horse swap. It appears from the record that the defendant traded to plaintiff a certain horse, which was subject to a mortgage executed by a previous owner in favor of yet another person; that, at the time of the trade, defendant warranted the horse to be free from incumbrances; that afterwards the mortgage in question was foreclosed, and the execution issued thereunder levied upon the property. To this levy the plaintiff in this case filed a claim, setting up title in himself, derived through the defendant. He notified the defendant of the execution and levy, and required him to defend his claim to the horse; and in pursuance of his demand the defendant signed his bond in the claim case, as a surety for the forthcoming of the animal. While the claim was yet pending, the plaintiff, with the consent of Vickery, dismissed the claim; and

the mortgage execution proceeding, the plaintiff did not produce the horse at the time and place of sale. Suit was brought upon the forthcoming bond, and judgment recovered against the plaintiff; and, in order to protect his title to the horse and preserve his property, plaintiff was compelled to lay out and expend the sum of \$109.04. For this sum he brought an action against the defendant, alleging that he was injured by a breach of the defendant's warranty to that extent. It appears that in the claim-case proceedings the defendant and plaintiff co-operated in the employment of counsel to defend it. The defendant knew of the litigation, made suggestions as to its conduct, assisted in the employment of counsel, and, for all practical purposes, was as active as though he were an actual party to the litigation. When the claim case came on for trial before the justice, the plaintiff in this case confessed judgment, and appealed to a jury; and, the case coming on for trial before a jury, the plaintiff withdrew or dismissed the claim, under advice of counsel employed jointly by the plaintiff and defendant. The testimony for the plaintiff was to the effect that Vickery consented to the withdrawal of the claim, but the testimony for the defendant was that he did not so consent. On the day the horse was to be sold under the execution, plaintiff failed to bring the horse to the place of sale. The plaintiff testified that the defendant told him not to bring the horse, and he (defendant) would pay the bond. On this point the testimony for the defendant was, that he told plaintiff to bring the horse to town, and that plaintiff said it was raining too much, and that if it quit raining he would bring it. The court, upon the trial of the case, charged the jury that if, after the horse had been levied on in the hands of the plaintiff under the mortgage *fi. fa.*, the defendant aided the plaintiff in employing counsel to interpose a claim, and pending the prosecution of the claim the defendant consented for the claim to be dismissed without a trial, they were authorized to find for the plaintiff. Exception was taken to this charge, and as well to the ruling of the court upon the admissibility of certain documentary evidence offered on the trial.

We do not think it necessary to consider the objections made to the rulings of the court upon the admissibility of the documentary evidence. We do not think the admission or refusal to admit it would have materially changed the case. Whether or not the mortgage lien was valid and binding in this case, as against this plaintiff, under the facts as they are presented to us in the record, we do not think the defendant can be heard to urge its invalidity. The filing of the claim by the plaintiff, and his subsequent dismissal thereof, with the consent of the defendant, by and through the counsel jointly employed by them, is equivalent to an admission made by the defendant that the mort-

gage was a valid and subsisting lien upon this property. Had the defendant in no manner participated in this litigation, his position with respect to the present case would have been materially different; but where, by his own act, he induces the plaintiff to dismiss his claim, and thus impliedly to admit the validity of the mortgage execution upon the property received by him, in an action like this (upon a breach of warranty) the defendant will be estopped to deny the validity of the mortgage lien. We think the charge of the court was correct. It left for the consideration of the jury the only facts material to be considered in fixing the liability of the defendant, and the jury having found these facts against him, and the verdict being in harmony with and supported by the evidence, this court will not interfere. Judgment affirmed.

(35 Ga. 683)

MORGAN et al. v. BATTLE.

(Supreme Court of Georgia. March 18, 1895.)

PAROL CONTRACT AS TO LAND—EXECUTION—STATUTE OF FRAUDS.

B. and M. agreed orally that M. should bid off for B. certain land about to be sold at sheriff's sale, take the title in M.'s name, and hold the same for B. until the latter could pay for the land. M., in pursuance of this agreement, bid off the land. The sheriff made out and executed a deed conveying the land to M., but it was never delivered to him. Immediately after the sheriff's sale, B. went into possession of the land, and afterwards, with the sheriff's consent, paid the purchase money to the attorney of the plaintiff in the execution under which the land was sold. B.'s possession continued until he was subsequently evicted under another sheriff's sale. Under these facts, the parol contract between B. and M. was fully executed, and thus taken out of the statute of frauds, and B. obtained a complete equity in the land, as against M. and all who hold under him.

(Syllabus by the Court.)

Error from superior court, Warren county; H. McWhorter, Judge.

Action by J. L. Battle against A. S. Morgan and others. Judgment for plaintiff. Defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

E. P. Davis, A. S. Morgan, and W. P. Davis, for plaintiffs in error. Jas. Whitehead, for defendant in error.

LUMPKIN, J. The sheriff of Warren county levied an execution against J. L. Battle, as administrator, upon a tract of land, as the property of his intestate, and advertised the same for sale. Before the sale, Battle requested Morgan to buy the land for him, take the title in Morgan's name, and hold the land for the use and benefit of Battle till he could pay for the same, to all of which Morgan assented. It does not appear to have been in contemplation of these parties that Morgan was to advance the money, and, in point of fact, it was never paid by him; but shortly after the sale an arrangement was made with the attorney who represented the

administratrixes of the original plaintiff in execution, who had died before the levy was made, by which time for payment was allowed. The sheriff made out and executed a deed conveying the land to Morgan, but it was never delivered to him, nor did he ever have possession of the land. On the contrary, Battle went into possession immediately after the sheriff's sale, and afterwards, with the sheriff's consent, paid the purchase money to the attorney above mentioned, the latter giving his receipt to the sheriff for the same. Mrs. N. C. Battle, claiming under Morgan, as the real purchaser, though she had no written conveyance from him, made a deed conveying the land to Morgan's wife and another, reserving to herself a life estate in the property. This life estate was afterwards levied on and sold by the sheriff under an execution against Mrs. Battle. At that sale, Norris, who had notice of Battle's claim of title, became the purchaser, and went into possession of the land; and thus Battle, who had held up to that time, was evicted. Subsequently, Battle brought against Morgan, the grantees of Mrs. Battle, and Norris, an equitable action for the recovery of the premises, with rents, praying (1) that Morgan be compelled to convey the land to him (Battle) in fee simple; and (2) the cancellation, as clouds upon his title, of the above-mentioned deed from the sheriff to Morgan, and that made by Mrs. N. C. Battle to her grantees. The above statement sets forth, substantially, the facts relied upon by the plaintiff in support of his action. On the trial of the case in the court below there was considerable conflict in the evidence upon nearly every material matter involved, but the jury, as it was within their province to do, as the exclusive triors of all questions purely of fact, having by their verdict settled all these issues in favor of the plaintiff, we are now called upon to deal only with such questions of law as are presented by the case which the plaintiff has thus succeeded in establishing. Under the facts disclosed by the evidence introduced in his behalf, we think there can be no doubt of his right to the land. The parol contract between himself and Morgan was fully executed, and thus taken out of the statute of frauds; and, inasmuch as Battle actually paid for the land, he obtained a complete equity, as against Morgan and all who held under him. The second sheriff's sale was a nullity, so far as Battle's rights are concerned, and, as against him, Norris, who took with notice of Battle's claim of title, gained nothing by becoming the purchaser of the land at that sale. Judgment affirmed.

(95 Ga. 655)

EDWARDS v. RICHARDS.

(Supreme Court of Georgia. March 18, 1895.)
BILL TO SET ASIDE DEED—PARTIES—PLEADING—
AMENDMENT—LACHES.

1. Where an equitable petition was brought to set aside a conveyance of land alleged to

have been procured from the plaintiff by the fraud of the defendant, and for other appropriate relief, it was error, over the plaintiff's objection, to make the defendant's vendee a codefendant to the action, it not appearing that such vendee was either a necessary or proper party thereto.

2. The amendment to the petition which the court rejected ought to have been allowed; but, even without this amendment, the petition, with the amendments which were allowed, set forth a cause of action not barred by the lapse of time, and it was error to sustain a general demurrer thereto.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; H. McWhorter, Judge.

Action by Priscilla Edwards, as administratrix of W. C. Edwards, against Titus Richards. Judgment for defendant, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

H. M. Holden and Hart & Sibley, for plaintiff in error. M. P. Reese, H. T. Lewis, and T. R. R. Cobb, for defendant in error.

LUMPKIN, J. Mrs. Edwards, as administratrix of W. C. Edwards, brought an equitable petition against Titus Richards to set aside a sale of land, cancel a deed, etc. The following is a condensed statement of the material portions of her petition: The land in question belonged to the estate of her intestate. Leave to sell the same was granted to her by the ordinary, upon an application, notice of which had not been published for the full period of four weeks. At the sale, which was had pursuant to this order, the land was bid off by Richards for \$300. She conveyed the same to him by deed. He went into possession, and has been in possession ever since. Before the sale took place, and before any bid was made by any one, Richards announced publicly that he would bid off the land for the widow of the deceased; and in consequence of this announcement, which, though false, obtained credence, other persons who were present at the sale, and intending to bid for the land, declined to do so, and it was knocked off to Richards for the sum above mentioned, while in point of fact the land at that time was worth \$2,500. The statement made by Richards that he would bid for the widow was a willful misrepresentation, made with intention to deceive, and it did actually deceive, those present at the sale, and the sale was thus affected with gross fraud, to the injury of petitioner and the heirs and creditors of the deceased. The above-mentioned conduct of Richards was not known to petitioner or the heirs until a short time before the bringing of this action. The petition prayed for a recovery of the land, with mesne profits, and that the sale to Richards be rescinded and declared void.

There were two amendments to the petition which the court allowed. One alleged that out of the rents and profits of the land Richards had received more than sufficient

to pay back to him the \$300 he had paid for the land, with interest thereon; and it was prayed that he account for these rents and profits; that they be applied, as far as necessary, to the repayment to him of the \$300, and interest; and that the plaintiff recover the balance thereof. The other amendment above referred to alleged that Richards had borrowed money and given a mortgage on this land to secure its repayment. That by reason of this mortgage the title of petitioner might be put in jeopardy, or at least she would be subjected to the expense and annoyance of defending her title against that mortgage. In this amendment there was a prayer for a money judgment against Richards for the value of the land, to be discharged, within 60 days after the termination of the suit, by his conveying to her an unincumbered title to the land. Still another amendment to the petition was offered, which the court rejected. It alleged that although the petitioner's attorney, John W. Hixon, was present at the sale of the land, and heard the false announcement made by Richards, he did not then, nor until recently, know or ascertain that the same was untrue; or, if her attorney did have such knowledge at the time of the sale, or before or afterwards, by reason of some understanding between himself and Richards, he concealed the fact from her. At the trial of the case, Mr. Hixon appeared as one of the counsel for Richards. Defense to the petition was made both by demurrer and by answer.

1. Before the demurrer was passed upon, a motion in writing was made by Richards to make one Bryant a party codefendant to the case. In this motion it was recited that Richards had conveyed the land to Bryant to secure a loan of \$850. Over the objection of the plaintiff, this motion was granted. In the order making Bryant a party, it was recited that he held a deed to the premises, and had appeared in open court by counsel and asked to be made a party defendant. In view of the above-mentioned amendment to the petition, wherein a money judgment was prayed against Richards, with the privilege to him of discharging the same by a conveyance to the plaintiff of the land unincumbered, there was no need whatever for making Bryant a party to the case, either on his own motion, or at the instance of Richards. That amendment distinctly recognized Bryant's rights in the premises, and prayed for a judgment by which they would be fully protected. It is true the amendment does not designate Bryant by name, and alludes to the paper held by him as a mortgage instead of a deed, but these matters are immaterial, and his protection would not, because of this omission and inaccuracy, be any the less complete. Indeed, the plaintiff does not, either directly or indirectly, attempt to proceed against him, or ask any relief whatsoever by which his

rights would be prejudiced, or in any way affected. So far, therefore, as Bryant is concerned, a denial of his request to be made a party would have been proper. Nor was it at all necessary to any right of Richards in the premises that Bryant should be made a codefendant. If the plaintiff can establish by evidence the truth of her charges against Richards, she would certainly be entitled, as against him, to the relief prayed in the amendment last mentioned; and, in this event, there would be no necessity for having Bryant a party to the record. If she is unable to make out her case against Richards, the result would necessarily be a verdict in his favor, and he could derive no possible benefit from having Bryant associated with him as a codefendant.

2. The court ought to have allowed the amendment which was rejected. It was all-important for the plaintiff to show ignorance on her part of the alleged gross fraud by which Richards had obtained title to the land. Of course, it was to be expected that she would be met with the defense that her counsel, Mr. Hixon, was present at the sale and presumably representing her. When she discovered at the trial that he was appearing for the defendant, Richards, it was altogether prudent to strengthen her case by setting forth the facts in connection with Hixon's presence at the sale. She therefore ought to have been permitted to allege that she derived through her attorney no notice of the fraud practiced by Richards at the sale, her attorney having failed, either through ignorance of the falsity of the statement made by Richards, or because of collusion with him in the perpetration of the fraud, to communicate to her the fact that Richards had employed at the sale the deceitful and fraudulent means with which he is charged.

It is unnecessary, we think, to consume time or space for the purpose of proving that the petition set forth a cause of action. It certainly cannot be seriously contended that the plaintiff is chargeable with any laches. While she does not, it is true, allege the precise time when she discovered the fraud, or undertake to explain why she failed sooner to discover it, the fact that her suit was brought within seven years from the date of the sale negatives any suggestion that she is barred by the lapse of time. She certainly could not have discovered the fraud prior to the date of the sale, for it was not till then she alleges its perpetration; and, even had she discovered it immediately after Richards secured his deed from her and went into possession, she would, under the repeated rulings of this court, still be in time. It was not, therefore, essential to allege with exactness the precise date of her discovery, or to do more than negative knowledge of the fraud prior to the execution of her deed to Richards. Her allegation that she had knowledge of the fraud only a short time prior to bringing her

action meets this requirement fully, as it also appears by her petition that the deed to Richards was made immediately after the sale, six years or more before her action was brought.

There is little or no merit in her allegation that the notice of the application for leave to sell was not published the full time required by law, for, as she acted upon the order granting leave to sell, she should not now be heard to question its validity. But, as to the main facts of the case, there can scarcely be a doubt that if her petition is sustained by proof, the court, by a proper decree, should undo the outrageous fraud alleged to have been perpetrated by Richards against the heirs and creditors of the estate of W. C. Edwards. Of course, we must not be understood as asserting that such a fraud was in fact committed; but in dealing with a general demurrer to a petition the allegations therein made must be taken as true. Judgment reversed.

(95 Ga. 675)

MOSS et al. v. STOKELEY.

(Supreme Court of Georgia. March 25, 1895.)
LIABILITY OF FACTOR — REFUSAL TO PAY CUSTOMER'S DRAFT — PLEADING — AIDED BY VERDICT.

1. A cotton factor, unless he has expressly or impliedly engaged to pay the drafts of a customer, is not liable in damages to the latter for refusing to pay his draft, even though the customer had in the factor's hands funds sufficient to meet the same at the time it was presented; but the contrary is true when, by express agreement, or by necessary implication arising from the course of dealings between the parties, there is an undertaking or contract on the factor's part to pay such drafts.

2. While the declaration in the present case did not, in terms, allege any express agreement on the part of the defendants to pay the plaintiff's draft, yet, as it did allege facts from which such an agreement could be reasonably implied, the defect in the declaration was curable by amendment; and it was too late, after verdict, to take advantage of the same by motion in arrest of judgment,—the declaration, in other respects, setting forth a cause of action.

(Syllabus by the Court.)

Error from city court of Athens; Howell Cobb, Judge.

Action by J. M. Stokeley against R. L. Moss & Co. Judgment for plaintiff, and defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Geo. Dudley Thomas and W. S. Basinger, for plaintiffs in error. Thomas & Strickland, for defendant in error.

LUMPKIN, J. This was an action by Stokeley against Moss & Co. for damages alleged to have been occasioned by the refusal of the defendants to pay a draft drawn upon them by the plaintiff. The material portions of the declaration were as follows: Moss & Co. were cotton factors and warehousemen, having carried on business as such for a number of years. The plaintiff, as a merchant, had shipped a large quantity of cot-

ton to the defendants, with instructions to sell the same and place the proceeds to his credit. During the fall of 1892, and prior to October 22d, he had drawn various drafts upon them, which were all promptly paid on presentation. On the day last mentioned, having then to his credit with the defendants more than \$450, he drew upon them a draft for \$403.88, payable to the order of Pope & Fleming, which was placed in bank for collection, and duly presented to the defendants for payment, when they refused to pay the same; stating, in effect, that the plaintiff had no funds with them for that purpose. The declaration further alleged that this refusal "was wanton and malicious, and done for the purpose of injuring and damaging" the plaintiff, and that it did in fact damage him in the sum of \$10,000. There was a verdict in favor of the plaintiff for \$100. It does not appear that the defendants objected to any ruling made during the trial, nor did they file a motion for a new trial; but during the term they moved in arrest of judgment, on the ground that the declaration set forth no cause of action, and authorized no judgment whatever in favor of the plaintiff.

1. If the declaration will support a recovery for any amount, the motion in arrest of judgment was not well taken, for it is to be presumed the evidence was sufficient to authorize a finding in the plaintiff's favor for the amount awarded him by the jury. The law bearing upon the controlling question involved in this case is thus aptly stated in Chitty on Bills (*page 281): "The drawee of a bill, unless he has, for adequate consideration, expressly or impliedly engaged to accept it, is not, although he be indebted to the drawer in the full amount, or although adequate funds have been remitted to him for the express purpose, legally bound to accept, nor is he liable to any action for the consequences of his refusal, though, according to mercantile usage, such refusal would be deemed very improper. In this respect the situation of an ordinary debtor or agent differs from that of a banker, who is liable to an action if he should refuse, having sufficient money in hand, to honor the check of his customer; and, in case of refusal, the holder (though the drawer may withdraw the funds, or sue the drawee for the debt) has not, in this country, any remedy at law against the drawee, or the funds in his hands. However, in commercial transactions frequently, from prior intercourse and dealings between the parties, an engagement to accept may be inferred; and it should seem that when funds have been remitted to a drawee for the express purpose of providing for a bill drawn upon him, and he receives and retains the same without objection or returning the amount, an engagement to accept may be implied. If the drawee has expressly or impliedly promised the intended drawer to accept the bill, to be drawn on him for a valuable consideration, and afterwards should

refuse to perform such contract, then the drawer (but not any other party) may certainly sue him, and recover re-exchange, and other damages occasioned by the dishonor of the bill; and, where the drawee has money in hand, very slight evidence—as previous commercial transactions—will support the presumption of a contract to accept; and a promise to give notice to a party when he might draw a bill amounts to an undertaking to accept the bill when drawn in pursuance thereof." Of course, what is there said with reference to the acceptance of bills maturing in the future is likewise applicable to the payment of sight drafts. We consider this citation of authority sufficient to establish liability on the part of Moss & Co. to Stokeley for their refusal to pay his draft, if, in connection with the facts alleged in the above condensed statement of the declaration, it was also true they had expressly agreed to pay his drafts, or an undertaking on their part to do so arose by necessary implication from the course of their dealings with him.

2. The declaration does not, in terms, allege any express agreement to this effect, but we think there can be no doubt it does allege facts from which such an undertaking could be reasonably implied. The allegations of the declaration, fairly construed, amount to saying this much; and the failure to say so distinctly and explicitly is certainly, under the doctrine of the *Ellison Case*, 37 Ga. 691, 13 S. E. 809, a defect which would have been curable by amendment, and one which, we think, is aided by verdict. This being so, the judgment cannot be arrested or set aside. Code, § 3590; *Dill v. Jones*, 3 Ga. 79; *Stanford v. Bradford*, 45 Ga. 97. These two cases are but instances of the scores that might be cited to the same effect. See, also, 12 Am. & Eng. Enc. Law, p. 147 (d), and notes. Judgment affirmed.

(95 Ga. 683)

LINTON v. SHAW et al.

(Supreme Court of Georgia. March 25, 1895.)

TRUSTS—EQUITABLE JURISDICTION—NONRESIDENT BENEFICIARIES.

Where all the beneficiaries of a trust estate, consisting of both realty and personalty in the hands of a trustee residing in this state, are citizens of another state, it is within the power and jurisdiction of the superior court of the trustee's residence, exercising its equitable powers, upon the application of these beneficiaries, to render a decree authorizing them to apply to the proper court in the state of their residence for the appointment of a trustee to take charge of the trust estate for their benefit, and to provide that upon his appointment the Georgia trustee shall convert the real estate into cash, and deliver the same, together with the personalty belonging to the trust estate, already in his hands, to the foreign trustee; the decree making proper provision for the giving of a valid and adequate bond by such foreign trustee in the state of his residence, and providing fully for the protection of the Georgia trustee as to his fees and commissions, and also for the pro-

tection of all creditors of the trust estate residing in Georgia.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by Sarah I. Shaw and others against H. H. Linton, trustee. Judgment for plaintiffs, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Howell Cobb, for plaintiff in error. Erwin & Cobb and Shackelford & Shackelford, for defendants in error.

LUMPKIN, J. The only question presented for our determination in this case is that arising upon the state of facts summarized in the headnote. We have, without much difficulty, reached the conclusion that the trial judge took the right view of this question. It was insisted that section 1865 et seq. of the Code, which provides expressly for the transfer of property in this state belonging to a nonresident ward to the guardian in the foreign jurisdiction, was exclusive, and that, in the absence of express statute, property in this state in the hands of a trustee could not, even by a court of chancery, be transferred to a trustee in another state, although all the beneficiaries of the trust resided there. We do not think this contention well founded. Even without the statute as to guardians, a court of equity could, by proper decree, have provided for the transfer of property belonging to nonresident wards. In *Clanton v. Wright*, 2 Tenn. Ch. 342, it was held that the funds of a nonresident lunatic could be transferred to the state of the lunatic's residence, upon the production of a certified transcript of the proceedings in lunacy, showing the appointment of the guardian, and upon his giving a good and sufficient bond, specially covering the funds so delivered to him. In the opinion rendered in that case it was distinctly stated that there was no statute in Tennessee providing for the removal from that state of a lunatic's property, and that the power to authorize the removal without a statute had been questioned. "But," said the chancellor, "the right of the court of chancery to transfer the funds of an estate which is being administered from the forum of ancillary administration to the administration of the decedent's domicile, without the aid of a statute, has been universally admitted." See authorities cited in support of this statement. Again, in *Earl v. Dresser*, 30 Ind. 11, it was held that the court of common pleas, possessing general chancery jurisdiction, had the power to order the funds of a ward transmitted or paid over to a guardian in another state, where the ward was domiciled. A question arose in that case whether a statute authorizing such delivery and payment to a nonresident guardian was still of force; but Elliott, J., remarked it was unnecessary to

decide that question, as the court was clear in the opinion that the power conferred by the statute was possessed by courts of equity under the common law, and that this statute, in that respect, was but declaratory of what the law was before its enactment. A case which seems to be precisely in point is that of *Yandell v. Elam*, 1 Tenn. Ch. 102. It was there held that funds settled in trust upon a married woman and her children, in the custody and control of the chancery court of that state, might be transferred to the custody and control of the chancery court of another state, where the married woman and her children were domiciled, upon its being shown that such transfer was manifestly for the interest of the beneficiaries. Of course, where the superior court deals with a matter of this kind, the decree should make proper provision for the giving of a valid and adequate bond by the foreign trustee in the state of his residence, and should also expressly provide for the protection of the Georgia trustee as to his commissions and fees, and for the protection of all creditors, if any, of the trust estate, who reside in Georgia. All this seems to have been done in the present case, and we find no reason for disturbing the decree. Judgment affirmed.

(95 Ga. 685)

JOHNSTON v. RICHMOND & D. R. CO.
(Supreme Court of Georgia. March 25, 1895.)
INJURY TO EMPLOYEE—BURDEN OF PROOF—OPINION
EVIDENCE—BOOKS OF SCIENCE.

1. In an action by a locomotive engineer against a railroad company, of which he was an employé, for personal injuries received by him while running a locomotive, it was error to charge that, in order to entitle the plaintiff to a recovery, it was necessary for him to show affirmatively both negligence on the company's part and the absence of negligence on his part. If he showed that he was not negligent, the presumption of negligence was raised, by law, against the company. If he showed that the company was negligent, it then became incumbent on the company, as matter of defense, to show that the plaintiff was negligent.

2. Books of science and art are not admissible in evidence to prove the opinions of experts announced therein.

3. The case being, to a great extent, controlled by the legal propositions announced in the first of the preceding notes, if errors, other than as therein indicated, were committed at the former trial, the court will doubtless correct them upon the next hearing.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by J. C. Johnston against Richmond & Danville Railroad Company. Judgment for defendant, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Lumpkin & Burnett, for plaintiff in error. Geo. Dudley Thomas, for defendant in error.

ATKINSON, J. 1. In this case the suit was brought by the plaintiff (he being an employé)

against the company for injuries alleged to have resulted from the negligence of coemployés in and about the running and operating of the same train by which he was himself injured. Such being the case, the trial judge charged the jury that, in order to entitle the plaintiff to recover, two things are necessary: First, he must show negligence on the part of the company, or its agents or employés; second, the absence of negligence on his part contributing to the occasion or cause of the injury complained of. We think, in view of the previous rulings of this court, that this instruction was erroneous. The rule, as stated by this court in *Railroad Co. v. Kenney*, 58 Ga. 489 (Justice Bleckley delivering the opinion), is as follows: "Concerning one class of cases, viz. that class in which, as in the instance before us, the injured party shared directly in the act which resulted in his own wounding, the rule as to the burden of proof is as follows: After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the company was to blame; or if he will show, on the other hand, that the company was to blame, the law then presumes, until the contrary appears, that he was not to blame. So that in order to make a prima facie case, and change the onus, he need not go further than to show by evidence one or the other of these two propositions,—either that he was not to blame, or that the company was. The company, taking at this stage the burden of reply, can defend successfully by disproving either proposition." We think the charge of the court contravened directly this rule, and imposed upon the plaintiff a burden greater than the law contemplates he shall bear. To the same effect as the case cited, see *Railroad Co. v. Kelly*, Id. 108; *Railroad Co. v. Small*, 80 Ga. 521, 5 S. E. 794; *Railroad Co. v. Bryans*, 77 Ga. 434; *Campbell's Case*, 56 Ga. 587; *Railroad Co. v. Powell*, 89 Ga. 602, 16 S. E. 118, headnote 6; *Railroad Co. v. Vandiver*, 85 Ga. 473, 11 S. E. 781.

2. Upon the trial of this case the plaintiff offered in evidence *Erichsen on Concussion of the Spine*; it being a book treating, from a medical and scientific standpoint, the effect upon the spine and nervous system of a certain fall or jar. The defendant objected to this testimony upon the ground that such evidence was inadmissible. The court repelled the testimony, and the plaintiff excepts to that ruling. Many reasons may be assigned in support of the principle announced in the second headnote, touching the admission in evidence of text-books by medical and other scientific authors. Those assigned, however, by the text writers of our own profession against the admission of such works are so satisfactory to our minds that we approve, without undertaking to elaborate, them. The reasons are: First, that experiment and discovery are so constantly changing theories on scientific subjects that the books of last

year may contain something which this year everybody rejects as absurd; secondly, the book may be a compilation of a compilation, and be thus hearsay evidence of the most extreme kind; thirdly, that the authors do not write under oath, and cannot be cross-examined as to the reasons and grounds for their opinion. See *Lawson, Exp. Ev.* p. 170. This latter seems to us a controlling reason against the admission of that class of testimony. In the case of *State v. O'Brien*, 7 R. I. 336, upon the trial of a murder case, the court refused to permit Taylor's Medical Jurisprudence (a text-book of recognized authority) to be read to the jury as evidence; and the supreme court of that state, in approval of this ruling of the presiding judge, declared that such works were inadmissible, assigning as a reason that: "No evidence in the nature of parol testimony could properly pass to the jury, except under the sanction of an oath; and, upon this ground, books of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and value as treatises. Scientific men are permitted to give their opinions as experts, because given under oath; but the books which they write containing them are, for the want of such oath, excluded."

3. Inasmuch as a new trial must be ordered because of the error of the court in giving to the jury the instruction complained of by the plaintiff, and which is treated in the first paragraph of this opinion, and inasmuch as, upon the next trial of this case, it is not at all probable that the other questions of practice upon which exception was taken in the court below will again arise, we do not deem it necessary to pass upon them. Let the judgment of the court below be reversed.

(95 Ga. 688)

BOWEN v. GAINESVILLE, J. & S. R. CO.
(Supreme Court of Georgia. March 25, 1895.)

NEGLECT—ACCIDENT AT RAILROAD CROSSING—
FRIGHTENING HORSE.

Relatively to a traveler on a public road, driving an animal attached to a vehicle, and approaching a railroad crossing over which he is about to pass, the railroad company is under a duty to obey the requirements of section 708 of the Code; and if, by reason of a failure to observe this duty, the locomotive comes within such close proximity to the animal that it takes fright, runs away, and injury results to the person in consequence of being thrown from the vehicle, the company is liable for such injury, although there was no actual contact between the locomotive and the vehicle or its occupant.

(Syllabus by the Court.)

Error from city court of Hall county; M. L. Smith, Judge.

Action by Chapman A. Bowen against the Gainesville, Jefferson & Southern Railroad Company. Judgment for defendant, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

J. B. Estes and F. M. Johnson, for plaintiff in error. Bryan Cumming and Prior & Thompson, for defendant in error.

LUMPKIN, J. The plaintiff's case was dismissed on the ground that the declaration did not set out a cause of action. It alleged, in substance: He was traveling on a public road which crosses the defendant's railroad, driving a mule which was unaccustomed to and afraid of engines and trains. The situation of the railroad track with reference to the public road was such as to prevent him from seeing or hearing the cars until he was on the track. He knew the railroad schedule and that no train was then due or reasonably to be expected; but, nevertheless, he exercised all reasonable precaution in looking and listening for a train. Not seeing or hearing any, he drove on the track, when, to his consternation, he saw, not more than 30 to 50 steps distant, a train coming at the rate of 15 or 20 miles per hour. It was an extra train, and not running on any schedule. He used every possible effort to free himself from his perilous situation, urging his mule forward as rapidly as he could. Just as the rear of his buggy cleared the track, the engine sped rapidly by and terribly frightened the mule, which rushed with the buggy against a tree on the railroad right of way, demolishing the vehicle and harness, injuring the animal, and throwing the plaintiff out, and permanently injuring him, the nature of his injuries being described. The defendant's employes neglected to blow the whistle or to check the speed of the train in approaching the crossing. Had they observed the legal requirements in these respects the plaintiff would have been warned, and would not have undertaken to cross the railroad until after the train had passed. Wherefore the plaintiff averred that, being entirely free from fault, his injuries were caused by the negligent failure of the defendant's employes to obey the law regulating the manner in which trains shall approach public crossings.

Section 708 of the Code, which makes it the duty of a locomotive engineer, when he shall arrive within 400 yards of a road crossing, "to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," was designed to prevent injuries to person and property at road crossings. In the case of *Railway Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, we gave to this law deliberate and anxious consideration, and the writer endeavored to cite and discuss the previous decisions of this court in which this section had been construed. Our conclusion, after a careful review of the whole subject, was that a railroad company was not liable for injuries occurring between

a blow post and a crossing, when the only act which could be imputed to the company as negligence was the failure of the engineer to observe the requirements set forth in the above-cited section of the Code. But we did not hold, and, so far as we are informed, this court has never yet held, that a railroad company would not be liable for an injury occasioned to one who was exercising his right to approach and pass over a railroad at a crossing of the public highway over the same, when that injury was directly attributable to the failure of the engineer to obey the law laid down in that section. The statute embodied therein was, as we have already, in substance, remarked, enacted for the protection of travelers on public roads intending to cross railroads at points where these two kinds of roads intersect each other. It was, therefore, relatively to the plaintiff, a duty of the company to obey this statute, and the declaration alleges that in this duty the company failed, and that but for such failure the plaintiff would not have been injured. The breach of the duty due to the plaintiff was negligence as to him, and for the consequences of that negligence—assuming as true all the allegations of the declaration—the company is liable. It must be remembered that a traveler has as good a right to be upon a public crossing as the company has to run trains over it. When, therefore, a traveler is on his journey in the highway, intending to presently use such a crossing just ahead of him, a railroad company has no right, by a disobedience of law, to prevent him from using the crossing safely. The right to thus use it includes, not only the right to approach it for that purpose, but also the right to go upon and leave it without being hindered or put in danger by any unlawful act or omission on the part of the railroad company or its servants. We do not think the law was intended solely to prevent such injuries as might be caused by actual collisions upon the track itself, but also injuries resulting from animals taking fright and running away, when the act of crossing was about to begin, was in progress, or had just been completed. The general assembly must have had in contemplation the prevention of all injuries which might thus be occasioned. It is important, just here, to bear in mind that the statute requires two distinct things to be done. One is to check, and keep checking, the speed of the train, so as to stop in time, should any person or thing be crossing the railroad; and the other is to begin blowing the whistle 400 yards from the crossing, and keep blowing it till the crossing is reached. The first of these requirements has been frequently construed to mean that the engineer must have his train under such control that he can bring it to a complete stop, if necessary to prevent a collision upon the track itself. If, therefore, no injuries were to be prevented save

those only occasioned by collisions between the locomotive and persons or property upon the track, the requirement as to checking would be all-sufficient; for, if it should be strictly obeyed, a collision of any sort on the crossing would be rendered impossible, and there would be no necessity whatever for any warning of the approach of the train by the blowing of the whistle. But the law distinctly says the whistle must be blown, commencing nearly a quarter of a mile from the crossing; so the question presents itself, why should it be blown? The obvious answer is that at least one purpose must be to give warning to persons riding or driving along the public road and approaching the crossing, in order that they may get their animals under control, watch them carefully, or, if liable to become frightened by the locomotive, and consequently to do mischief, to keep them at a safe distance until the train has passed. This was precisely the warning, and for the purpose just indicated, which the plaintiff in the present case needed and was entitled to have. If the allegations of his declaration are true, his injury was directly attributable to the fact that such warning was not given. It is true he was not hurt upon the track, but was thrown out of his buggy because of the fright of his mule, produced by the close and terror-giving proximity of the locomotive. This, however, would not have occurred if the plaintiff, being warned in time, had kept at a safe distance from the railroad until the train had passed on its way. We therefore do not think the negligence of the engineer can fairly be claimed to be only the remote cause of the injury. On the contrary, we think it was sufficiently the proximate cause to give the plaintiff a right of action.

Upon a former occasion we investigated at some length various questions as to the rights of travelers upon public roads in connection with the duty imposed upon railroad companies to signal the approach of trains to crossings. We found that in most of the cases bearing upon the subject it was held that persons using the highway and approaching railroad crossings, intending to cross, were entitled to the protection afforded by statutes requiring signals to be given. We also found many cases holding that persons using a public highway in the vicinity of a railroad were entitled to this protection, even though not intending to cross; and still other decisions making the question of the company's liability depend upon whether or not there was an intention to cross. It is unnecessary now to examine very closely into these decisions, or the reasons upon which they are based. In view of the dual requirement of our own statute, above pointed out, we have little difficulty in reaching the conclusion that the plaintiff below, under the facts he alleged, came fully within its protection. Judgment reversed.

(95 Ga. 683)

HAMILTON v. ENGLAND.

(Supreme Court of Georgia. March 25, 1895.)

VENDOR AND PURCHASER—CONTRACT—SPECIFIC PERFORMANCE.

1. Where, by the terms of an instrument under seal, signed by two parties, an obligation is imposed upon one of them to make a conveyance of land to the other upon the performance of conditions set forth in the instrument, even though there be no express undertaking upon the part of the latter to perform, the contract is nevertheless mutual, and the latter is bound to the performance of the covenants and conditions thereby impliedly imposed upon him.

2. Where, as to one of its essential elements, time is of the essence of the contract, and the party in whose favor the stipulation as to time was incorporated does not insist on that stipulation, the other party cannot avoid performing his part of the contract on the ground that he himself did not perform within the time limited, especially where, after the expiration of that time, he has actually filed an equitable petition to compel performance by the other party.

3. The contract, upon the interpretation of which the questions in this case were made, was correctly construed by the trial judge in his instructions to the jury, the verdict was supported by the evidence, and a new trial was properly denied.

(Syllabus by the Court.)

Error from superior court, Union county; C. J. Wellborn, Judge.

Action by J. S. Hamilton against J. England for specific performance. Judgment for defendant. Plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

On August 16, 1890, James S. Hamilton and John England entered into the following contract: "This is to certify, for and in consideration of fifty (\$50.00) in hand this day paid, receipt for which is herewith acknowledged, paid by Jas. S. Hamilton, that I have and do hereby bind myself to make deed to a certain mineral interest in a tract of land in Towns county, * * * under the following conditions: Provided the said Jas. S. Hamilton shall pay the sum of five hundred dollars (\$500) by or on October 1st, 1890; shall pay \$1,500.00 (fifteen hundred dollars) by or on March 1st, 1891; and, further, that should the property be sufficiently developed and of sufficient worth on March 1st, 1891, the said Jas. S. Hamilton shall pay two thousand (\$2,000.00) on or by Sept. 1st, 1891, and two thousand dollars (\$2,000.00) on or by March 1st, 1892. The question of the worth of the property [to] be decided by arbitration of men of experience in corundum mining, provided the said Hamilton and myself cannot agree. It is a further condition that the said Hamilton shall proceed at once, or as soon as practicable, to work and open the property for mining purposes. If payments are not paid at maturity, the contract becomes null and void." On March 28, 1891, Hamilton brought his petition against England for specific performance of the contract; alleging that, in addition to the \$50 cash payment, he paid England \$500

on October 1, 1890, and that on March 1, 1891, he sought to agree with England as to the value of his interest, and, failing to do so, offered to arbitrate the matter as stipulated in the contract, but England refused to do this, and declined to appoint any one to act for him, whereupon Hamilton's arbitrator proceeded to act alone, and, having fully examined and investigated the property, fixed the value of England's interest at \$2,050, deducting from which the \$550 already paid left \$1,500, which Hamilton tendered to England, and made the tender continuous. This petition was answered by England, who claimed that the property was fully worth \$6,050, and offered to make Hamilton a deed thereto upon payment of \$5,500, which he alleged was the balance due under the contract. On April 4, 1894, Hamilton filed an amendment alleging that, by the terms of the contract, time was of the essence thereof; that, if the payments provided for were not made at maturity, the whole contract became null and void; that he tendered England \$1,500 on March 1, 1891, and the same was refused; that he had fully worked, tested, and developed the mine, and since said tender had expended \$8,000, or other large sum, on said development, and the mine had turned out to be utterly worthless. Therefore he withdrew his tender of the \$1,500, as well as his application for specific performance, and prayed that the contract be decreed null and void, and be canceled, and that he have judgment against England for the \$550 already paid him. Verdict and decree were rendered that England execute to Hamilton a deed to the property, and recover of Hamilton \$1,500, with costs. Hamilton moved for a new trial on the general grounds, and for error in the court's charge construing the contract, and the motion was overruled. The charge complained of was: "I construe it to mean this: That it is conditional as to the two last payments, of two thousand dollars each, provided for in it, and unconditional as to the first three payments, of fifty dollars, five hundred dollars, and fifteen hundred dollars; that the aggregate of these first-named amounts represents the valuation placed by both parties on the property as it then appeared, and that Hamilton was bound to pay that much, without reference to how the mine might develop; and that any failure to pay these first-named amounts would not make the contract void."

H. Thompson and W. S. Pickrell, for plaintiff in error. M. G. Boyd and W. E. Candler, for defendant in error.

ATKINSON, J. The facts other than those herein recited are sufficiently stated in the official report.

1. We do not think that the contract set forth in the record, and which is made the basis of the action in the case, was a unilateral agreement, imposing an obligation to

perform upon one of the parties only. If such had been their intention, it would have been only necessary for one of them to have signed the agreement. It is an instrument executed, as to each of the parties, under seal, and this, without more, imports a consideration for the covenants and undertakings of the respective parties, as expressed therein or implied therefrom. The plaintiff, Hamilton, brought a suit against England, the other party, to compel a specific performance of his contract, and to compel a conveyance of the premises upon the terms expressed in the contract. He alleged, after the commencement of the suit, that he had performed, and stood ready to perform, his undertakings, and demanded the execution of the deed in compliance with the undertaking of the other party. England, in his answer, set up a claim against Hamilton, for the payment of the two sums first in the contract stipulated to be paid; and, upon the filing of this answer, Hamilton amended his petition, and undertook thereby to withdraw from his suit the prayer for specific performance, and inserted a prayer for the restitution by England of a part of the money paid by him in pursuance of the contract. If there was ever anything doubtful about the interpretation of this contract; if, as to its true meaning, it was, in the first instance, in the least degree equivocal,—we think these doubts have all been resolved by the subsequent conduct of Hamilton. Illuminated as the dark spots in this transaction are by the evidence showing his recognition of the obligation of this contract upon him, of his acceptance of its terms, his insistence upon its performance and execution by England, there can be no doubt that the contract imposed upon him, as well as England, the performance of some duty. In determining what this duty is, it is necessary to look to the language of the agreement. His covenant was to pay to England \$500 on the 1st day of October, and \$1,500 on March 1st. He in fact paid the \$500 as he undertook to do, and alleges in his prayer for specific performance that he actually tendered the other \$1,500 at the time and place stipulated for the payment thereof. So that, according to his understanding of this agreement, he was, at all events, bound to pay the \$2,000. We think that his construction was the correct one, and that he was bound, at all events, by this contract, to pay these two sums. The other payments contemplated by the agreement were left conditional upon the happening of a future event, and, as that event did not transpire, Hamilton never became liable for either of those payments. The judge and jury, upon the trial of this cause, took the same view of the contract, touching the liability of Hamilton thereunder, as he did himself at the institution of the suit, and found accordingly; and the charge of the court construing for the jury the terms of that contract is in exact accord with the opinion we now express.

2. It was insisted by Hamilton that he was excused from a performance of the contract, and that he was entitled to recover of England the money paid, under this stipulation of the agreement: "If payments are not made at maturity, the contract becomes null and void." He claims that the effect of this stipulation was to make time of the essence of all of the covenants contained in the contract, and that a failure upon his part to meet any one of the payments provided for by the contract should operate to put an end to his obligation to perform. This, we think, is a strange view to take of that stipulation in the agreement. It is a well-settled and universally recognized rule of law that no man can profit by his own wrong; and that no man ought to be permitted to profit by a failure upon his own part to perform the obligations imposed upon him by the terms of an agreement to which he was himself a party is a principle equally well founded both in law and morals. The obligation imposed by this agreement was that Hamilton should pay at the specified times the two several sums as stipulated in the contract. That was one of the obligations that he assumed, and upon a valuable consideration; and yet we are invited so to construe the covenant as to time as not only wholly to excuse him from the future covenants, but likewise to restore to him moneys expended in the execution of covenants already performed. In other words, he is to be not only excused, but paid a premium upon his own default. We do not think this covenant, in the light of this agreement, bears any such interpretation. On the contrary, we think the rational construction to be placed upon this contract is that a failure to perform within the time limited, upon the part of Hamilton, would excuse a subsequent nonperformance upon the part of England. But, we think, to hold that, though England were willing to waive the forfeiture upon his part, Hamilton, because of his own default, nevertheless stands absolved of all obligations under the terms of his contract, is to do violence to the most obvious rules of law and the plainest principles of justice. Let the judgment of the court below be affirmed.

(95 Ga. 351)

DISHARON V. STATE.

(Supreme Court of Georgia. Feb. 27, 1895.)

ADULTERY—INDICTMENT—EVIDENCE.

1. An indictment which charges that a married man had sexual intercourse with an unmarried woman, with her consent, is a good indictment against him for adultery and fornication, although it denominates the crime "seduction," and contains allegations ineffectually undertaking to set forth that offense.

2. The evidence fully warranted the verdict for adultery and fornication, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Dawson county; George F. Gober, Judge.

James M. Disharoon was convicted of adultery, and brings error. Affirmed.

R. P. Lattner, Thos. Hutcheson, and H. H. Perry, for plaintiff in error. Geo. R. Brown, Sol. Gen., for the State.

ATKINSON, J. In the indictment against the defendant the offense was designated specifically as that of seduction. The indictment charged the act of sexual intercourse between the accused and an unmarried woman; alleged that she, previous thereto, was a virtuous female, and that her consent for the defendant to have carnal knowledge of her person was induced by deceitful means and artful practices, and by false and fraudulent means; that the female alleged to have been seduced was of tender years, being only 13 years of age, and that this defendant, being himself a married man, did then and there represent to her that he loved her, and did then and there win her confidence and affection; that he represented to her that it would not be wrong to yield to his lustful embraces, and it would not be wrong to allow him to have carnal knowledge of her person, that it would not hurt or injure her character, and that, if she would consent to sexual intercourse with him, he would leave his wife and take her; that she being young and inexperienced, having implicit confidence in the defendant, and believing the representations he made to her were true that it would not be wrong, that it would not injure her character, she then and there yielded to his lustful embraces, and allowed him to have carnal knowledge of her person. These representations by the defendant were alleged to have been false and fraudulent, and the deceitful means and artful practices resorted to to induce her consent.

To justify a conviction for the offense of seduction the consent of the female seduced must have been induced either by persuasion and promises of marriage or by other false and fraudulent means. It is not insisted in this case that the consent of this female was induced by persuasion and promises of marriage. In order to justify a conviction upon persuasion or solicitation to the criminal act, it must appear that such persuasion or solicitation was coupled with the promise of marriage, and that the promise of marriage established such a relation between the parties as that the female was induced, under the influence thereof, and upon expectation of its realization, more readily than otherwise she would have been, to yield to the persuasion or solicitations of the seducer. A consent to the act of sexual intercourse, based upon a promise of marriage as a consideration moving to the female alleged to have been seduced, and upon the faith of which she consents to the sexual act, takes the whole transaction out of the definition of

seduction and makes it purely meretricious; the relation thus established being wholly inconsistent with the idea of that virtuous consent involved in the commission of the offense of seduction. Solicitations, however earnest, coupled with a promise of marriage, whereunder a woman undertakes to sell her person in consideration of a promise of marriage, do not make it a case of seduction. To constitute a promise of marriage the incriminating element in a case of seduction the woman must believe it to be a bona fide promise, and she must yield to the solicitations of her pretended lover, and not merely submit to the demands of her purchaser. The fraudulent means resorted to must be such as mislead the party upon whom they are practiced, and induce her, upon a misapprehension of the true state of affairs, to yield to the lustful embraces of the man who thereby induces her consent. A fair illustration of this may be found where a man induces a woman, upon false representations that he is an unmarried man, to enter into a marriage contract, and, under the relation thus seemingly established, to consent for him to have carnal knowledge of her person. She must be entrapped into giving her consent, not by solicitation and persuasion only, but by these supplemented with some false token by means of which she is deceived. It does not sustain the charge of seduction to show that some moral wrecker, standing on the barren shores of vice and immorality, with a siren song has beguiled his passing victim, however much such melodies may have pleased the ear or tickled the fancy; but it must also appear that, by the exhibition of a false beacon, he gave assurance of innocence and promise of safety. He must first allure, then tempt, then persuade, and, she yielding, the offense, of all others, save one, reprobated of God and man, becomes complete. In its punishment the law cannot be too swift, too sure, too uncompromising. Mankind is little disposed to extenuate or excuse its commission, and because of its very heinousness the courts should carefully avoid confusing the voluntary and meretricious gratification of lustful desires upon the part of a woman with the idea of her betrayal by a man. The difference between the two is wide and deep. On the one hand is the harlot, who bargains her person for a price; on the other the pure and virtuous, but deeply-wronged, woman. In the conviction and punishment of the sexual act with the one the law looks merely to the suppression of the social evil; in the other it strikes with a mailed hand, and with the double purpose to suppress the evil and to avenge the wrong. The woman whose every maidenly instinct must teach her that the representations made to induce her consent were indeed false, and who then, upon such representations, submits her person to another, could not be a virtuous female in the truest sense, whatever may be the legal significance at-

tached to those words. Such conduct is more compatible with that moral condition which enables her, in advance of overtures from the man, to herself entertain lascivious desires. It places her where she is more likely than otherwise herself the seducer. She must know that the sexual act is wrong, and that the bare contemplation of such a thing does violence to every instinct of a maidenly modesty. A virtuous unmarried woman, laboring under no mental disability, must know that any representation made to her by a married man that the act of sexual intercourse was not immoral and would do her no harm was utterly false. It is a representation by which she could not be misled or deceived. Therefore a bare statement by him that it was not wrong, coupled with solicitations to her consent to the act, would not justify his conviction for seduction. If, coupled with that statement, however, he employ other false and fraudulent means, as if by spiritual exhortation, or by reason of any peculiar relation existing between them by and through which he exercises a controlling influence over her mind and will, he induce her to consent, he would be guilty of seduction. *Wood v. State*, 48 Ga. 192. The indictment in this case does not allege the use of any false or fraudulent means, within the meaning of the term as employed in the statute, by which the consent of this female was induced to the act of sexual intercourse. It alleges persuasion, it is true; but this alone, without promise of marriage, will not suffice. It is true that she was a young girl, he a mature man; but it is not alleged that there was any special relation existing between them by which over her will he could exercise a controlling influence. His statements were untrue. The opinions he expressed as to whether or not this particular act would be morally wrong are wholly at variance with sound morals and good law, and so manifestly so as not to have amounted to misrepresentations which could be said to be calculated to deceive. Of the fact that he was a married man it is not alleged that she was ignorant. It is a case in which the female, simply upon solicitation, consented to the act of sexual intercourse, her consent not being induced by any of the false and fraudulent means contemplated by the statute. We conclude, therefore, that, as charging the offense of seduction, the indictment was bad. Its allegations were inadequate to that charge, but it contains all of the substantive facts constituting a case of adultery and fornication, alleged probably with too minute and unnecessary particularity, but nevertheless stated so that, if proven, a verdict for the latter offense would stand. The evidence is clear and satisfactory to each of the material averments constituting the offense of adultery and fornication. It has been often ruled in this court that an offense is characterized, not by its specific designation in the indictment, but by the criminal acts therein alleged to have been committed. See

Camp v. State, 3 Ga. 417, and *O'Halloran v. State*, 31 Ga. 206. While it has been decided in this court that, upon an indictment for seduction, the defendant might be convicted of the lesser offense of adultery, or adultery and fornication, or fornication (*Wood v. State*, 48 Ga. 192, and *Hopper v. State*, 54 Ga. 389), we do not think that question occurs in this case. This indictment, upon a careful analysis of its allegations, is really an indictment for adultery and fornication, though rather inaptly described as being an indictment for seduction. Had the jury convicted the defendant generally under the indictment in this case, it would have been the duty of the court to have sentenced him as for the offense of adultery and fornication, that being the only offense laid in the indictment.

The evidence being clear and satisfactory, and the jury having convicted the defendant of the offense of adultery and fornication, the judgment of the court below denying a new trial will not be disturbed. Judgment affirmed.

(35 Ga. 214)

PULLMAN'S PALACE-CAR CO. v. MARTIN.

(Supreme Court of Georgia. Jan. 28, 1895.)

SLEEPING-CAR COMPANY—PROPERTY STOLEN BY EMPLOYE—LIABILITIES—COSTS ON APPEAL.

1. Without reference to the law regulating the liability of a sleeping-car company for the loss of property by a passenger occasioned by the negligence of its employes, it is clear that in a case where the jury could reasonably infer from the evidence that the property lost by a passenger consisted of a sum of money and such articles as she might for her personal convenience and adornment have appropriately carried with her in the car, and that the same was stolen by an employe of the company while the passenger was under his protection, the company is liable.

2. The verdict is supported by the evidence, and the court did not abuse its discretion in refusing a new trial.

3. Where a proper and complete brief of evidence was presented to the judge for his approval, it was bad practice for him, on motion of the opposite party, to require a number of interrogatories and the answers to same, all of which were fully covered by the brief, to be attached to such brief; and, when it plainly appears that doing so was entirely unnecessary, the cost of bringing such superfluous matter to this court will be taxed against the party at whose instance it was added to the brief.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Elise C. Martin against the Pullman's Palace-Car Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Barrow & Osborne and Jackson & Leftwich, for plaintiff in error. W. D. Harden and West & McLaws, for defendant in error.

ATKINSON, J. 1. According to the view we take of the questions made in this case, it is unnecessary for us to determine whether

in Georgia a sleeping-car company should be held to the same degree of diligence as is imposed upon an innkeeper, or whether it shall be adjudged to be a common carrier; nor is it necessary specially to define its appropriate position among that class of persons denominated "ballees for hire." Whether we treat this defendant as a common carrier of passengers, or treat it as an innkeeper, or treat it as a simple lodging-house keeper, hiring its space, for an agreed consideration, for sleeping apartments for a determinate period, it would be responsible for personal jewels and belongings of a passenger, appropriate to his or her social position and financial standing, carried by such passenger while traveling thereon, and for his or her convenience, comfort, or personal adornment, to the extent, at least, of making good to such person any loss resulting from a theft of such property by its own employés while such person was under their protection. It guaranties, at least, that, while enjoying the comforts afforded by the car of the defendant, a person traveling thereon shall not be robbed by its employés. To what extent and under what circumstances it might be liable for the wrongdoing of other persons we do not think is involved in this case, and do not at present undertake to decide. By her declaration the plaintiff alleged that on or about March 2, 1892, she was a passenger for hire on defendant's sleeping car "America" from Chattanooga to Macon; that by the contract of hiring it undertook to use reasonable and proper diligence in guarding and protecting her from loss by theft while she slept, during the usual hours of sleep, in the berth assigned to her on the car by defendant; that she had with her reasonable money and jewelry, to wit, money to the amount of \$35 and jewelry of the value of \$700; that, upon retiring for the night upon the sleeper, she put the money and jewelry in a satchel, and placed the satchel between her person as she lay in her berth and the wall of the car, and then went to sleep; that defendant so negligently guarded and protected her while she was thus sleeping that, through its negligence, some person unknown to her, while she was asleep, and during the night, took the money and jewelry from the satchel, without her knowledge, and stole it, etc.

According to the evidence reported in the record, the plaintiff was a passenger upon defendant's car, and on the evening before she lost her property, in conversation with another passenger with whom she was traveling, she casually so exposed her pocketbook containing the money and jewelry sued for as that the porter of the car saw it in her possession, and saw her place it in a satchel. Upon retiring, this satchel was placed in the berth beside her, between herself and the wall of the car. She testified that she had not removed the pocketbook from the satchel, but, upon retiring, went to sleep, and so remained until the next morning, about day-

light or before. That about this time she was awakened by a sensation as of some person intruding in her berth. That she awoke and recognized the head of the porter, a servant of the company, inside the curtain of her berth. That she asked what he meant, and, when ordered to close the curtain, he said he had come in to call her for breakfast at Macon, Ga. She, however, went to sleep again,—does not know how long she slept,—and then got up and dressed before she reached Macon. That when she finally awoke the satchel was at her feet, and open. That she closed the satchel, and several hours thereafter reopened it, to get some money with which to purchase fruit, and found that the money and jewelry were gone. That she called the attention of the conductor to it, and search was made, but it was impossible to recover the money and jewelry. The conductor testified that both the porter and himself were on watch until all the berths were made down, which was about 10:30 p. m.; that the porter then retired, and he remained on watch until 3:00 a. m., at which time he awoke the porter, who went on watch, and he then retired; that he arose between 6:30 and 7:00 a. m.; that from the time the berths were made down until he retired he was constantly watching the aisle between the berths, to see that the occupants thereof were not disturbed in their persons or property while they slept; that the plaintiff arose about 7:00 o'clock, but did not report her loss until about 11:30 a. m.; that she did not say where her satchel had been during this interval, whether she had left it unguarded for all or any portion of the time or not. The porter testified that he did not know anything of the earrings or money; that the conductor and himself were both on watch until the berths were made down, and then he went to bed, and the conductor remained on watch until 3:00 a. m.; that at that hour the conductor awoke him, and he stood watch alone until the passengers arose the next morning; that he kept a strict watch, did not go to sleep at any time, and was not out at any of the stations; that neither the plaintiff nor her property was interfered with by any one while he was on watch; that the other door was not locked, because it was not necessary, as he was on watch all the time, and could see it; that the car was an old one, and there was nothing to prevent him from seeing from one door to the other; that he did not go inside the curtain, nor put his head, his arms, or his shoulders inside the curtain, before the plaintiff got up; that he did not see her take her pocketbook out of her satchel at any time during the trip, or show her earrings or money to any one; that he remained on watch until the conductor and passengers got up in the morning, and then the conductor shared his watch; that he was in the car the entire time, but was in bed and asleep between 1 and 3 a. m.; that while on watch he was constantly awake and on duty,

guarding the car, the property in it, and the passengers, and no one could have disturbed the passengers or their property without his seeing it; that he blacked shoes that night at the end of the aisle, in the body of the car, where he had a full view through the aisle; that this was an old-style car, and had no smoking room in it; that in making down the berths he closed both sashes of the windows; that the windows all had fastenings, to prevent their being raised from the outside; that there was no conversation between the plaintiff and himself; that in waking the passengers, if she was not already up, he woke her in the same manner as he awoke other passengers, by calling, and, if no answer was made, by putting his hand on the berth curtains and pushing them in until they touched her, so as to arouse her; that this was always the way passengers were waked up.

That this passenger lost her jewelry and money, and that she lost them while a passenger in this car, are both facts which may be taken as established beyond controversy by the evidence. The plaintiff's testimony places the porter, the servant of this defendant, in such a situation as that he might easily have purloined her property. According to his own statement, it was not necessary for him to have put his head inside her berth. According to her statement, he did put his head inside of her berth, and thereafter she found her satchel open and her purse gone. These circumstances, even in the face of a denial by the porter, would have furnished strong inferential evidence that he was the man who appropriated these goods. His guilt, we think, is practically demonstrated by his own testimony and that of the conductor. According to the conductor, he was constantly on guard from the time the passengers retired the evening before until 3 o'clock in the morning; and if his testimony be true—and it is not disputed by any one—it would have been impossible for any person without his knowledge to have intruded upon the privacy of this passenger during this interval, and stolen her property. According to the testimony of the porter, from 3 o'clock a. m. until the time when the passengers arose he was constantly on guard for the purpose of protecting the persons and property of the passengers against the depredations of other people; that he was in a position where he could have seen and would have seen any person who intruded upon the passengers in that car, and that no such thing was done. So that, according to his own statement and the statement of the conductor, it would have been impossible for any person other than one of these two to have robbed this plaintiff between the hour when she retired and the hour when she arose. But since she was robbed, and since, as we have seen, it would have been impossible for any person other than one of these two to have robbed her, then the inference

is that she was robbed by the one or the other of these employes; and for the larceny of either the company would be responsible. We think the evidence of this plaintiff established beyond controversy that the porter intruded his head into her berth and stole her property. He was the person identified by the passenger as having intruded upon her privacy. According to his testimony, at the time she says it was done it would have been impossible for any person other than he to have entered unobserved. This was the view the jury might have taken of this case in the court below. The only reasonable conclusion to be drawn from this evidence is that the servant of the defendant, whose duty it was to guard the person and property of this passenger while she slept, purloined the chattels sued for; and we therefore think that, without reference to the liability imposed upon the company for injuries resulting from the negligence of its employes, the jury were justified in finding against it because of the larceny committed by its servants.

2. It is unnecessary to discuss further than is therein stated the question of practice referred to in the third headnote to this opinion. Let the judgment of the court below be affirmed.

(96 Ga. 320)

PULLMAN'S PALACE-CAR CO. v. MARTIN.

(Supreme Court of Georgia. Jan. 23, 1895.)
SLEEPING-CAR COMPANY—PROPERTY STOLEN BY EMPLOYE—NONSUIT.

Under the facts in evidence, there was no error in denying a nonsuit.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Elise C. Martin against the Pullman's Palace-Car Company. Judgment for plaintiff. Defendant brings error. Affirmed.

ATKINSON, J. Upon the exception to the order overruling the motion for nonsuit, brought up by the bill of exceptions to the last term of this court, and which, by consent, was continued to be argued and considered along with the main case, it is unnecessary to do more than refer to the discussion of the evidence as stated in the opinion in the case of Car Co. v. Martin (this day decided) 22 S. E. 700. Judgment affirmed.

(96 Ga. 172)

GIBSON v. NEEDHAM.

(Supreme Court of Georgia. April 29, 1895.)

EXECUTORY AGREEMENT TO LEASE—RIGHT TO POSSESSION.

1. A parol agreement by the owner of premises with another person, to the effect that the former would, at a future time, rent the premises to the latter for a given term at a reasonable price, to be agreed upon by the parties,

and for which promissory notes were to be executed and delivered, did not constitute a present contract of rental, but was merely an executory agreement to make such a contract in the future.

2. It not appearing in the present case, under any view of the evidence, that anything more than a mere executory agreement to rent (as distinguished from a contract of actual rental) was ever made between the plaintiff and the defendant, the latter had no right, as against the former, to the possession of the premises for the contemplated term; and consequently, irrespective of alleged errors committed at the trial, the verdict was right, and ought not to be disturbed.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by W. S. Needham against S. B. Gibson. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Brannon, Hatcher & Martin, for plaintiff in error. Little & Wimblis and B. H. Crawford, for defendant in error.

LUMPKIN, J. On October 1, 1890, a warrant was issued, upon an affidavit made by Needham to dispossess Gibson, as a tenant holding over, of certain premises in the city of Columbus. By counter affidavit, Gibson alleged that he was not holding possession beyond his term. Upon the issue thus made, there was a verdict for the plaintiff, and Gibson made a motion for a new trial, which was overruled, and he excepted. The motion contained quite a number of grounds, which, however, we will not discuss, but will simply undertake to show that upon the substantial merits of the case the verdict was undoubtedly right. Taking that version of the evidence most favorable to the defendant, the following, in brief, appeared: Needham had rented the property in dispute to one Newman for the year beginning October 1, 1889, and ending September 30, 1890. Newman occupied the premises several months, and then sublet the same to a man from Opelika, who, in turn, sublet to one Summerlin, and the latter to Gibson, who went into possession in the spring or summer of 1890, having previously bought out a retail liquor business conducted by Summerlin upon the premises. Before doing so, he had notified the plaintiff that he contemplated buying Summerlin's business, but did not wish to do so unless he could get the house for another year from October, 1890, to which Needham replied: "All right. You shall have it. Go ahead and buy him out. I would be glad to get rid of him." Gibson asked Needham what rent he would charge, and the latter replied: "You can have it at a reasonable rent." Gibson then offered to give Needham his notes for the rent, but Needham replied there was plenty of time to do that. Upon the faith of what thus passed between himself and Needham, Gibson bought out Summerlin, and went into possession. Several times after this Gibson undertook, directly and in-

directly, to close the trade with Needham by executing and delivering notes for the rent. On one occasion, Needham told him he could have the place at \$10 or \$15 per month,—"Just a reasonable rent." Neither of them ever decided upon the price, though it was the understanding between them that the amount would be agreed upon later. The contract between these parties as to a rental of the property for any term after October 1, 1890, never approached any nearer to consummation than as above stated. In point of fact, Needham rented the property to another party for a term to begin on that day, and the contemplated contract between himself and Gibson was never closed. We do not think, under the facts above set forth, that an actual contract of rental was made between Needham and Gibson. What occurred amounted, at most, merely to an executory agreement to make such a contract in the future. Whether or not Needham would be liable in damages to Gibson for a violation of such agreement is not now before us for determination. We simply hold that Gibson had no right, as against Needham, to retain possession of the premises after the 1st day of October, 1890; and, consequently, he could not lawfully resist the execution of the dispossessory warrant. There is a wide difference between an actual contract and an executory agreement to make a contract. The distinction between the two is very clearly pointed out in the somewhat similar case of *Weed v. Lindsay*, 88 Ga. 686, 15 S. E. 836, which case, in principle, controls the case at bar. Judgment affirmed.

(95 Ga. 791)

POPE v. COLBERT, County Judge.

(Supreme Court of Georgia. April 29, 1895.)

WRIT OF PROHIBITION—EXECUTED ACT.

The writ of prohibition is designed to prevent the performance of some official act unauthorized by law, and not to relieve against the consequences of such an act. Accordingly, where a county judge had declared a county office vacant, and had ordered an election to fill the vacancy, it was too late to "prohibit and direct him to abstain and desist from proceeding further to have said election." Whether the county judge originally had authority to pass such an order or not, and, if so, whether or not it was rightly passed in the given case, it is certain that after the order was in fact passed he had no further jurisdiction or control over the matter.

(Syllabus by the Court.)

Error from superior court, Taylor county; W. B. Butt, Judge.

Application by O. A. J. Pope for writ of prohibition against O. M. Colbert, county judge. Writ denied, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

A. E. Thornton and C. J. Thornton, for plaintiff in error. W. S. Wallace, for defendant in error.

SIMMONS, C. J. Pope presented to the judge below a petition for a writ of prohibition against the county judge of Taylor county, in which he alleged that he had been duly elected sheriff of that county, and that he had executed and filed his bond as such sheriff, as by statute provided, but that the county judge was endeavoring to have an election held in the county for sheriff, and had issued an order to that effect, declaring therein that a vacancy exists in the office because of petitioner's failure to give bond and qualify as sheriff of the county. He prayed that the writ of prohibition issue, directed to the county judge, directing him to abstain from proceeding further to cause said election. The petition contained other allegations to the effect that the county judge has no jurisdiction and power over the election, bond, and qualification of petitioner, as county judge or otherwise; but, in the view we take of the case, it is unnecessary to consider these allegations. Whether the county judge originally had authority to pass such an order, or not, and, if so, whether it was rightly passed, or not, it is certain that after the order was in fact passed he had no further jurisdiction or control over the matter. The election having been ordered, the matter had passed out of his hands, and a writ of prohibition would therefore have no office to perform. The writ of prohibition lies to "arrest" or prevent the performance of an official act unauthorized by law, but does not lie to relieve against the consequence of such an act. Code, § 3209a; 19 Am. & Eng. Enc. Law, "Prohibition," p. 203. The court below did not err, therefore, in refusing to grant the writ prayed for. Judgment affirmed.

(96 Ga. 186)

HARRIS v. EARLY COUNTY.

(Supreme Court of Georgia. April 29, 1895.)

SUBPOENA IN CRIMINAL CASE—VALIDITY—WITNESS FEE.

Unless, at the time a subpoena for a non-resident witness for the state in a criminal case is issued, it is signed both by the clerk of the superior court and the solicitor general of the circuit, it is void; and, though such witness may attend thereon, he is not entitled to compensation, under the provisions of section 3845 of the Code.

(Syllabus by the Court.)

Error from superior court, Early county; B. B. Bower, Judge.

Action by George Harris against Early county to establish a claim. Judgment for defendant, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

G. D. Oliver, A. G. Powell, and R. H. Powell, for plaintiff in error. R. H. Sheffield, for defendant in error.

ATKINSON, J. Whatever considerations of public policy may have influenced the general assembly in requiring subpoenas for

nonresident witnesses in criminal cases, who are desired to testify on behalf of the state, to be signed by the solicitor general of the circuit before they were issued by the clerk, it nevertheless was so enacted, and accordingly section 3845 of the Code provides that "no subpoena for a nonresident witness for the state shall be issued, unless the same shall be signed by the clerk of the court and the solicitor general of the circuit." The evident purpose of the general assembly was to leave the selection of witnesses to be sworn on behalf of the state, and to be paid out of the county treasury, to the selection of that officer who, by law, was charged with representing the interests of the state in criminal prosecutions. In the case under consideration the plaintiff in error resided without the limits of the county in which the criminal prosecution was pending, the clerk of the superior court issued an ordinary subpoena, addressed to him, and upon that he attended the court. This subpoena, being issued without having first been countersigned by the solicitor general, was issued in direct contravention of the provision of the Code now under consideration. Any process which issues against the prohibition of a statute is void, and the person to whom it is directed is under no obligation to obey its mandate. This witness might have disregarded entirely this void process, but, inasmuch as he saw proper to attend the court thereunder, he must be treated in law as a mere volunteer, and not as attending in obedience to the mandate of a lawful process. By the very terms of the act, he was not entitled to either his per diem or mileage allowance, and the judgment of the court disallowing his claim was correct, and is accordingly affirmed.

(96 Ga. 301)

CALLAWAY v. PHILLIPS et al.

(Supreme Court of Georgia. May 13, 1895.)

DISTRESS FOR RENT—SUFFICIENCY OF WARRANT.

Where an affidavit to obtain a distress warrant sufficiently states the facts upon which such a warrant may lawfully issue, it is not necessary for the warrant itself to "set out the reasons why rent was due as set forth in the affidavit." The failure of the warrant so to do does not render it invalid, if, in other respects, it contains all that is legally requisite.

(Syllabus by the Court.)

Error from superior court, Lee county; C. L. Bartlett, Judge.

Distress by J. B. Callaway against Phillips & Crew. Judgment for defendants, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Wooten & Wooten and Long & Son, for plaintiff in error. Fort & Watson, for defendants in error.

LUMPKIN, J. Section 4082 of the Code declares, in substance, that any person having rent due him may, on his own oath in

writing, or that of his agent or attorney, obtain a distress warrant for the sum claimed; and section 2285 provides that a landlord may distrain for rent before it is due, if the tenant is seeking to remove his goods from the premises. If, therefore, when a tenant is thus seeking to remove his goods, the landlord desires to obtain a distress warrant, he can do so by making before the proper officer an affidavit sufficiently stating the facts as required by the two sections of the Code above cited. Upon this being done, it becomes the duty of the officer to issue the warrant for the amount claimed. There is no provision of law, of which we have any knowledge, making it necessary for the warrant itself to "set out the reasons why rent was due, as set forth in the affidavit." The affidavit upon which the distress warrant in the present case was issued showed upon its face that the rent claimed was not yet due, and sought to comply with section 2285 by alleging that the tenant was "disposing of and making way with his property." The warrant was levied, and a claim filed. At the trial the claimants objected to the affidavit on the ground that it did not follow the statute, because it failed to allege that the tenant was "seeking to remove his goods from the premises." This defect, over the claimants' objection, was cured by an amendment, to the allowance of which no exception was taken. The claimants then moved to dismiss the warrant on the ground that it did not follow the affidavit; and, upon an intimation from the court that if the warrant was amended the levy would fall, the plaintiff announced he would stand upon the warrant as it was. The court then dismissed the warrant because of its failure to "set out the reasons why rent was due, as set forth in the affidavit." There was no other objection to the warrant, and the court erred in dismissing it, the objection taken being without merit. Judgment reversed.

(95 Ga. 701)

MODEL MILL CO. et al. v. McEVER et al.
(Supreme Court of Georgia. March 25, 1895.)

INSTRUCTIONS—LIMITING JURY IN CONSIDERATION OF EVIDENCE.

1. The issue being whether a bill of sale from a mercantile firm to a creditor was executed and delivered upon a bona fide contract of absolute sale, or upon a secret agreement that this creditor, out of the proceeds of the property conveyed, was to pay a debt due another creditor of the firm, and there being both parol and documentary evidence bearing directly upon this issue, there was no error in refusing to charge a written request which limited the jury, in determining the question involved, to a consideration of the bill of sale and the parol evidence explanatory of the same.

2. There was evidence sufficient to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Hall county;
C. J. Wellborn, Judge.

v.22s.E.no.16—45

Action by the Model Mill Company and others against J. M. McEver and others. Judgment for defendants, and plaintiffs bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

G. K. Looper and Dean & Hobbs, for plaintiffs in error. Prior & Thompson, W. S. Pickrell, W. L. Telford, and J. B. Estes, for defendants in error.

SIMMONS, C. J. 1. The only grounds of the motion for a new trial were that the verdict was contrary to law and the evidence, and that the court erred in refusing to give in charge to the jury the following written request: "If it appears from the instrument of writing executed by a debtor insolvent at the time of the transaction, and from the parol evidence explanatory thereof, that personal property consisting of a stock of goods, notes, accounts, fixtures, mule, and wagon was delivered to a creditor, not on a contract of absolute sale to him, but with the understanding that he was to pay over to another creditor a part of the property, or a part of its proceeds, and retain the balance on a debt due him, the transaction was an assignment for the benefit of creditors; and, it not being made with the inventory and schedule required by statute, the same was void." This request is substantially in the language of this court in the case of Johnson v. Adams, 92 Ga. 551, 17 S. E. 898, and is correct in the abstract; but, under the facts of this case, the court could properly decline to give it in charge, inasmuch as it limited the jury, in passing upon the question of whether the "instrument in writing" referred to was delivered on a bona fide contract of absolute sale or not, to a consideration of the instrument itself, and the parol evidence explanatory thereof, when there was other evidence, both parol and documentary, bearing upon that issue.

2. There was sufficient evidence to warrant the jury in finding as they did, and, the trial judge having approved the verdict, this court will not set it aside. Judgment affirmed.

(95 Ga. 702)

JACKSON v. MANER et al., Road Commissioners.

(Supreme Court of Georgia. March 25, 1895.)

DECISION OF ROAD COMMISSIONERS' COURT—REVIEW—REMEDIES.

1. Whether a person who, in a road commissioners' court, has been duly adjudged to be a road defaulter, and who has subsequently been arrested, under the provisions of section 627 of the Code, and brought before that court, "to abide the judgment of the same," can be then heard on the question as to what his punishment shall be, or upon any other question, he is not entitled to have the judgment already rendered, and declaring him to be a road defaulter, reviewed in that court.

2. If such a judgment is void for want of jurisdiction in the court, the person against whom it operates may, by affidavit of illegality,

arrest an execution based thereon, or, in case of arrest, may raise the question of the validity of the judgment by writ of habeas corpus.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

L. I. Maner and others, road commissioners, entered judgment against M. A. Jackson as a road defaulter. Certiorari by defendant was dismissed in the superior court, and Jackson brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Mozley & Morris, for plaintiff in error. W. R. Power, for defendants in error.

ATKINSON, J. It appears from the record in this case that the plaintiff in error was convicted before a court held by certain road commissioners as a road defaulter. It appears that he was duly summoned to work upon the public road, and notice given of the time and place when the commissioners would sit to hear the excuses of defaulting road hands; that this plaintiff in error failed to appear, and a judgment was rendered against him in that court, declaring him to be a road defaulter, and upon this judgment a warrant was issued for his arrest, requiring the officer executing the same to cause the defendant to be brought before the commissioners to abide the judgment in the case. When he was brought before the commissioners, he insisted that he ought not to be punished, upon the ground that he was a resident of another county at the time he was required to work the road, and was not liable to do road duty in that county. The commissioners declined to hear or accept the evidence of these facts, and directed his imprisonment, under the warrant of the arrest which had been previously issued, for the term of 30 days. To this judgment he sued out the writ of certiorari, and upon the hearing in the superior court the circuit judge overruled his petition for certiorari, and directed that the judgment of the commissioners' court proceed. We think this judgment was right. The judgment of the commissioners, finding this defendant to be a road defaulter, was conclusive upon him in that court, as to that point. The court itself had no power to review or set aside its own judgment. In so far as it could legally adjudge any matter of fact preceding the judgment, the person against whom such judgment was rendered was concluded in that court. If, for any cause, the judgment was erroneous, it might have been excepted to and set aside by the writ of certiorari. When brought before the commissioners upon their warrant against the defendant, directing his apprehension, to abide the judgment rendered, whether he could then make any question upon the excessiveness of the fine imposed, we do not now adjudge. If, in the rendition of its judgment in the first instance, the court had no jurisdiction of the person of the

defendant, because of his being a nonresident, he can make that question in a forum which has the power to adjudicate upon it. If an execution be issued against his property for the collection of a fine imposed, he may file an affidavit of illegality, and cause the same to be returned into the commissioners' court for trial, under section 3866 of the Code; and upon this affidavit, if it appear that the judgment upon which the execution is based is void for any cause, or that the execution is proceeding illegally against his property, the commissioners may vacate the judgment, or quash the execution, as the questions made in the case might require. If, on the other hand, as in this case, the commissioners shall adjudge a person to be a road defaulter, and cause him to be apprehended under the warrant of arrest provided for by section 627 of the Code, he may make the question as to the validity of the judgment rendered against him by writ of habeas corpus sued out.

This matter of the trial of road defaulters, and their punishment, is a judicial contrivance of the simplest possible character. The law is simple, plain, and easy of understanding,—necessarily so, because it must be administered by those who are little versed in its intricacies,—and its due enforcement is necessary to the keeping of the public roads in good repair. We guard by this decision the rights of those persons of whom road duty is required, who are not liable therefor, against any oppression which may result from the caprice or ill-judged conclusions of those charged with the administration of the law, but we desire to surround this simple procedure with as little of the mystery of the law as possible. Judgment affirmed.

(95 Ga. 781)

NEW ENGLAND MORTGAGE SECURITY CO. v. GORDON et al.

(Supreme Court of Georgia. April 29, 1895.)

CONSTRUCTION OF WILL—DEVISE OF LAND IN COMMON—POWER TO INCUMBER.

Where, by his will, a testator devised to his daughters, one of whom had children then in life, certain described property, and in the will also declared that "the property willed to my daughters is to be kept for theirs and their children's own use and benefit, free from the debts and control of any husband or person whatever," the legal effect of these provisions was to vest in the daughter who then had children, and her children, an estate in common, at least as to the use, and the portion of the estate assigned to such daughter could neither be sold nor incumbered by her to an extent greater than her undivided interest.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

Claims by R. W. Gordon and others to property levied on under a judgment by the New England Mortgage Security Company against Harriet E. Gordon. Judgment for claimants, and the mortgage company brings error.

Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

W. E. Simmons and J. H. Worrill, for plaintiff in error. J. M. Mobley and B. H. Walton for defendants in error.

ATKINSON, J. An execution in favor of the New England Mortgage Security Company against Mrs. Harriet E. Gordon, based on a judgment of October 10, 1893, was levied upon the property involved in this controversy. A claim to the property levied upon was interposed by and on behalf of the children of Mrs. Harriet E. Gordon, 11 in number. They claimed as devisees under and by virtue of the will of their grandfather Robert Weldon, who was the father of Harriet E. Gordon,—she being the defendant in execution, and the mother of the claimants. The jury found the property subject as to a one-twelfth undivided interest only. The plaintiff moved for a new trial, which was overruled and denied by the court below. The particular devise upon which these claimants base their right to this estate is contained in Items 3 and 6 of the will of their grandfather Robert Weldon. Item 3 of the will reads as follows: "I will and bequeath to my daughter Harriet E. Gordon, wife of Geo. W. Gordon, lot 53, east half of lot 54, and west half of lot 70." The sixth item is as follows: "I will and bequeath to my three children [naming them; Harriet Elizabeth, the mother of these claimants, being one of them] all the balance of my property, both real and personal, to be equally divided between them, share and share alike. The property willed to my daughters is to be kept for theirs and their children's own use and benefit, free from the debts and control of any person or husband whatever." The executor named in the will, as a part of the residue of the estate devised by the sixth item of the will, above quoted, exposed for sale the property in question; and the defendant in execution became the purchaser thereof, accepting it as a part of the property devised to her by the sixth item of the will. Upon the trial of the claim case the court charged the jury "that, under the will of Robert Weldon, Mrs. Gordon and her children were tenants in common in all the property left them; and, if you believe from the evidence that the property given Mrs. Gordon and her children paid for this land levied upon when the same was sold at executor's sale, then I charge you that all the land levied upon would not be subject,—only a part would be. And in this case it is conceded that Mrs. Gordon has eleven children. Then only one-twelfth interest would be subject." The court further charged the jury "that under the will of Robert Weldon the property given to Harriet E. Gordon was also given to her children, and, under the law, this makes Mrs. Gordon and her children tenants in common in all the property conveyed to Harriet E. Gordon and her chil-

dren." Exception is taken to this charge, and the plaintiff insists that the legal effect of the devise to the mother of these claimants was to vest in her an absolute fee, and that for this reason it was subject to the payment of the execution levied. It will be observed from the language of this will, as employed by the testator, that there was no absolute devise of any portion of his property to his daughter Harriet E. Gordon alone; for, coupled with the devise was the qualification that it should be kept for the joint use of his daughter and her children, free from the debts and control of any husband or person whatever. If there be any doubt in the construction of this devise, that doubt arises upon the question whether or not the testator intended to create a trust estate, vesting in the daughter the fee, to her own use and the use of her children, or whether the effect of it was to constitute them, by the terms of the will itself, tenants in common. At all events by the plain language of the devise, the testator had no intention of conveying to the daughter an absolute, unincumbered fee. If so, he could not have adopted language less adapted to the expression of that idea than that which he in fact employed. Neither the context of the will, the testamentary scheme manifested by the devise now under consideration, nor the words of the instrument itself, would seem to indicate any such purpose upon the part of the testator, and we know of no artificial rule of construction which would constrain us to such a conclusion. We think that the decisions of this court in the case of *Lee v. Tucker*, reported in 56 Ga. 9, and the case of *Loyless v. Blackshear*, 43 Ga. 327, adjudicate favorably to the contention of the claimants the construction which should be placed upon this will. We think the charge of the court was correct. The mother of these claimants took no interest under the will of Robert Weldon separate from their own. She could neither sell nor incumber it as her own estate; and the verdict of the jury subjecting her interest only is all that the plaintiff in error was entitled to have. Let the judgment of the court below be affirmed.

(96 Ga. 183)

CHERRY v. STRONG.

(Supreme Court of Georgia. April 29, 1895.)

EVIDENCE OF PARTNERSHIP—LABORER'S LIEN.

Under the facts set forth in the plaintiff's affidavit to foreclose his alleged lien as a laborer, the relation between himself and the defendant was not a partnership; and it was therefore error to sustain the defendant's special demurrer, the ground of which was that under these facts the parties were partners. The question whether or not the plaintiff's affidavit was for any other reason defective was not presented for adjudication by this court.

(Syllabus by the Court.)

Error from superior court, Early county; J. M. Griggs, Judge.

Action by D. M. Cherry against D. D. Strong. Action dismissed, and plaintiff brings error. Brought forward from the last term. Code §§ 4271a-4271c. Reversed.

G. D. Oliver and W. D. Kiddoo, for plaintiff in error. W. A. Jordan, for defendant in error.

LUMPKIN, J. An affidavit was made by Cherry for the purpose of foreclosing an alleged special lien in his favor, as a laborer, against Strong, "agent for Mrs. A. A. Strong." An issue was formed, and at the trial the defendant moved to dismiss the plaintiff's case upon the ground that the facts set forth in his affidavit showed that he was a partner of the defendant, and not a mere laborer. This motion was sustained, and the plaintiff excepted. The material portions of the affidavit were, in substance, as follows: On the 28th of October, 1892, Cherry, the deponent, contracted with Strong, as the agent of Mrs. Strong, to cultivate her lands for the year 1893. The same were to be planted in corn, cotton, etc. Strong, as agent, was to furnish 140 acres of land, 4 head of horses or mules, a wagon, farming utensils sufficient to cultivate the land, 500 bushels of corn, 1,200 bundles of fodder, and "supplies for the laborers who he was to hire for three of the plows run on said farm." Cherry "was to take charge of the four plows, and run them together; and he was to manage the whole farm, and keep all the fences in repair, * * * and do all that was required to be done by a farm manager,—for which services he was to have one-fourth of what was made on said farm." The affidavit then proceeded to state that Cherry faithfully performed and completed his contract of labor; set forth the amounts of the crops made, the portion and value thereof to which Cherry was entitled, the amount he had received, and the balance still due him "for said labor performed by affiant as aforesaid." Demand and refusal to pay, etc., were also alleged.

The only question made before, and passed upon by, the trial court, was whether or not, under the facts alleged, Cherry was a partner of Mrs. Strong. No question was raised as to the insufficiency or defectiveness of the plaintiff's affidavit in other respects; and therefore, in deciding the case, we have confined ourselves strictly to the issue of partnership or no partnership. If the plaintiff's affidavit does not, with sufficient clearness and distinctness, allege that he actually performed manual labor, and was therefore entitled, as a laborer, to a lien upon the defendant's property, the defect, upon being pointed out, would have been curable by amendment. We therefore deem it fair to decide only the one question above indicated, and leave open such other questions as may hereafter arise in the further progress of the case. We are quite clear that

under the facts presented the contract alleged in the plaintiff's affidavit did not constitute a partnership between the parties. There are numerous decisions of this court in support of this conclusion. In *Holloway v. Brinkley*, 42 Ga. 226, this court held that where there was a contract between a freedman and a landowner to make a crop for one year, by the terms of which the latter was to furnish the land and stock, and the freedman to work the same, and receive for his labor one-half of the crop, no partnership between the parties resulted. This case was cited approvingly in *Smith v. Summerlin*, 48 Ga. 425, where a very similar contract was under consideration, and the same doctrine was announced. The case of *Gurr v. Martin*, 73 Ga. 528, is also very much in point. By the terms of the contract between these parties, Martin was to furnish Gurr a farm, stock to cultivate the same, implements, cotton seed, and guano, and also to advance certain supplies for Gurr's support. Gurr was to furnish the necessary labor to cultivate the farm, "and feed for said labor"; to make, gather, and house the crops, repair fences, "and perform such other service as is usually done on a farm,"—for all of which he was to receive one-half of the crops made, gathered, and housed by him, and also one-half of certain hogs. Under these facts, it was held that the contract did not constitute a partnership between the parties. And see, also, *Almand v. Scott*, 80 Ga. 95, 4 S. E. 892. In view of the cases above cited, and others which might be cited to the same effect, there is no difficulty in holding that in the present case no partnership existed. The contract simply contemplated that Cherry was to be paid for his services one-fourth of what was made upon the farm. The fact that his compensation would vary according to the size and value of the crops produced would make no difference, for it might well be stipulated that the measure of his wages should depend upon the diligence and success with which he performed his work. If he really performed manual labor in the production of the crops, he was as much a laborer as though his wages had been payable in money. He had no joint interest in the property used in the business, nor a joint interest in its profits and losses, but the price of his services was simply to be measured by the results of his labor. The court erred in dismissing the plaintiff's case on the ground stated. Judgment reversed.

(96 Ga. 85)

HIDELL v. FUNKHOUSER et al.
(Supreme Court of Georgia. April 1, 1895.)

PROCEEDINGS BELOW ON REMAND.

This court having, at the March term, 1892 (16 S. E. 79, 89 Ga. 532), decided that the pleas of the defendants in this case, taken as a whole, set forth a good defense to the plaintiff's action; and it now appearing that at the last trial in the court below the evidence fully sus-

tained the pleas, and required a finding for the defendants,—the verdict, upon the substantial merits of the case, was right, and, irrespective of the errors alleged to have been committed by the trial judge, should be allowed to stand.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Dora R. Hidell against Samuel Funkhouser and others. Judgment for defendants, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

C. N. Featherston, for plaintiff in error. J. Branham and C. Rowell, for defendants in error.

LUMPKIN, J. It would be unprofitable to state and discuss the complicated facts set forth in the record, or the questions presented by the motion for a new trial. When this case was before this court at the March term, 1892 (see 89 Ga. 532, 16 S. E. 79), it received a very thorough and careful examination and consideration, although, for want of time, no opinion was written. This court at that term reached the conclusion that the pleas of the defendants, taken as a whole, set forth a good defense to the plaintiff's action. It now appears that at the last trial in the court below the evidence fully sustained the averments of the pleas, and was so strong as to demand a verdict for the defendants. This being so, and the verdict in their favor being undoubtedly right upon the substantial merits of the case, it must be allowed to stand. The rightful determination of the case depending upon its own peculiar facts, and it not being probable that another in many respects similar will arise again, it will be of no great value as a precedent; and for this reason, also, we deem it unnecessary to discuss the questions involved in the various assignments of error. Judgment affirmed.

ATKINSON, J., not presiding.

(96 Ga. 177)

CITY OF COLUMBUS v. OGLETREE.

(Supreme Court of Georgia. April 29, 1895.)

DEFECTIVE STREETS — NEGLIGENCE OF CITY — NOTICE TO POLICE.

1. Upon the trial of an action against a municipal corporation for personal injuries, it was error to instruct the jury that a given state of facts would be sufficient to establish negligence on the part of the defendant; these facts not being such as would in law, per se, constitute negligence.

2. It not having been shown that the duty of looking after and reporting the condition of the streets and sidewalks of the city devolved upon its policeman, it was error to charge that notice to "the police" of the defective condition of a particular street or sidewalk would be notice to the municipal corporation.

3. Even if the plaintiff was entirely without fault, he would not be entitled to recover unless his injuries were caused by, or attributable to, negligence on the part of the defendant.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by George Ogletree against the city of Columbus. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

J. H. Worrill, for plaintiff in error. G. Y. Tigner and Blandford & Grimes, for defendant in error.

LUMPKIN, J. This was an action against the city of Columbus for damages alleged to have been sustained by the plaintiff from falling into a hole in the sidewalk upon a public thoroughfare of the city, the declaration charging that this hole had been carelessly and negligently left open by the city. There was a verdict for the plaintiff, and the defendant excepted to the overruling of its motion for a new trial.

1. The court, among other things, charged as follows: "If a man passes along the street, and purposely, negligently, and carelessly deviates from the regular traveled way, and falls into an excavation, and is injured, then the city would not be liable. But, on the other hand, if you believe from the evidence that the plaintiff was passing along, and that he inadvertently or unintentionally deviated slightly from the regular traveled way, and fell into this open eye of the sewer, or hole in the sidewalk, or near thereto, then it would have been negligence on the part of the city, provided it was in such close proximity to the sidewalk that the plaintiff did not know of its dangerous condition." It can hardly be doubted that this charge was erroneous. If anything is settled in the law of this state, it is that, as a general rule, what will or will not constitute negligence is a question peculiarly for determination by the jury. Where, by express law, a given act or omission is forbidden, or declared to be negligent, the judge may inform the jury that such act or omission constitutes negligence; but in all other cases it is improper for him to instruct the jury that a particular state of facts would or would not be sufficient to establish negligence on the part of either party to the case on trial. There is no occasion to cite authority for what is here said, for the rule stated is well known, and generally accepted. We have no doubt at all that our able and learned brother of the circuit bench is perfectly familiar with the law on this subject, and he doubtless fell into error through mere inadvertence.

2. The court also charged: "As to knowledge upon the part of the defendant, gentlemen, notice to the police, or other city officials, or any one of them, would be notice to the whole. In other words, if you believe from the evidence in this case that the policemen, who were the agents of the city, or in the employ of the city, had notice of the dangerous condition of this street or sidewalk,

and they failed to take steps to repair the damage, or to repair the sidewalk so as to make it reasonably safe, then the city would be liable for injuries resulting therefrom." It does not appear that this charge was based upon anything contained in the charter or ordinances of the city of Columbus making it the duty of its policemen to look after and report the condition of its streets and sidewalks; but it would seem that the judge was undertaking to state what he regarded as the general rule upon this subject, without reference to charter provisions or municipal regulations. Thus regarded, we do not think the doctrine of the charge sound; certainly not to the extent of being alike applicable to all incorporated cities. In the absence of any ordinance or statutory provision specially defining the powers and duties of policemen, they are, presumptively, as at common law, mere peace officers. *Throop*, Pub. Off. § 565. Ordinarily, therefore, it would not be presumed that a policeman was specially charged with any duty respecting the streets or sidewalks of a city; and if, as matter of fact, any such duty did devolve upon the police officers of a particular city, this fact should be made affirmatively and unequivocally to appear. In *Mechem*, Pub. Off. § 844, the rule in the case of an agent acting for a private principal is stated to be that the law imputes to the principal all notice relating to the subject-matter of the agency which the agent acquires while acting as such, and within the scope of his authority, etc. In section 845 the same rule is applied to private corporations, and it is further stated that "the notice or knowledge must have come to an agent whose powers and authority extend over the particular subject-matter to which the notice or knowledge applies." And in section 846, while the author remarks that it is not yet fully settled by the authorities to what extent the rules applicable to private agencies will obtain in respect to public officers, he does distinctly assert that "notice or knowledge in reference to a matter over which [a public officer] has no authority, and in respect to which he has no duty to perform, cannot be deemed notice to the public." Under these rules, it would seem that, unless it be affirmatively shown that a police officer has some duty to perform in reference to the streets or sidewalks, notice to him of their condition would not necessarily be notice to the municipal authorities. In *Cook v. City of Anamosa*, 68 Iowa, 427, 23 N. W. 907, it was distinctly ruled that notice of a defect in a sidewalk, communicated to a city marshal, is not such notice to the city as will render it liable for an injury resulting therefrom. In our investigation, we found some extreme cases in which it was held that notice to a member or members of the city council in regard to a defect in a public street would not be notice to the city itself; but we do not cite them, for the reason that they carry the doctrine further than we are,

as at present advised, willing to go. In section 187 of *Jones on Negligence of Municipal Corporations*, which treats of notice of a defect in a city street, there is an expression to the effect that "it has accordingly been held that notice to the members of the police force of a city is notice to the city," and a number of cases are cited in a note to this section. An examination of them, however, will show that in every instance the police force was specially charged with some duty respecting the streets or sidewalks of the city, and this assertion by Mr. Jones in his text must be considered and understood with reference to the authorities cited by him to sustain it. See *Rehberg v. Mayor*, etc., 91 N. Y. 137; *Goodfellow v. City of New York*, 100 N. Y. 15, 2 N. E. 462; *Twogood v. City of New York*, 102 N. Y. 216, 6 N. E. 275; *Carrington v. City of St. Louis*, 89 Mo. 208, 1 S. W. 240; *City of Denver v. Dean*, 10 Colo. 375, 16 Pac. 30. In *Donaldson v. City of Boston*, 82 Mass. 508, it appears that the trial judge instructed the jury that notice to the mayor, aldermen, superintendent of streets, or policemen, would be notice to the city, but declined to instruct them that knowledge of the defect in question on the part of some of the principal citizens and taxpayers would likewise be such notice. The reviewing court did not deal specifically with the question of whether the charge as given was a correct proposition of law, but contented itself with saying that it was as favorable to the plaintiff as she had any right to demand or expect. The ordinances of the city of Columbus were not introduced in evidence, and we have not deemed it essential to scrutinize the charter of that city. If they throw any light upon the question of negligence involved in the present case, they may be resorted to for what they are worth at the next trial.

3. Another charge complained of was in the following language: "Although one may know of the dangerous places on the street, yet, if passing along inadvertently, and without any fault upon his part, falls into it, and he sustains injuries to his person thereby, he would be entitled to compensation in damages, and the city would be liable for whatever amount of damages he has proven to have sustained by reason of this injury." We think this charge too broad in its statement of what would render the city liable, because it eliminates from the investigation to be had by the jury any and all inquiry as to whether the city was guilty of any negligence. No matter how free from negligence the plaintiff might have been, he certainly would not be entitled to recover unless his injuries were caused by or attributable to negligence on the part of the defendant. Under the charge quoted, if the plaintiff, while himself exercising proper care, inadvertently fell into a hole in the sidewalk, and was injured, the city was made liable, without more. Whereas, before the city could be rendered liable, it must have been guilty of some negligence,

either in causing the hole in question to exist, or in permitting it to remain unrepaired for an unreasonable length of time after the municipal authorities had, or, in the exercise of ordinary and reasonable diligence, ought to have had, knowledge of its existence. There being no presumption of negligence against the city, it was incumbent upon the plaintiff to prove negligence on its part; and, as the charge with which we are now dealing entirely relieved the plaintiff from the necessity of so doing, it was necessarily erroneous and harmful to the city.

Some other questions were presented in the motion for a new trial, but we have dealt with those which ought to control the case at the next hearing. Judgment reversed.

(96 Ga. 206)

HAWKINS et al. v. AMERICUS NATIONAL BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. May 13, 1895.)

BUILDING AND LOAN ASSOCIATIONS — USURY — FORECLOSURE OF BOND — NOTICE — PLEADING.

1. The scheme of a building and loan association, pure and simple, is not unlawful, as being a device for the evasion of the laws against usury, so long as, proceeding upon the principle of mutuality among its members it adheres to the conduct of its business in accordance with the primary plan of its organization, and engages in no business inconsistent therewith; and this is true even though the aggregate of fines and forfeitures imposed upon, and premiums and interest exacted of, a member, who is himself a borrower of its funds, exceeds the rate of interest fixed by law.

2. Even if section 3968a of the Code is applicable to a suit brought by a building and loan association upon a bond secured by a deed to land, where the declaration in such case itself conveys to the defendant all the information which that section requires shall be given in the notice therein provided for, the purpose of the law is accomplished, and further notice may be dispensed with.

3. The special pleas of the defendants, other than that of partial payment, being vague, indefinite, uncertain, and presenting no issues for determination by a jury, there was no error in striking the same; nor was there, under the evidence disclosed by the record, any error in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by the Americus National Building & Loan Association against C. C. Hawkins and others. Judgment for plaintiff, and defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

J. E. D. Shipp and Fort & Watson, for plaintiffs in error. W. P. Wallis, for defendant in error.

ATKINSON, J. Defendants were original investors in the capital stock of the Americus Building & Loan Association, and, as subscribers to its stock, had issued to them a stock certificate for 30 shares of the capital stock of the association. Thereafter they became borrowers of the association,

and from it obtained a loan of \$3,000. To secure the payment of this sum, they pledged as collateral their stock in the association, and, in addition thereto, entered into a bond in the sum of \$6,000, secured by a deed to certain property, conditioned for the repayment of the loan. As borrowers, they undertook by this bond to pay to the building and loan association the sum of 60 cents per share per month dues upon their stock, and the sum of 50 cents per share per month as premiums upon their stock, to be paid for the privilege of becoming borrowers of the fund accumulated from the mutual contributions of the several members of this association. In addition thereto, they undertook to pay the sum of 6 per cent. interest upon the loan, and as well such sums by way of fines, amounting to not more than \$3 per month, as might be assessed against them in the event they made default in the payment of any sums which they undertook to pay by way of dues and premiums as members of the association. This building and loan association was strictly a mutual institution. It had no capital stock save such as accrued from time to time from the mutual contributions of its members by way of dues, amounting to 60 cents per share per month. According to its by-laws, each borrower was required to carry one share of stock for every \$100 borrowed. Such stock was required to be assigned to the association as collateral security for his loan, and, when matured, would of itself cancel the loan. In addition to the regular dues on shares, the borrower was required to pay at the same time a fixed premium of 50 cents per share per month for each share borrowed on, and 6 per cent. interest per annum on the amount loaned, payable monthly. When any borrower failed for three months to pay the dues, interest, and premiums due by him, the whole principal loan became due, and the association was authorized forthwith to begin proceedings for the foreclosure of any lien or collection of any note given to the association on property pledged as security. All interest paid upon loans, premiums, fines, and forfeitures went into and became a part of the loan fund, and was not subject to be used for the payment of expenses of any kind by the association. Ten cents on each share for expense account was deducted from the monthly installments payable by way of dues, and the balance of the fund resulting from the payment of dues likewise went into and became a part of the loan fund. It will be seen that, according to this scheme of doing business, each one of the subscribers to the capital stock of this institution was a joint proprietor in the ultimate profits which might result from the mutual venture. If its business proceeded to a final result in accordance with the scheme devised for its conduct, the borrowing subscriber would pay nothing except

his 6 per cent. interest upon the loan, with such an additional sum by way of premium as was charged against him for the privilege of using in the interim the money of the association. Whatever he contributed toward the common stock would come back to him in the end. The only effect of paying the 50 cents premium was to mature at an earlier date his own and the stock of his coproprietors than it would have matured without this. If each subscriber became a borrower, it would be impossible for him to lose anything by the operation, because the premium is not adjusted to the loan, but to the amount of stock which is assigned as collateral security for the loan. So far, then, as this particular institution is concerned, as appears from this record, it falls within the principle of the *Parker Case*, decided in 46 Ga. 166, and the case of *Van Pelt v. Association*, 79 Ga. 443, 4 S. E. 501, which declares that the scheme itself for the conducting of building and loan associations is not per se usurious, and, if the transaction was designed to carry into effect the scheme and purposes for which the association was chartered, it was not unlawful. We do not mean to intimate that the principle of mutuality alone in the conduct of its business would protect all the dealings of a building and loan association against impeachment for usury. The principle itself may be made a cloak to conceal usury. We only mean to hold that, if there be not beneath the scheme for the conduct of mutual building and loan associations a covert wherein usury doth secretly lurk, their transactions may be upheld. The plea of usury filed in this case failed to allege how or wherein usury was exacted of the borrowers, how or wherein, for the use of the money borrowed, the defendants undertook, directly or indirectly, to pay a greater interest than that allowed to be exacted by law; and this latter is usury. There was a general allegation of usury in the transaction, but the plea did not state it with such certainty and such circumstantiality as would have enabled the court to refer that question for the consideration of a jury, and therefore the court did not err in striking the plea of usury. The other special pleas filed in this case, in aid of the plea of usury, to the effect that the association did not keep its books properly, made improper investments of its funds, was engaged in business other than a building and loan association business, were all too general in their nature to be considered by the court. No plea should be retained unless it present an issuable defense in such manner as would enable the court and jury intelligently to pass upon the issue presented by it. Tested by these rules, the court did not err in striking, upon oral demurrer, any of the several amendments to the general issue filed in this case. There was a plea of partial payment, which was retained by the

court; but, upon consideration of the admitted evidence in the case, the court directed a verdict in favor of the plaintiff; the payments claimed having already been allowed as credits in the account made by the plaintiff to the defendants.

Exception was further taken to the judgment of the court in directing a verdict upon the ground that there was no sufficient evidence of notice to the defendants by the plaintiff, as required by section 3968a of the Code, which section provides that: "No judgment of foreclosure shall be given in favor of any building and loan association, upon any mortgage executed to them, unless they shall have served upon the mortgager, at least thirty days before the court at which such judgment shall be taken, a complete statement of the amount for which they claim judgment, fully setting out the amount claimed for principal, interest and fines, or penalties; and also setting out the credit allowed for stock transferred to them as collateral, and any other credit to which the mortgager may be entitled." By its express terms, this section is confined to judgments of foreclosure upon a mortgage executed to a building and loan association, and therefore, literally interpreted, no error was committed by the court. We are not inclined, however, in passing upon this question, to confine the operation of this section to that class of cases to which it is made literally applicable; but we think the point was not well taken in this case, inasmuch as, at the time of the institution of the suit filed by the plaintiff, a full and complete statement of the accounts between the plaintiff and these defendant borrowers was incorporated in the declaration. We think this is a substantial compliance with the requirements of the provision of the Code now under consideration. In addition thereto, we think the evidence established, with reasonable precision at least, the actual fact of the service of the notice, independent of the declaration. Let the judgment of the court below be affirmed.

(95 Ga. 699)

ERWIN et al. v. SMITH.

(Supreme Court of Georgia. March 25, 1895.)

CONSTRUCTION OF WILL—INTENT OF TESTATOR.

Where the terms of a will are plain and unambiguous, they cannot be varied or explained by parol evidence showing an intention on the part of the testator at variance with that expressed in the will itself.

(Syllabus by the Court.)

Error from superior court, Union county: M. L. Smith, pro hac Judge.

Action by C. M. Smith against H. A. Erwin and others to construe a will. Judgment for plaintiff, and defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

W. E. Candler and M. G. Boyd, for plaintiffs in error. J. B. Estes, for defendant in error.

LUMPKIN, J. It is now too well settled to require argument or the citation of authority that where the terms of a will are plain and unambiguous they must control, and that parol evidence cannot be received to give the will a meaning different from that which is clearly and unequivocally expressed therein. While it is true that the cardinal rule for the construction of wills requires that the intention of the testator should be ascertained and enforced, and that in so doing parol evidence may be resorted to when the language of the will is doubtful or uncertain, there is no room for construction when the meaning of the words used in the will is so plain and obvious that it cannot be misunderstood. This is true although they may express a meaning entirely at variance with the real intention of the testator. For instance, a legacy to the sons of a testator's daughter could not be changed into a legacy to the daughters of a testator's son, although he had grandchildren of both classes, and a hundred witnesses were offered to prove he really meant the legacy for the latter, instead of the former, as declared in the will itself. The controversy in the present case arose upon a dispute among the legatees of R. H. Erwin. All of them except Mrs. O. M. Smith contended that under the testator's will she was bound to pay or account for the indebtedness of her deceased husband, S. J. Smith, to the testator, amounting to more than \$1,200, before she would be entitled to receive any further legacy or share from the estate. She, on the other hand, contended she was not bound to settle any such indebtedness, and was entitled to her full share under the will without any diminution on this account. The following is the only portion of the will material to be considered in determining the issue thus made: "Item 4. I give and bequeath to my beloved children, to wit, Catherine M. Smith, Huston A. Erwin, James C. Erwin, William W. Erwin, Mary Ann E. Smith, John S. Erwin (excepting my beloved daughter, Sarah E. Major, who is provided for in item 5th of this will, that being all I intend for her to have out of my estate), all of my property, both real and personal, share and share alike, each and all, in a final settlement with my executors, Joseph Reid and Carlton J. Wellborn, accounting for all advancements that they have received from me in my lifetime, either by notes or accounts, with the express understanding that the statute of limitations is not to affect in any way any claim I have and hold against any of my heirs at law, intending that they all (except my daughter Sarah E. Major) shall share equally in my estate." It will be observed that the testator required his children named in this item to account for all ad-

vancements they had received from him; but there is not a single word requiring any of them to account for any advancement or loan he had made to any other person. The name of the deceased son-in-law, S. J. Smith, is not used in this connection, nor is there any language which could possibly be construed as being intended to designate him. It was insisted, however, and much evidence was introduced tending to show, that the testator really intended that his daughter Mrs. Smith should account for certain money he had loaned her husband, and for which the latter had given notes that had become barred by the statute of limitations at the time the will was executed. There is very strong reason to believe that this is the real truth of the case; but the evidence just mentioned ought never to have been received at all. Notwithstanding the fact that it was admitted, the jury properly found in favor of Mrs. Smith. Indeed, this was the only outcome of the case legally possible. It is therefore unnecessary to deal with the specific points made in the motion for a new trial. The verdict was right, beyond all question, and the court did not err in refusing to set it aside. Judgment affirmed.

(95 Ga. 712)

EZZARD v. ESTES.

(Supreme Court of Georgia. April 1, 1895.)

RES JUDICATA.

Where the trial of an action involving the question whether or not certain security deeds from the defendant to the plaintiff were void because of usury in the debts they had been given to secure resulted in a judgment which necessarily adjudicated in the plaintiff's favor that these deeds were free from usury, and were valid and binding upon the defendant, the latter's wife, upon whose application a homestead in the land covered by the deeds had been set apart after they were executed, was estopped from attacking the deeds on the ground of the alleged usury.

(Syllabus by the Court.)

Error from superior court, Forsyth county; George R. Brown, pro hac Judge.

Action by Louvinia Ezzard against V. R. A. Estes. Judgment for defendant, and plaintiff brings error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

G. L. Bell and H. H. Perry, for plaintiff in error. H. L. Patterson, for defendant in error.

LUMPKIN, J. The facts are somewhat complicated, and the motion for a new trial contains numerous grounds, but the case turns upon two questions only,—the first being whether or not certain security deeds from Ezzard, the defendant in execution, to Estes, the plaintiff in execution, were void because of usury; and the second, whether or not the claimant, who was the wife of Ezzard, was estopped from attacking these deeds on the ground of the alleged usury. It appears from the record that in certain

litigation between Estes and Ezzard the question whether or not these deeds were infected with usury was directly involved and passed upon. That litigation resulted in a judgment which necessarily adjudicated in favor of Estes that the deeds were free from usury, and were valid and binding upon Ezzard. This is all that need be said as to the first question. It further appears that, after the execution of these deeds, Mrs. Ezzard applied for and had set apart a homestead in the lands which they embraced, as the property of her husband; and in the present case she relied upon the homestead title in support of her claim, insisting that the deeds were void because of usury in the debts they were given to secure, and that for this reason the title remained in the husband, even after the execution of these deeds, and consequently the homestead was good as against his creditors. In view of the adjudication above mentioned, we think Mrs. Ezzard was estopped from attacking the deeds on the ground of the alleged usury. The cases of *Hightower v. Beall*, 66 Ga. 102, *Stewart v. Stisher*, 83 Ga. 297, 9 S. E. 1041, and *Barfield v. Jefferson*, 84 Ga. 609, 11 S. E. 149, are very much in point, and sustain the ruling now made. Judgment affirmed.

(95 Ga. 705)

HUBBARD v. McRAE.

(Supreme Court of Georgia. March 25, 1895.)

VERDICT — SPECIFIC SEPARATION OF PRINCIPAL AND INTEREST.

1. As the verdict in favor of the plaintiff manifestly includes both principal and interest, and does not specify separately the amount of each, a new trial will be required unless the plaintiff will renounce all future interest upon the judgment.

2. Direction is therefore given that if the plaintiff, during the term at which the remittitur from this court shall be entered, will make and file such a renunciation, and amend the judgment already rendered in her favor accordingly, that judgment shall stand affirmed; otherwise, the judgment below is reversed.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action by Mrs. W. A. McRae against D. A. Hubbard. From a judgment for plaintiff, defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed on conditions.

C. D. Phillips and T. B. Irwin, for plaintiff in error. Clay & Blair, for defendant in error.

LUMPKIN, J. This was an action in a justice's court upon two promissory notes for \$50 each, dated January 6, 1891, due 12 months after date, bearing interest from date at 8 per cent. per annum, and each containing a stipulation in the following words: "If this note is not paid as agreed when due, at the end of one year from this

date, and annually thereafter, it is hereby agreed for the interest accrued to become principal, and to draw interest at the agreed rate, and to be counted in that way." Each of the notes was credited on November 3, 1892, with \$15, and on November —, 1892, with \$5. The case went by appeal to the superior court, was tried January 23, 1894, and the following verdict was rendered: "We, the jury, find for the plaintiff \$82.55; also, 10 per cent. attorney's fees." There was a motion for a new trial by the defendant, one of the grounds of which complained that the verdict was erroneous "in failing to state the amount of principal due said plaintiff, and the date thereof, so as to compute the interest intelligently and accurately." In view of section 2054 of the Code, which provides that all judgments in this state shall bear lawful interest upon the principal amount recovered; and of section 3570, which provides that no part of a judgment shall bear interest except the principal which may be due on the original debt,—the objection was well taken. The language in which the objection is expressed is not very apt; but its obvious meaning is that the verdict includes both principal and interest in one gross sum, and that, unless corrected, the judgment entered thereon would bear interest against the defendant upon both the principal and interest of the balance of the original debt after deducting the credits. In point of fact, the judgment entered in this case does allow interest on the entire amount recovered. It is true, the judgment recites that the \$82.55 is "the principal sum"; but a calculation will show that this recital is manifestly incorrect, and that the sum recovered necessarily includes both principal and interest. Although the notes do stipulate for compound interest, and granting that this is legal, as was intimated in *Hadden v. Larned*, 87 Ga. 642, 13 S. E. 806, it will be observed there was not, as seems to have been true in that case, any stipulation in the notes that the interest accrued up to judgment should bear interest, but simply that the interest should be compounded annually, beginning on the 6th day of January, 1892. Giving to the plaintiff the fullest benefit of the stipulations in the notes, there could be no right whatever to have the interest accrued up to any other day become principal, and bear interest as such. Therefore, on the 23d day of January in any year there would inevitably be at least a small amount of interest included in the total amount due upon the notes; and, as the verdict in this case was rendered on the 23d day of January for the gross amount then due on the notes, a part of the plaintiff's recovery was undoubtedly interest. As already stated, however, the only prejudicial result to the defendant would be charging him with interest on interest, as well as interest on the principal of the debt. And as this result can, at the plaintiff's option, be

obviated, we have given direction that if, during the term at which the remittitur from this court shall be entered in the court below, she will make and file a renunciation of all future interest upon the judgment, and have the judgment itself amended accordingly, there shall be no new trial; otherwise, the judgment of the court below must be reversed. A somewhat similar state of affairs was presented in the case of Buice v. McCrary, 94 Ga. 418, 20 S. E. 632, and the difficulty was removed by a direction substantially the same, in effect, as that now given. Judgment affirmed, with direction.

(96 Ga. 44)

CANDLER v. FARMERS' LOAN & TRUST CO. et al.

(Supreme Court of Georgia. April 1, 1895.)

RES JUDICATA—SUFFICIENCY OF VERDICT—JUDGMENT—VACATING VERDICT—DELAY.

1. Where suit is brought for the recovery of a debt, and the declaration includes a proceeding for the foreclosure of a lien which, arising out of the same transaction, was alleged to be a security for the payment of the principal debt sued for, the verdict of the jury thereon rendered covers both phases of the alleged liability of the defendant, and, being unexcepted to, concludes the parties as to all matters covered by the allegations of the declaration, although the verdict fails to express with such fullness and accuracy a finding for the plaintiff as will enable the court to decree fully as to all the matters of relief sought. A finding for the plaintiff as to some of his contentions and the silence of the verdict as to others thereof is equivalent to a finding adversely to those contentions concerning which the verdict is silent.

2. Where suit is brought for the foreclosure of a contractor's lien for the construction of a railroad as an entire line of road, and as well for the recovery of a general judgment for the amount of the debt as a security for which the alleged lien was created, and the jury upon the trial of the cause find generally for the plaintiff, but limit their finding as to the lien to only a portion of the line of railroad, such verdict, if acquiesced in by the plaintiff, becomes final, and that portion thereof relating to the lien being illegal, because not sufficiently comprehensive to cover the subject upon which a lien of the character sought to be foreclosed could be lawfully imposed, the court, in the rendition of a judgment thereon, will construe the verdict as a finding against the claim of lien, and will award judgment only, as at common law, for the amount of the debt sued for.

3. After an acquiescence in such a verdict until the time has passed within which a motion for a new trial may be made, it is too late to move to vacate the verdict as to the claim of lien, and, upon a petition for reinstatement, reopen that question for further adjudication. As to that, as well as to all other questions covered by the pleadings, the parties are concluded by the original finding of the jury.

(Syllabus by the Court.)

Error from superior court, Hall county; W. E. Simmons, pro hac Judge.

Petition by A. D. Candler against the Farmers' Loan & Trust Company and others. Dismissed on demurrer, and plaintiff brings error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

The petition of A. D. Candler against the

Farmers' Loan & Trust Company and others was dismissed on demurrer. It alleges the following: January 29, 1884, as railroad contractor, he filed a petition to the superior court, setting forth his claim of lien against the Gainesville, Jefferson & Dahlonga Railroad Company, and praying for judgment for his claim, and for the establishment of his lien. At the August term, 1884, a verdict and judgment were rendered in his favor, and a lien was allowed on a part of the property of the railroad company; and thereupon the case was stricken from the docket by the court. All the property of the railroad company was sold by a receiver under order of court and by consent of parties; and, on a contest over the money arising from the sale, the supreme court held that plaintiff's verdict and judgment, in so far as they attempted to set up and enforce a lien upon a specified portion of the property, were void so far as the special lien was concerned. 87 Ga. 241, 13 S. E. 560. Afterwards, on his petition to amend said verdict and judgment, the supreme court held that they were not amendable. 92 Ga. 249, 18 S. E. 540. The money arising from the sale of the property is still in the hands of the receiver, and is, therefore, in the custody of the court undistributed; and plaintiff has a special lien thereon which he is entitled to foreclose, and he is entitled to said money on his lien in preference to all other claims. The effect of the judgment declaring said verdict and judgment void on their face was to leave the proceeding to foreclose his special lien still pending in court undisposed of, notwithstanding the same was stricken from the docket, and no formal entry reinstating it has ever been made. If said judgment of the supreme court did not in law reinstate the case, it does entitle him to have it reinstated on motion. If said judgment of the supreme court does not entitle him to have the case reinstated without setting aside the void verdict and judgment on a formal motion therefor, it does entitle him to have the same set aside on motion. He therefore prays that the case be reinstated formally on the docket, if that is necessary, and stand as though the void verdict and judgment as to his special lien had never been rendered; that, if the court hold that no formal reinstatement on the docket is necessary, he be allowed to proceed as though the void verdict and judgment had never been rendered; that, if it be necessary to formally set aside the void verdict and judgment before the case can be reinstated, said verdict and judgment as to his lien be set aside, and the case reinstated, and stand as though this void verdict and judgment had never been rendered; that the receiver be required to hold the fund arising from the sale till this question of plaintiff's lien and right to the fund is finally settled, and a further order of distribution is granted; and that such other or further

order be granted as he may in law be entitled to. After sustaining the demurrer, the court decreed that the fund of the receiver's hands be awarded to the Farmers' Loan & Trust Company on the mortgage held by it and foreclosed in this case. To both rulings Candler excepted.

J. B. Estes, W. I. Pike, Prior & Thompson, S. C. Dunlap, and L. E. Bleckley, for plaintiff in error. M. L. Smith, H. H. Dean, and H. H. Perry, for defendants in error.

ATKINSON, J. The questions made in this case, except as hereinafter stated, are sufficiently set forth in the official report of the facts.

The motion to reinstate rests upon the hypothesis that the verdict originally rendered in the cause was void. If the verdict had been void in its entirety, the cause would have remained still pending and undetermined; but the vice of the hypothesis consists in the assumption that the entire verdict was void. It will be observed from an examination of the record in this case, a synopsis of which is contained in the plaintiff's petition, set forth in the official report, that the plaintiff's original suit was instituted for the recovery of a debt due by the defendant railroad company to him for labor performed as a contractor in and about the construction of its railroad, and, in addition thereto, for the foreclosure of a lien upon the railroad of the defendant. Upon the trial of that cause the jury found in favor of the plaintiff generally, but limited, by the terms of its verdict, the lien of the plaintiff to a portion of the railroad of the defendant. Whether this verdict was rendered by consent, or whether as the result of protracted litigation, the record does not disclose. In either event, however, it was the finding of the jury impaneled in that case for the trial of the issues of fact set forth in the pleadings. Upon the one hand was the allegation of the plaintiff of the fact of indebtedness and the existence of his lien upon the entire road of the defendant, and, presumably, on the other hand, was the contention of the defendant to the contrary, although no written defense to that effect appears from the record to have been filed. The verdict in that cause was not excepted to; but a number of years after its rendition, upon the judgment based thereon, the plaintiff claimed a certain fund arising from the sale of the railroad property upon which, by his original declaration, the plaintiff sought to foreclose his lien. The judgment was attacked as being void, in so far as the same claimed to establish a special lien upon that particular property, upon the ground that, if the lien of a contractor attached to a railroad at all, it attached to the entire property, and was not imposed by statute upon a fragment of it. The court below sustained that exception to the judgment, and this court, in 87 Ga. 241, 13 S. E. 560,

in ruling the question, employs this language with reference to the particular verdict now under consideration: "Section 1990 of the Code, providing for the foreclosure of liens on real property, declares that, if the lien is allowed, the verdict shall set it forth, and the judgment and execution be awarded accordingly. It follows from what has already been said that a verdict and judgment attempting to set up and enforce a lien upon a specified portion of a railroad are void upon their face, so far as the special lien is concerned." The verdict is in the following language: "That the plaintiff have a lien, as a contractor to build railroads, upon that part of the Gainesville & Dahlonega Railroad from its terminus in the city of Gainesville to the Chattahoochee river, in Hall county, including its right of way, roadbed, depot grounds, and all other property belonging to said railroad company, for the sum aforesaid," etc.; and this court then adjudged that such a verdict did not have the effect to set up a lien upon the whole road referred to, but was simply an ineffectual attempt to set up a lien upon a part thereof. Afterwards the cause went back, and the plaintiff made a motion to amend the verdict by extending the lien thereunder declared so as to establish it upon the entire road. This court decided, when the judgment upon the allowance of this amendment was brought here for review, that, inasmuch as the verdict was void in the first instance upon the subject of the lien, it was not amendable. The court, in passing upon that question, in 92 Ga. 253, 18 S. E. 540, used the following language: "The jury having expressly restricted the lien to a part of the railroad, the amendment made is absolutely repugnant to the verdict itself. If the verdict was not void, but only needed an amendment to make it certain, the pleadings could be resorted to for that purpose. But there is as much certainty that the verdict limits the lien to a part of the railroad as there is that any verdict was rendered. The amendment does not change uncertainty to certainty, but substitutes one certainty for another certainty. It is as impossible to doubt that the verdict as found by the jury did not declare a lien on the whole road as it is to doubt that the amendment does declare such a lien. The judgment originally entered up conformed to the verdict; and, as the verdict is not amendable, neither is the judgment amendable, for the two must correspond as to the extent of the lien which the one finds and the other seeks to enforce."

The proposition now is to reopen for adjudication the entire question as to the existence of a lien in favor of the plaintiff. This was a valid verdict for the amount of the plaintiff's debt. It therefore cannot be said that it is a void verdict. It was ineffectual as asserting and establishing the lien, and void pro tanto. On exception taken in time, this partial invalidity of the judgment would have justified the court in avoiding it, and

awarding a new trial, provided the findings of the jury were not in harmony with the plaintiff's testimony seeking to establish his lien. If the jury had found contrary to the evidence, and established only a partial lien, when, as a matter of law, the plaintiff was entitled to a lien upon the entire road, the court would doubtless have granted a new trial. But, acquiescing in this verdict, it is as conclusive against the plaintiff as to those things it does not find as it is in his favor as to those things which it does find. Let us, for illustration, suppose that the plaintiff had brought an action upon an open account against the defendant, and there had been a verdict, or even a confession of judgment, for a gross sum representing only some of the items of the account. Such a verdict would not be void, but, on the contrary, after the time had elapsed for setting it aside, the conclusive presumption would have been that the jury found adversely to the plaintiff upon those items not allowed in the verdict. Suppose he had sued upon two promissory notes, and recovered a verdict upon one only. The plaintiff, acquiescing in the verdict, could not thereafter bring a suit upon one of the notes upon the supposition that, the jury having disregarded that note, he was still entitled to recover. Nor could he afterwards, upon motion, reopen the whole question and ask the court to extend the verdict so as to make it embrace a finding upon two notes. Another familiar illustration may be found in the action of ejectment where mesne profits are sued for. If the verdict should be in favor of the plaintiff for the premises in dispute, and be silent as to mesne profits, it would be equally conclusive as though the jury had expressly declared in their finding that they found against the claim of mesne profits. So we think it may be taken as one of the settled maxims of the law that a verdict, when once rendered, is conclusive of all matters of fact upon which the parties are at issue by the pleadings. This is as well established as the cognate principle that a judgment fairly rendered is conclusive between the parties upon all contentions in the pleadings, either of law or fact, until reversed or set aside. If the verdict were unsatisfactory to the plaintiff, and failed to find for him all of the issues to their fullest extent as presented by the declaration, it was his duty then to have excepted, and moved for a new trial. An acquiescence in the verdict in this case, as in any other, until too late to move to set it aside, concludes the parties. It can make no difference that, long after the rendition of the verdict, it is ultimately decided in this court that, as to some of the matters and things therein adjudged, the verdict was void. It cannot be totally disregarded unless it be wholly void. If, as to some of the matters and things adjudged, it be legal, and as to others illegal to the extent of rendering the findings thereon void, that which is legal will be enforced in favor

of the plaintiff, and as to those things concerning which it is illegal it will be adjudged as finding against the contention of the plaintiff. These considerations lead us to the conclusion that, however strong and apparent the moral equities in favor of this plaintiff may be, the courts cannot grant to him the relief he asks without manifest violence to principles of law and rules of pleading which are absolutely essential to a well-ordered judicial system. Let the judgment of the court below be affirmed.

(95 Ga. 792)

PHOENIX INS. CO. OF HARTFORD,
CONN., v. ASBERRY.

(Supreme Court of Georgia. April 29, 1895.)

INSURANCE — CONVEYANCE TO SECURE DEBT —
BREACH OF CONDITIONS.

A conveyance of real estate by a debtor to a creditor, under section 1969 of the Code, is an alienation of the property, operates to pass the title to the premises conveyed, and is not a mere incumbrance thereon. Hence, where a policy of insurance covering a building on the premises is issued, containing a condition that the policy should be void "if the property should be sold, or the title or possession of the property, or any part thereof, transferred or changed, whether by legal process, judicial decree, conveyance, or otherwise"; and where, pending such insurance, the holder of the policy thus conveys the property insured, — the policy is thereby rendered void, and in case of loss the assured cannot maintain thereon an action against the insurer.

(Syllabus by the Court.)

Error from superior court, Terrell county;
J. M. Griggs, Judge.

Action by B. J. Asberry against the Phoenix Insurance Company. Judgment for plaintiff, and defendant brings error. Brought forward from last term. Code, §§ 4271a-4271c. Reversed.

Mynatt & Willcoxon, for plaintiff in error.
J. A. Laing and J. H. Guerry, for defendant in error.

ATKINSON, J. The plaintiff, being the owner of certain tenements, situated upon real property belonging to him, procured the defendant, the insurance company, to issue its policy of insurance upon these tenements. Among the conditions upon which the policy of insurance issued was the one "that if the property should be sold, or the title or possession of the property, or any part thereof, was transferred, or changed, whether by legal process, judicial decree, voluntary transfer, conveyance, or otherwise, * * * the policy was to be void." Subsequent to the issuing of the policy of insurance containing this clause, the assured, in order to secure the payment of a debt due by him to another, made an absolute conveyance of the premises, including the property insured, to a third person, who in turn conveyed it to yet another. This latter person executed, in favor of the assured, his bond for titles, conditioned to convey to him the premises

described, upon condition that he should pay to the obligor in the bond a certain sum of money therein stated. According to the testimony of the plaintiff, both conveyances were executed in carrying into effect an arrangement by which the assured obtained from the person who executed the bond for titles a loan with which to pay a debt due by the assured to the person to whom he directly conveyed. The insurance company had no notice of these conveyances, and did not consent to their execution. Subsequent thereto, the tenements were destroyed by fire, and an action was brought upon the policy of insurance, alleging substantially a liability upon the part of the insurance company to the assured. The defendant company pleaded that at the time of the loss the assured was not the owner of the property insured, but that, pending the insurance, in violation of the condition hereinbefore expressed, he had conveyed to another the premises insured, and thereby had avoided his policy of insurance. Upon the trial of the cause the court was requested to instruct the jury that the sale of the property insured to Mercer (who was the immediate grantee of the assured), without the consent of the defendant, the insuring company, reserving no right in the plaintiff, was a violation of the policy of insurance, and rendered the policy void. The court was further requested to charge the jury that the deeds to Mercer and from Mercer to the bank (which bank was the obligor in the bonds for titles back to the assured), followed by title bond from the bank to Asberry (who was the assured), was a total change of the title, and, if done without the consent of the defendant, rendered the policy void. Exception is taken to the charge of the court to the effect that, if it was the intention of Mercer, the bank, and Asberry to convey the title to the property, that would be an alienation of the property, and the defendant would not be liable; but if they simply intended it as a lien on the property to secure the payment of a debt, then it would not be an alienation of the property, and the defendant would be liable. So the question is presented whether the conveyance executed in this case operated as an alienation of the title. We think this question is answered in the affirmative by the very terms of section 1969 of the Code. The first conveyance was an absolute deed upon its face, and such an alienation of the title as that the vendee could have recovered in ejectment thereon as against the vendor. Assuming that the statements of the plaintiff's witnesses are true,—that it was designed as a security for a debt,—upon the execution of the absolute deed it left in the grantor only the equity of redemption, of which he could avail himself only by the payment of the debt intended to be secured. We think both conveyances together,—the one from the assured to Mer-

cer, and from Mercer to the bank,—with the bond for titles back from the bank to the assured, constitute the execution of just such a conveyance as is contemplated by section 1969 of the Code. It is a conveyance to secure a debt. The purpose in the minds of the parties to the transaction must be, of necessity, to secure a debt, and yet this section of the Code provides that such a deed shall operate as an absolute conveyance, and shall be so held by the courts of this state, with a right reserved only in the vendor to have the property reconveyed to him upon the payment of the debt or debts secured, and that the same shall not be held to be a mortgage. Accordingly, it has been held: That, where land is conveyed under this section of the Code, the homestead right of the vendor does not attach in favor of himself or his family. *Johnson v. Trust Co.*, 55 Ga. 891; *Isaacs v. Tinley*, 58 Ga. 459. That such a deed passes the legal title, and will support a recovery in ejectment. *Dykes v. McVay*, 67 Ga. 502. A title acquired under this section by conveyance is not divested by bankruptcy. *Braswell v. Suber*, 61 Ga. 400. The radical point of difference between conveyances of the character here under consideration, when executed for the purpose of securing the payment of a debt, and an ordinary mortgage, consists in the fact that, by the express terms of the Code, an instrument in the form of the latter is a mere security for the payment of a debt, and passes no title to the property covered thereby, whereas a conveyance such as we are now considering, by terms of the Code equally express, operates as a deed, and its character as a mortgage is expressly denied. We think that aside from the stipulations contained in the policy against the alienation of the property by the assured, pending the insurance, the form of conveyance here employed by the parties to this transaction constitutes, in the language of section 2807 of the Code, an alienation of the property insured, without the consent of the insurer, which avoids the policy of insurance. It is not the mere creation of a lien upon the property. It does not purport to be, and has not that legal effect. It is something more than a mere lien. It is an alienation. We think, therefore, the court erred in refusing to grant the new trial moved for in this case, and its judgment is accordingly reversed.

(96 Ga. 123)

BURCH et al. v. BURCH.

(Supreme Court of Georgia. April 15, 1895.)

ADVERSE POSSESSION—WHAT CONSTITUTES—TACKING.

1. In order for a son, by virtue of the provisions of section 2864 of the Code, to acquire title to land belonging to his father, the former must have exclusive possession, under all the conditions therein specified, for the full period of seven years; and if, before the expiration of that period, a son, while in possession, under

took by deed to convey the land to his wife and children, although he may, after the execution of the deed, have remained upon the land with the grantees, his possession was no longer exclusive and in his own right, but in subordination to theirs.

2. In such case, the grantees could not tack their possession under the deed to that which had been previously held by the grantor, and thus acquire title in themselves as against the grantor's father or his successors in title.

(Syllabus by the Court.)

Error from superior court, Laurens county; W. F. Jenkins, Judge.

Action by Emma Burch, for herself and as next friend of her minor children, against William Burch. Judgment for defendant, and plaintiff brings error. Brought forward from last term. Code, §§ 4271a-4271c. Affirmed.

P. L. Wade, H. P. Howard, and A. F. Daley, for plaintiff in error. F. H. Burch and Roberts & Burch, for defendant in error.

LUMPKIN, J. The verdict in this case was amply sustained by the evidence, and should not be disturbed unless some error of law was committed by the judge at the trial. Emma Burch, for herself and as next friend of her minor children, brought an action against William Burch, the father of her deceased husband, Nathan Burch, for the recovery of certain land. It appeared that Nathan Burch had gone into possession of the land in question while it belonged to his father, and subsequently, while so in possession, made a deed of gift by which he undertook to convey the land to his wife and children. The plaintiff sought to make good her title upon three lines: First, she insisted that her deceased husband had been in possession of the land for more than seven years before the making of the deed of gift, and therefore had at that time, as against his father, a good title, under the provisions of section 2864 of the Code. Second, she contended that, if this were not true, inasmuch as her husband remained upon the land with his family after the execution of the deed up to his death, thus making the whole period of his remaining there more than seven years, he had in his own right, under that section, a good title as against his father, to which she and her children succeeded. Third, her remaining contention was that, in any event, she could tack the possession which she and her children held under the deed from her husband to the possession held by her husband prior thereto, and thus make out a complete title as against the father.

As to the first contention, it is sufficient to say that the evidence was conflicting as to how much time elapsed between the date when Nathan Burch first went into possession and the date when he executed the deed of gift to his wife and children. So the jury were authorized to find, and evidently did find, that this period was less than seven years.

In the next place, we do not think the second contention of the plaintiff was well founded. In order for a son, by virtue of the provisions of the above-mentioned section of the Code, to acquire title to land belonging to his father, the son must have exclusive possession, without the payment of rent, for the full space of seven years, under all the conditions specified in that section. This means that the possession must be that of the son in his own right, and not in the right of another. Where a possession of this kind has begun, and title under it is ripening, it would undoubtedly be the right of the father, at any time before the expiration of the seven years, to re-enter; and in this event the prior possession of the son would count for nothing. In other words, he would acquire no conclusive right as against the father, nor have title at all, until the full completion of the seven years. When Nathan Burch undertook by deed to convey the land to his wife and children, the mere fact that he thereafter remained with them upon it is of no consequence, for his so-called subsequent possession was no longer exclusive and in his own right, but in subordination to theirs. Certainly, if he had undertaken to convey the land to a brother, or to any other person, and afterwards lived with his grantee upon the land, it could not be insisted that he himself was in the exclusive possession of it; and, in principle, it is exactly the same thing, although the conveyance was made to his wife and children.

We are equally sure that the last ground of recovery relied upon by the plaintiff is not maintainable. We have already seen that no period of possession by the son against the father of less duration than seven years would be of any avail; and it follows that the possession of the son's wife and children, acquired under their deed from him, could not be tacked to the son's former possession in order to make out a good title as against the father or his successors in title. There is absolutely nothing in the provisions of section 2864 of the Code, or in any other law of which we have any knowledge, which would authorize any such form of tacking. The case of *Studstill v. Willcox*, 94 Ga. 690, 20 S. E. 120, relied upon by counsel for the plaintiff in error, is entirely different from the case at bar, and in no way controls it. Judgment affirmed.

(44 S. C. 500)

STATE ex rel. BARTHERS et al. v. TOWN COUNCIL OF BEAUFORT.

CROCKER v. SAME.

(Supreme Court of South Carolina. Sept. 3, 1895.)

COSTS ON APPEAL—APPEALABLE JUDGMENT.

1. An application to the circuit court to correct errors in the adjustment of costs by a clerk is not an appeal, within Code, § 373, al-

lowing costs to the prevailing parties in judgments rendered on appeal.

2. The adjustment of costs by a clerk of court is not a judgment, within Code, § 358, providing for an appeal from a judgment of a trial justice, county commissioners, or other inferior court or jurisdiction.

Appeal from common pleas circuit court of Beaufort county; D. A. Townsend, Judge.

Actions by the state, upon the relation of W. H. Barthers and others, against the town council of Beaufort, and by D. W. Crocker against the same defendant, consolidated. Appeals were taken in each case to the circuit court from the decision of the clerk of the court of common pleas refusing to tax costs of a previous appeal from his adjustment of costs by the defendant, the prevailing party on the appeal. From a judgment for defendant on such appeal, plaintiffs appeal. Reversed.

Elliott & Elliott, for appellants. W. J. Verdier, for respondents.

McIVER, C. J. These two cases, involving the same question, were heard and will be considered together. While the remarks which we shall make apparently apply to one case alone, for convenience sake, yet they are intended to apply to both, and the judgment rendered will be applicable to both cases.

It appears that after a final decision of these cases the costs were taxed by the clerk, and appellants gave notice of exceptions to the clerk's taxation, and moved before the circuit court to correct the same, which motion was refused. "Thereupon, respondents gave notice of the following taxation of costs in each case before the clerk" "on appeal to the circuit court," followed by a statement of the items claimed. This the clerk refused to do, "because there is no statute or rule authorizing the same, and I do not consider that I have any power to allow it." From this ruling of the clerk the respondents gave notice of appeal, upon the several grounds set out in the case, which it is unnecessary to state here, as, in our view, but a single question, which will be presently stated, is involved. This so-called appeal was heard by his honor, Judge Townsend, who granted an order overruling the decision of the clerk, and directing that officer to proceed to tax the costs as claimed, except two specified items. From this order the plaintiffs appeal upon the grounds set out in the record, which really make the single question whether there is any provision for the costs of what is called (improperly, as we shall see) an appeal from the action of the clerk in taxing (or, to use the statutory term, "adjusting") the costs in an action.

It is too well settled to need the citation of any authority that one who claims costs must be able to point to the statute allowing the costs claimed, as the right to costs is of

purely statutory origin. The respondents appear to base their claim for costs upon the provisions of section 358 of the Code, which provides for an appeal from a judgment rendered by a trial justice, by the county commissioners, or any other inferior court or jurisdiction, and upon the provisions of section 373 of the Code, which allows costs to the prevailing party, in judgments rendered on appeal, in all cases, with certain specified exceptions, not pertinent to the present inquiry. It is very obvious that the claim of respondents rests upon the assumption that an application to the circuit court to correct any errors in the adjustment of costs by the clerk is an appeal, in the sense of that term as used in the Code, and that it is an appeal from a judgment rendered by a trial justice, by the county commissioners, or any other inferior court or jurisdiction. There is no warrant for any such assumption. There is no provision, by statute or otherwise, for an appeal from the action of the clerk in adjusting the costs for an action. As was said by O'Neill, J., in *Bogan v. White*, Dud. (S. C.), at pages 317, 318: "I am satisfied that, in strictness, there is no such a thing as an appeal from the clerk's taxation of costs. He is merely a ministerial officer, exercising no judicial power. It is true, he decides; but it is not as a judge. It is as the mere agent of the court. He ascertains the fact of the costs incurred, and makes out a bill, which is for the examination of the parties. If they are satisfied with it, there is an end of the matter; but if either is dissatisfied with it, he has the right to ask the court to review and correct it." Accordingly, it was held that the circuit judge had erred in regarding an application to the court to review the action of the clerk in taxing the costs as an appeal, and dismissing the same because not taken within the time prescribed for taking an appeal. This view of the matter has been recognized in the following cases: *Bradley v. Rodelsperger*, 6 S. C. 290; *Dilling v. Foster*, 21 S. C. 340; *Cooke v. Poole*, 26 S. C. 323, 2 S. E. 609. It is true that in the case of *Williams v. Jones*, 2 Hill, 556, it is said, in speaking of the taxation of costs by the clerk: "In taxing costs he exercises judicial power, and an appeal lies from his judgment to the circuit court." But that remark was a mere dictum, not necessary to the point raised in that case, as the only question there was as to the right of the parties to have notice of the taxation by the clerk; and it does not appear from the report of the case whether the question was brought up by appeal, or by motion to correct the taxation of costs by the clerk. At all events, since the subsequent case of *Bogan v. White*, supra, and the other cases which we have cited, recognizing, as the correct practice, motion, and not appeal, this dictum in *Williams v. Jones*, supra, cannot now be recognized as law.

It may be also true that there are loose expressions in some of the cases characterizing a proceeding to correct the adjustment of costs by the clerk as an appeal; but there is no case, so far as we are informed, which decides that the errors of the clerk in adjusting the costs of a case can be corrected by appeal, but, on the contrary, the case first above cited shows that the proper practice to correct such errors is by motion, and not by appeal. But, in addition to this, the Code allows costs on appeal from the judgment of a trial justice, or any other inferior court or jurisdiction, and we do not think that the action of the clerk in adjusting the costs of a case can, in any proper sense of the term, be regarded as a judgment. He simply, as the agent of the court, ascertains the amount to be inserted in the judgment rendered by the court, and cannot be said to render any judgment himself, from which an appeal can be taken. The action of the clerk in ascertaining and adjusting the amount of the costs to be inserted in the judgment rendered by the court may be regarded as analogous to the action of the officer, under the former practice, in assessing the damages under a judgment by default; and any error committed by the clerk in performing that duty was corrected by motion, and not by appeal. See *Ashmore v. Charles*, 14 Rich. Law, 63. Again, the Code provides for an appeal from a judgment rendered by a trial justice, by the county commissioners, or any other inferior court or jurisdiction, and we do not think that the clerk falls within any of those classifications. The judgment of this court is that the order appealed from be reversed, and the action of the clerk in refusing to tax the costs in these cases be affirmed.

(44 S. C. 491)

SMITH v. McCONNELL.

(Supreme Court of South Carolina. Sept. 3, 1895.)

JUDGE OF PROBATE—ELECTION TO FILL VACANCY—TERM OF OFFICE.

1. Const. art. 4, § 20, provides that the judge of probate shall be elected "for the term of four years." Article 14, § 10, provides that "the election of all state officers shall take place at the same time as is provided for that of members of the general assembly, and the election of those officers whose terms of service are for four years shall be held at the time of each alternate general election." *Held*, that a person elected to fill a vacancy in the office of the judge of probate occasioned by the resignation of the previous incumbent is entitled to hold the office for the full term of four years.

2. The proviso to Const. art. 4, § 11, "that if the unexpired term does not exceed one year the vacancy may be filled by executive appointment," does not indicate that a vacancy in the office of the probate judge means the unexpired term of the officer by whose resignation the vacancy has been occasioned.

Appeal from common pleas circuit court of Williamsburg county; I. D. Witherspoon, Judge.

v.22s.R.no.16—46

Proceeding brought by Erwin M. Smith against J. Zuill McConnell, under section 434 of the Code, to obtain possession of the office of probate judge. Defendant had judgment, and plaintiff appeals. Affirmed.

E. G. Chandler, for appellant. Thos. M. Gilland, for respondent.

McIVER, C. J. The only question presented by this appeal is whether the plaintiff or the defendant is entitled to hold the office of judge of probate for the county of Williamsburg. The facts out of which this controversy arises are undisputed, and may be stated as follows: At the general election in 1890 one W. W. Grayson was duly elected to the office of judge of probate for the county of Williamsburg, and, having qualified as such, entered upon the duties of said office, which he continued to discharge until after the general election in 1892, when he resigned his said office. In January, 1893, a special election was ordered and held to fill the vacancy occasioned by the resignation of said Grayson, at which election the defendant, McConnell, was elected and qualified as judge of probate for said county, and is now holding said office. At the general election in 1894 Erwin M. Smith was elected to the said office, and, having qualified, has received a commission as judge of probate for the said county; and having demanded of the defendant to turn over to him the said office, with the books, papers, etc., belonging thereto, with which demand the defendant refused compliance, upon the ground that he was entitled to hold said office for the term of four years from his election in January, 1893, these proceedings were instituted by the plaintiff, under section 434 of the Code, to obtain the possession of said office. The case was heard by his honor, Judge Witherspoon, who held that the defendant was entitled to hold the office in question for the term of four years from his election in January, 1893, and accordingly rendered judgment that the proceedings be dismissed. From this judgment plaintiff appeals, upon the several grounds set out in the record, which need not be repeated here, as the whole case turns upon the single inquiry, whether defendant was entitled to hold the office for the full term of four years or only for the unexpired portion of the term of said Grayson.

It seems to us that this question has been so conclusively determined by at least two decisions of this court—*Wright v. Charles*, 4 S. C. 178, and *Whipper v. Reed*, 9 S. C. 5—as to render any further discussion unnecessary; for the former has been recognized in the following subsequent cases: *Whipper v. Reed*, supra; *Macy v. Curtis*, 14 S. C. 367, and *Simpson v. Willard*, Id. 191, while the latter has not only been recognized, but distinctly approved, in *Simpson v. Willard*, supra. This ought to be sufficient to determine this controversy, but in deference

to the zeal and ability with which counsel for appellant has pressed this appeal we will not decline to consider the question further. There can be no doubt that if the term of an office has been fixed by the constitution there is no power in this court—not even in the legislature—to abridge or alter such term. As is said by Moses, C. J., in *Wright v. Charles*, supra, quoting from the previous case of *Reister v. Hemphill*, 2 S. O. 335: "Where the organic law fixes the term of office it is not in the power of the legislature, by an act, to change that term." So that the fundamental inquiry in this case is whether the term of office of judge of probate has been fixed by the constitution. The terms of section 20, art. 4, of the constitution, leave such question in no doubt, for it is there declared (referring to the court of probate): "The judge of said court shall be elected by the qualified electors of the respective counties for the term of four years." But it is contended that the constitutional provision just quoted applies only to regular elections, and does not apply to a case like the present, where one has been elected at a special election to fill a vacancy occasioned by the resignation of the office by a former incumbent before the expiration of the term for which he was elected. This contingency has likewise been provided for by section 11 of the same article, which reads as follows: "All vacancies in the supreme court or other inferior tribunals shall be filled by elections as herein prescribed: provided, that if the unexpired term does not exceed one year, such vacancy may be filled by executive appointment." It is not, and cannot be, denied that this constitutional provision applies as well to a vacancy in the office of a judge of probate as it does to a vacancy in the office of a circuit judge, to which it has been applied in the case of *Whipper v. Reed*, supra. What then is the proper construction of the section last quoted? So far as the question presented in this case is concerned, it has been conclusively answered by the express decision of this court in the case of *Whipper v. Reed*, supra, recognized and approved in the subsequent case of *Simpson v. Willard*, supra, for we are unable to discover any difference, in principle, between the two cases. In both cases the question arose as to the title to a judicial office, which the constitution provided should be filled by election,—in one case by the legislature, and in the other by the people of the county,—and this, so far as we can perceive, is the only difference between the two cases. Surely this difference as to the mode of election cannot affect the principle here involved. It will be observed that in the section under consideration, providing for the filling of vacancies in any judicial office, the following language is used, "Shall be filled by elections *as herein prescribed*" (italics ours), showing that the framers of the constitution had in mind the fact that the constitution provided for different modes of election of judicial officers,—some by the legislature,

and others by the people,—and hence the propriety of the words used, "by elections as herein prescribed," to avoid the circumlocution of saying "by elections by the legislature, where that was the mode prescribed for the filling of certain judicial offices, or by elections by the people, where that was the mode prescribed by the constitution for filling vacancies in other judicial offices," e. g. judges of probate or justices of the peace. Now, as the constitution provides in section 20, art. 4, that a judge of probate shall be elected by the qualified electors of the respective counties for the term of four years, and in section 11 of the same article provides that a vacancy in the office of judge of probate shall be filled by an election by the qualified electors of the county, without saying anything whatever to alter or abridge the term of the office as fixed by the constitution, it follows necessarily that a person elected to fill a vacancy in the office of judge of probate occasioned by the death or resignation of the previous incumbent is entitled to hold the office for the full term as fixed by the constitution. It was upon this view that the case of *Whipper v. Reed* was decided; for in that case, Judge Graham having vacated the office of judge of the First judicial circuit, by death, before the expiration of the term for which he was elected, Judge Reed was duly elected to fill such vacancy, and the question was whether Judge Reed was entitled to hold the office for the full constitutional term of four years, or only for the unexpired portion of the term for which Judge Graham was elected. The court held, under the views above indicated, that Judge Reed was entitled to hold the office for the full constitutional term of four years. The same view was adopted by the court of appeals of Virginia in the case of *Ex parte Meredith*, 33 Grat. 119, reported also in 36 Am. Rep. 771, where Staples, J., in delivering the opinion of the court, uses language which meets some of the views contended for by counsel for appellant, as follows: "Vacancy *ex vi termini* means vacancy in the office and not in the term. When we speak of vacancy in an office we mean there is no incumbent,—no one is entitled to exercise its powers and to receive its compensation. 2 Abb. Law Dict. 624; *People v. Waite*, 9 Wend. 58. When an election is made to fill a vacancy the election carries with it all the rights, immunities, and privileges attached to the office, one of which is the right to hold for the full period prescribed, and not merely to serve out a vacant term of office of a predecessor." Or, as it is said by Moses, C. J., in delivering the opinion of the court in *Wright v. Charles*, supra: "The term of office being fixed by the constitution, the party holding it by election is entitled to all the rights, powers, and incidents which belong or pertain to it, and by what course of reasoning the duration of the term is not to be included among them is difficult to perceive. The person elected to fill a vacancy does not succeed to the unexpired term of

his predecessor, but holds by a determinate tenure prescribed by the constitution. The vacancy exists in the office. The term is the duration of it, not dependent upon the death or the resignation of the person holding it, but on the law. No matter how the office becomes vacant, the party elected to succeed to it is not in as the mere *locum tenens*, only supplying the place of the person who last preceded him."

But it is contended that the views which we have presented ignore the effect of the proviso to section 11, art. 4, of the constitution, "that if the unexpired term does not exceed one year the vacancy may be filled by executive appointment," which, it is contended, shows that the term "vacancy" is used in the section in the sense of, or as meaning, "the unexpired term of the officer by whose death or resignation the vacancy has been occasioned." This view would require the court to take such liberties with the language found in the constitution, as no court is permitted to do. The term "vacancy" must mean something more than the mere unexpired term of the previous incumbent, especially when used in connection with the office of judge of probate; for it will be observed that the constitution limits the term of that office to four years, and does not provide, as it does in reference to certain other offices, that the judge of probate shall hold his office for the term of four years, and until his successor shall be elected and qualified. Hence, upon the expiration of the four years for which a person may be elected to the office of judge of probate, such office becomes vacant when there could not possibly be any unexpired term. The true intent of the proviso to section 11 was simply to provide an exceptional mode of filling a vacancy in an exceptional case. But for this proviso no vacancy in the office of judge of probate could be filled by executive appointment, but must have been filled by election. *Whitmire v. Langston*, 11 S. C. 381. The real object of the proviso, therefore, was simply to provide for an exceptional case, and it was not intended to affect the general provisions in reference to all other cases made in the body of the section. But in addition to this, the very fact that the framers of the constitution saw fit to make special provision for an exceptional case shows that in all other cases not falling within such exception the general provision of the constitution that all vacancies shall be filled by election "as herein prescribed," which election carried with it the right to hold the office for the full constitutional term of four years, applies. As was said in *Ex parte Meredith*, supra: "Whenever elected, or for whatever purpose elected, the incumbent shall hold for six years. The language is general and positive. It embraces all the judges. It refers to the offices of all. If, therefore, in any case, we hold the duration of a term to be less than six years, it must be done by supplying words not found in the constitution.

The second section of the fifth article provides that the governor, during the recess of the general assembly, may fill pro tempore, all vacancies in these offices for which the constitution and laws make no provision, but his appointments must expire at the end of thirty days after the commencement of the next session of the legislature. Now, as the duration of the governor's appointment is expressly limited, if it was intended that the legislative appointment, upon the happening of a vacancy, should be also limited, the fair inference is, it would have been so expressly declared." So we say here that the fact of the power of appointment conferred upon the governor, in a special case, being limited to the expiration of a term for which the former incumbent was elected, the fair inference is that if it was intended to limit the appointment by the election by the people such an intent would have been declared; but as there is nothing in the section indicating any intent to limit the appointment conferred by the voice of the people, expressed by the ballot box, no such intent can be inferred.

But, again, it is contended that the scheme of the constitution, as indicated by the provision of section 10, art. 14, is that all elective officers shall be elected at the same time. That section reads as follows: "The election for all state officers shall take place at the same time as is provided for that of members of the general assembly and the election for those officers whose terms of service are for four years shall be held at the time of each alternate general election;" and hence that an election held at any other time cannot confer a title to office for a longer period than until the next regular election. This, it seems to us, is a non sequiter, for the mere logical conclusion from the terms of that section, if considered by itself, would be that an election held at any other time would be illegal, and would confer no title to the office for any period of time. We cannot adopt either of these conclusions, for the well-settled rule is that, in construing a constitution, or indeed any other instrument in writing, it must be looked at as a whole, and not in detached parts. If we should, in construing section 10, art. 14, of the constitution, we should certainly be brought to erroneous conclusions. It declares that "the election of all state officers shall take place at the same time as that appointed for the election of members of the general assembly," etc. Now, as justices of the supreme court and judges of the circuit courts are unquestionably "state officers," it would follow necessarily, if we looked alone to the terms of that section, that these judicial officers must be elected at the time appointed for the election of the members of the general assembly. But when we look to other provisions of the same instrument we see plainly that such a construction is not permissible. So, too, if we look at the literal terms of that section alone, we would be conducted to the conclusion that any election for

any office by the people would not be legal unless held at the time designated by the section; the practical result of which would be that if a judge of probate should vacate his office, by death or resignation, within one month after the general election in 1890, the office would remain vacant for the remainder of his term,—a period of very nearly four years,—for the vacancy could not be filled by the appointment of the governor (*Whitmire v. Langston*, supra), and could not be filled until the general election in 1894. Surely such a result the framers of the constitution, who must be regarded as conscious of the contingencies to which all human affairs are subject, could not possibly have intended; and they have shown by other provisions in the constitution they did not so intend, for, as we have seen, they made special provision, by section 11, art. 4, for filling vacancies in the office of judge of probate and all other judicial officers, embracing those elected by the people as well as those elected by the legislature. It seems to us, therefore, that section 10, art. 14, of the constitution, should be construed as prescribing a time for the regular elections of all state officers, and that other provisions in the constitution provide for special elections to fill vacancies, the time for holding which is not, and could not be, prescribed in the organic law, as that would depend upon the time when the exigency arose.

We may add that while the question whether judges of probate, clerks of court, sheriffs, and other officers usually denominated as "county officers," can properly be included in the term "all state officers," as used in section 10, art. 14, of the constitution, might, if *res integra*, be open to grave doubt, yet, in view of the decision in the *MSS.* case of *William v. Ostendorff*, not reported, but cited with approval in the case of *State v. Sims*, 18 S. C. 460, and also in *Pettigrew v. Bell*, 34 S. C. 104, 12 S. E. 1023, we are not now disposed to reopen the question. It does not seem to us that there was any error on the part of the circuit judge in holding that the defendant was entitled to hold the office in question for the term of four years. The judgment of this court is that the judgment appealed from be affirmed.

(44 S. C. 548)

SCATES et al. v. HENDERSON.

(Supreme Court of South Carolina. Sept. 7, 1895.)

DEED—DESCRIPTION—PAROL EVIDENCE—WAIVER OF OBJECTIONS.

1: Where a deed describes land as containing a certain amount, and gives its north, south, and west boundaries, the eastern boundary thereto added, being shown to be erroneous, may be rejected.

2: Where descriptions are, in the main, applicable to either of two tracts of land, the location may be determined by evidence of the circumstances surrounding and connected with the parties and the land at the time of the conveyance.

3. Objection that plaintiff's evidence did not show that both parties claimed title from a common source cannot be insisted on after defendant has introduced evidence which, with plaintiff's, shows such claim.

4. The right to object to testimony on the ground that the declaration testified to was a privileged communication is waived by submission to the discretion of the witness, by the attorney of the objecting party, the question whether it was a privileged communication.

Appeal from common pleas circuit court of Spartanburg county; James Aldrich, Judge.

Action by Mathew Scates and others against Willie Henderson, by his guardian ad litem, D. C. Ray. Judgment for plaintiffs. Defendant appeals. Affirmed.

Abney & Thomas, for appellant. P. T. Youmans and Alston & Patton, for respondents.

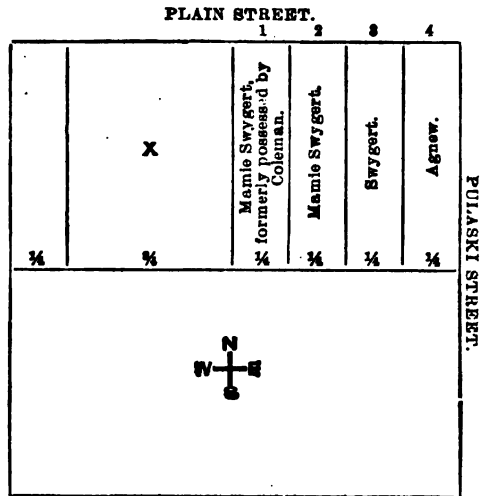
GARY, J. This is an action for the recovery of a certain lot of land in the city of Columbia. The complaint alleged that Mamie Scates was the owner of the land at the time of her death, and that upon her death the plaintiffs became the owners thereof by reason of being her heirs at law. The complaint also alleged that the defendant was in possession, and that the title by which the plaintiffs and defendant claimed the land had a common source, to wit, the said Mamie Scates. The answer of the defendant admitted possession, but denied the other allegations of the complaint, including the allegation that plaintiffs and defendant claimed from a common source. The following statement appears in the case: "Upon the close of plaintiffs' testimony defendant's attorneys moved for a nonsuit upon the grounds that plaintiffs had failed to make out their title to the premises in suit, either by tracing the same to a grant from the state or by showing possession of the premises by those under whom they claimed for such a time as would be presumptions of a grant, and that their testimony showed no evidence to support the allegation of the complaint that plaintiffs and defendant claimed title from a common source. His honor ruled that plaintiffs had not traced their title back to a grant from the state, and had failed to show such facts as would, in law, presume a grant from the state having failed to show that the land conveyed by the deed of Barnwell, master, to John Agnew was the land claimed by them, thus failing to trace the title set up by them back to those who had held the same for 20 years or more; but he held, upon the testimony submitted by the plaintiffs, and the pleadings, that there was evidence, sufficient to submit to the jury, to support the allegation of the complaint that plaintiffs and defendant claimed from a common source of title, and he therefore overruled the motion for a nonsuit. After the motion for nonsuit was refused the trial of the cause proceeded, and the evidence of the defendant disclosed

no claim of title except through Mamie Scates, through whom the plaintiffs also claimed," etc.

The appellant's first and second exceptions are as follows: (1) "Because his honor overruled defendant's motion for a nonsuit, and thereby committed error of law in so doing." (2) "Because his honor erred in ruling that there was any evidence upon plaintiff's testimony and the pleadings to support the allegation of the complaint that plaintiffs and defendant claimed from a common source of title."

The plaintiffs offered in evidence: (1) Deed of John Agnew to Mamie Scates, dated 13th May, 1884, containing three-fourths of an acre, and bounded as follows: "On the north by Plain street, on the east by lot of John Agnew, south and west by lands now or formerly of Killian & Fry, the same being a portion of an acre of land formerly belonging to Israel Smith, and conveyed to me by N. B. Barnwell, master, in proceeding in foreclosure bearing date 4th November, 1880, and recorded in the office of the register of meane conveyances," etc. (2) Deed of Barnwell, master, to John Agnew dated 4th November, 1880 (which recites the decree in the case of John Agnew against Israel Smith), conveying three-fourths of an acre, bounded as follows: North by Plain street, east by lot in possession of Charles H. Coleman, south and west by lands of Killian & Fry. (3) Deed of Barnwell, master, dated 4th November, 1880, conveying "all that lot of land bounded north by Plain street, east by Pulaski street, south by lot of Killian & Fry, and west by lot formerly of Israel Smith." (4) Judgment roll in the case of John Agnew, plaintiff, v. Israel Smith and Charles H. Coleman, defendants. This was a proceeding to foreclose a mortgage covering the one acre of land mentioned in the deed next below set forth, to which proceeding Charles H. Coleman, being in possession of a portion of said premises under an alleged contract to purchase the same subsequent to the date of said mortgage, was duly made a party, and appeared. After the proceedings usual in such cases, a decree was made 12th July, 1879, ordering a sale of the following described premises: (1) "All that piece, parcel, or tract of land, containing three-fourths of an acre, bounded north by Plain street, east by lot in possession of Charles H. Coleman, south and west by lands of Killian & Fry. (2) All that lot of land bounded by Plain street, east by Pulaski, south by lands of Killian & Fry, and west by lot formerly of Israel Smith." (5) Deed of Killian & Fry to Israel Smith, dated 22d February, 1872, conveying "all that lot, piece, or parcel of land * * * bounded on the north by Plain street, on the east by Pulaski street, and formerly on each side of said street 208 feet and 7 inches, more or less, on the south and west by Killian & Fry, and containing one acre more or less."

Below will be found a diagram showing the different parcels of land described in the testimony of plaintiffs' witnesses.



It appears that in the foreclosure proceedings mentioned above the decree provided that the lot containing one acre should be divided and sold in two parcels. This was done, and both bought by John Agnew, the mortgagee. One of these lots, containing one-quarter of an acre, and represented on the diagram as lot No. 4, was correctly described in the master's deed, as hereinbefore mentioned. The other lot, containing three-quarters of an acre, is described in the master's deed as hereinbefore mentioned, and gives the eastern boundary as a lot of Charles H. Coleman. A portion of the land in the said lot of three-quarters of an acre was possessed by Charles H. Coleman at the time the master made the said deed, but did not form the eastern boundary of the lot mentioned in the deed. There was testimony to the effect that the land in dispute was in the possession of Killian & Fry from 1851 until 1872, when they conveyed to Israel Smith, who mortgaged to John Agnew, and remained in possession until 1880, when the land was purchased by said Agnew under the judgment of foreclosure of said mortgage; that John Agnew was in possession from 1880 until 1884, when he sold to Mamie Scates (sometimes called Swygert), in 1884, and who retained possession until the time of her death.

The first question to be considered in a case of this kind is: If the boundary alleged to be erroneously set forth in the description of the property is rejected, does enough remain to render certain the locus in quo? When this can be done the law permits the rejection of such erroneous boundary. In the case of *Bratton v. Clawson*, 3 Strob. 129, the court says: "On this subject the rule laid down in *Shep. Touch.* is that when there is, in the first place, a sufficient certainty and

demonstration, and an additional term of description which falls in point of accuracy, it shall be rejected as surplusage." In this case the description of the lot would be certain if the words describing the eastern boundary are rejected as surplusage. When we have three of the boundaries of a lot, the fourth is ascertained ordinarily by drawing a straight line from the terminl of two of the boundaries so as to inclose the property covered by the three boundaries. 2 Am. & Eng. Enc. Law, p. 501.

When, as in this case, words descriptive of the locus in quo are, in the main, applicable to either of the two parcels of land, and issue is joined as to the location, this raises questions of fact to be determined by the jury. To correct an error of this kind does not require that resort should be had to a court of equity. The rule for determining the location of the land is clearly expressed in 2 Am. & Eng. Enc. Law, p. 497, as follows: "In the endeavor to ascertain the limits or boundary of the land which the grantor intended to convey, the courts will ascertain, if possible, all the circumstances surrounding and connected with the parties and the land at the time of the conveyance, since parties are presumed to refer to the conditions at that time, and the meaning of the terms used in the description can only be ascertained by a knowledge of the relative positions of themselves and of the land." Possession was taken, under the master's deed, of the property in dispute, and there is no testimony that any of the parties through whom the plaintiffs claim ever had any interest in the other lot which answers to the description in the deed except Killian & Fry. Every surrounding circumstance in this case shows that the description of the eastern boundary was a mistake, and that the presiding judge was right in admitting such testimony.

There is another reason why the nonsuit was properly refused. The "case" contains the statement that the evidence of the defendant disclosed no claim of title except through Mamie Scates, through whom the plaintiffs also claimed. The evidence of the defendant having shown that the parties claimed title from a common source, he cannot now insist upon his objection that there was no such testimony. *Martin v. Ranlett*, 5 Rich. Law, 545; *Thomas v. Jeter*, 1 Hill (S. C.) 382. The respondents' attorneys contend that even if the master's deed did not convey the land in dispute they can nevertheless maintain their action because their rights are derived from Agnew, who was a mortgagee in possession after condition broken. It must have escaped the notice of counsel for respondents that section 1, p. 536, of the Revised Statutes of 1873, was amended in 1879 by striking out from the statute relating to the foreclosure of mortgage the words "and said provisions shall not apply when

the mortgagor shall be out of possession." These exceptions are overruled.

The third exception is as follows: (3) "Because his honor erred in admitting, against defendant's objection, the testimony of the witness A. W. Ray as to the declaration of the defendant alleged to have been made to him." This testimony was objected to on the ground that it was a privileged communication. The defendant's attorney submitted to Mr. Ray's discretion the question whether it was a privileged communication. He thereby waived the right of such objection to the testimony. This exception is overruled.

The fourth exception is as follows: (4) "Because his honor erred in admitting, against the defendant's objection, the deeds of Barnwell, master, to Agnew, and the foreclosure proceedings in the case of Agnew v. Smith, when it was shown that the lands described in said deeds and in the decree of sale in said case were not the lands or any part of the lands in dispute." This exception is disposed of by what is said in considering the first and second exceptions, and is therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 462)

MORRIS v. PALMER et al.
(Supreme Court of South Carolina. Sept. 3, 1895.)

TENANCY AT WILL—CERTIORARI—REVIEW OF FINDINGS.

1. Plaintiff leased certain premises to one who afterwards assigned the lease to defendant, with plaintiff's consent. After defendant went into possession, plaintiff agreed to execute a new lease to defendant; but, after defendant signed the new lease, plaintiff refused to do so. *Held*, that defendant was not a tenant at will, within the meaning of Rev. St. 1893, § 1938, providing for the ejectment of a person who goes "into possession of land * * * as a tenant at will," etc.

2. The findings of fact of a trial justice in certiorari proceedings are conclusive upon the circuit and supreme courts.

Appeal from common pleas circuit court of Abbeville county; O. W. Buchanan, Judge.

Ejectment by R. F. Morris against J. F. Palmer and others, brought under Rev. St. 1893, § 1938. Defendants had judgment, and plaintiff appeals. Affirmed.

The trial justice, on the 26th day of March, 1895, filed the following decision in writing, viz.: "On the 27th day of January, 1895, the plaintiff had this court, under section 1938, Rev. St. S. C., to serve a notice on defendant to show cause, at the expiration of ten days, why he should not be ejected from plaintiff's premises, as in case of landlord vs. tenant at will. The only question for the court to determine is as to whether or not the defendant herein went into possession of plaintiff's land as a domestic servant, tenant at will, or to

labor otherwise. The court finds, as matters of fact: (1) That the plaintiff is owner of land in dispute; that he leased the same for two years, ending December 31, 1896, to one B. E. Gibert, for 2,800 pounds of lint cotton annually. (2) That the said B. E. Gibert afterwards rented the said premises to the defendant herein for two years, ending December 31, 1895, conditioned that defendant pay to plaintiff the annual rental of said land, to wit, 2,800 pounds of lint cotton, and also pay as additional consideration to him, the said B. E. Gibert, 400 pounds of lint cotton, and allow him the use of a dwelling and four acres of land till the expiration of his lease. Both conditions were fulfilled by the defendant. (3) After the trade had been made between the defendant herein and the said B. E. Gibert, the defendant and plaintiff agreed to enter into a lease for the said premises identical with that of plaintiff and B. E. Gibert. This lease was signed by defendant, and turned over to plaintiff for his signature, who promised to sign it, but never did, and consequently is not before this court for consideration. Therefore, the question is, as already stated, as to whether or not the defendant is a tenant at will, domestic servant, etc. Did the defendant go into possession of plaintiff's land by virtue of an agreement with plaintiff? On this point the testimony is clear that the defendant went into possession of plaintiff's land by virtue of contract with B. E. Gibert. Did the defendant buy B. E. Gibert's lease? If so, did defendant pay Gibert 400 pounds of lint cotton, and the use of a dwelling, for the two years, besides paying to plaintiff the annual rental? On this point the testimony is not disputed. The defendant might be considered a tenant at will, or holding under parol lease with B. E. Gibert. However, this question is not before the court for consideration. The defendant having shown sufficient cause why he should not be ejected from said premises, it is ordered and adjudged that he be allowed to retain possession of said premises until the expiration of Gibert's lease."

Subsequently, on March 29, 1895, the trial justice made the following additional certificate, which was used on the hearing: "I * * * do hereby certify that upon the return to the summons to the defendant Palmer to show cause why he should not be ejected from the premises in dispute, as a tenant at will of the said Morris, the said Palmer introduced evidence tending to establish, and which did establish to my satisfaction, a regularly executed written lease of the premises in dispute from Morris to one Benjamin Gibert for the period of two years, and longer if desired. Parol evidence of this lease was offered after it had been shown that the said Palmer had given to the said Morris, in whose custody the instrument was, due written notice to produce it upon the trial, and he having refused or failed to do so, claiming that he had burnt it, as the evidence will

show. I further certify that at the said trial the defendant Palmer proved and introduced in evidence a regularly executed written assignment and transfer from the said Gibert to the said Palmer of the lease from Morris to Gibert; that at the conclusion of the said trial the said instrument was returned to the said Palmer, as it was thought that he was entitled to the custody of the same. For this reason the said assignment or transfer was not included in the record sent up in response to the writ of certiorari."

The case came on for hearing on the 29th day of March, 1895, and on the 1st day of April the circuit judge filed the following order: "This case comes up on the return, and a voluntary amended return, to the preliminary order issued by me at chambers. It being of that class of cases triable before a trial justice, wherein there is no provision for appeal made by the statute, a remedy to correct errors below is sought by an application to the efficiency of a writ of certiorari. The power in this court at chambers is expressly given by Act Dec. 18, 1891 (20 St. 1123), and now a part of section 2247 of the Revised Statutes of 1893 (volume 1), passed, no doubt, in answer to the objections made in *State v. Black*, 34 S. C. 194, 13 S. E. 361. The contention of the plaintiff is that the occupancy of the defendant is that of a tenant at will. 'An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor.' 2 Bl. Comm. 145; 4 Kent, Comm. 111x. 'It was determined very anciently by the common law, and upon principles of justice and policy, that estates at will are equally at the will of both parties, and neither of them was permitted to exercise his pleasure in a wanton manner, and contrary to equity and good faith.' 4 Kent, Comm. 111. The policy that construes what would once have been construed terms of a tenancy at will into a tenancy from year to year is inexorable and continuous, and is in keeping with an enlightened public regard for the welfare of both parties. The tendency to such modern construction may be understood when a leading authority upon the subject says of it: 'The reservation of annual rent is the leading circumstance that turns such an uncertain estate into that of a lease from year to year. If the tenant be placed on the land without any terms prescribed or rent reserved, and as a mere occupier, he is strictly a tenant at will,'—the inference being logical and irresistible that if there be terms prescribed and rent reserved, certain and definite, the tenancy is not that of a tenant at will, the certainty of continuance assured. In the light of this rule, let us look into the evidence, and see what is the holding by the tenant now; and, as necessary to such inquiry, let us examine into his entry into this land, for it is a general rule that a tenancy once shown to exist will be presumed to continue so long as the tenant remained in possession. It appears there were two con-

tracts sought to be proved before the trial justice, or rather a double liability growing out of the same transaction. The defendant agreed to take an assignment of the lease executed by the plaintiff and one B. E. Gilbert, by which, in consideration of a certain amount of cotton, and the occupancy of certain dwelling, the interest of Gilbert was transferred to the defendant. The defendant, being solicitous of his holding, and with a view of getting the landlord to recognize him as his tenant, entered into a special contract, promising the payment of certain rent. It is to be noted that the date of this latter instrument is 4th of January, 1894, and contemplates the termination of the tenancy on the 1st day of January, 1896,—a two-years lease. It is also remarked that although it purports to be an agreement for two years, and the defendant carried it into effect, it is signed by the tenant alone; the landlord, although having promised to sign it, has omitted to do so. The trial justice found, as matter of fact, that the defendant was the tenant under Gilbert's contract, and was in possession by right. If the defendant is in under a valid contract, it matters little whether it be Gilbert's or his own. It is contended that, inasmuch as the contract was signed by the defendant here alone, it is indeed no valid lease, but a tenancy at will. The paper in other respects is certain and definite, both as to the time of the lease and the rental to be paid therefor. If this be so, and the parties have gone into possession of their respective rights under the provisions of the paper, it is a contract executed and binding. And the writing of the plaintiff, expressly reciting the receipt of the rent in full for the year 1894, shows the payment and possession by and in the defendant. Under these facts, such tenancy is not a tenancy at will, but is one for two years, under the terms of the holding. The landlord is bound in the same manner that the tenant would be bound if the tenant had omitted to sign the lease, and had allowed the landlord to sign alone; for 'if a tenant take possession and occupy under a written memorandum for a present demise, which he has never signed, it seems that he shall be presumed to hold upon the terms specified in such memorandum.' 1 Chit. Cont. (Ed. 1874) p. 453. So, upon either view of the matter, the decision of the trial justice, refusing to eject the defendant, should stand; the question being, not whether he is an assignee or lessee of Gilbert,—a lessee of plaintiff, merely,—but whether or not he occupies such an estate as comes within the section invoked. Let the writ be discharged, with costs."

The plaintiff excepts to the said order of the circuit judge, and asks the supreme court to reverse the same, for that his honor erred in the following particulars: "(1) In holding that the paper in the form of a lease, signed by the defendant Palmer alone, is a contract executed and binding, and that the tenancy was not one at will, but one for two years, under

the terms of the holding. (2) In not holding that the lease being signed by one party only amounted to no more than a parol lease, which did not give the tenant the right to hold for a longer period than twelve months, under the express terms of section 1932 of the Revised Statutes of South Carolina, as passed in 1893. (3) In not holding that, under section 2149 of the Revised Statutes of 1893, all estates or interests in lands not put in writing and signed by the parties shall have the force and effect of estates at will only, and in not holding that the estate in this case was only an estate at will, under the express terms of said section. (4) In not holding that the trial justice had committed error of law in refusing to pass upon the effect of the lease signed by Palmer, and in not reversing the judgment of the trial justice, and ordering him to issue a warrant to put the plaintiff in possession of the land in dispute. (5) Because of error in holding that if a tenant be put into possession of land under prescribed terms, and definite rent reserved, that he is not a tenant at will; thus ignoring the express terms of section 1938 of the Revised Statutes of 1892 and section 2149 of said statutes, which lays down the law of this state. (6) In holding that the defendant was rightfully in possession of the premises in dispute because he went in originally by virtue of an agreement with the plaintiff, although the statute is express that all parol agreements shall only last one year. (7) In holding that the receipt of the rent for the year 1894 by the plaintiff would have the effect of making the holding a tenancy from year to year."

Graydon & Graydon, for appellant.
Frank B. Gary, for respondents.

McIVER, C. J. In this case the plaintiff, on the 27th January, 1896, instituted proceedings, under section 1938 of the Revised Statutes of 1893, to eject defendants from the possession of certain premises belonging to plaintiff, upon the ground that they were in possession as tenants at will only. The case below turned upon the question as to whether the defendants, or rather the principal defendant, Palmer (the other defendants being probably his employes), was a tenant at will of plaintiff. Upon hearing the return to the rule to show cause the trial justice held, substantially, that Palmer was not a tenant at will, and refused to issue his warrant for the ejectment of said Palmer. Therefore, the plaintiff applied for and obtained from his honor, Judge Buchanan, a writ of certiorari, requiring the trial justice to certify to him all the proceedings in the cause. To this writ the trial justice made his return and amended return, as set forth in the case, and the case was heard by the circuit judge upon said return, who rendered the judgment set out in the case, affirming the action of the trial justice, and dismissing the writ of certiorari. From this judg-

ment plaintiff appeals upon the several grounds set out in the record, which, together with the return of the trial justice and the judgment of the circuit judge, should be incorporated in the report of the case.

The facts as found by the trial justice, may be stated substantially as follows: That plaintiff, being the owner of the premises in question, duly executed a lease in writing, with one Gilbert, for the lease of said premises for the term of two years ending on the 31st December, 1895, said lessee to have the refusal of the premises for another term at the expiration of said lease; that after the execution of said lease the said Gilbert rented said premises to the defendant Palmer, upon certain terms, which were duly complied with, and executed to said Palmer, in writing, an assignment of his lease from plaintiff, with the knowledge and consent of the plaintiff, as the testimony of the plaintiff himself shows; that after this trade or transaction between Gilbert and Palmer the plaintiff and Palmer agreed to enter into a lease identical with that of the plaintiff and Gilbert, and a lease was so drawn and signed by Palmer, and turned over to plaintiff, who promised to sign it, but never did so; and that the defendant went into possession of the land under his contract with Gilbert. These findings of fact by the trial justice are, in certiorari proceedings, final and conclusive, both upon the circuit judge and this court. *State v. Foot*, 24 S. C. 510, recognized and followed in *Charles v. Byrd*, 29 S. C., at page 558, 8 S. E. 1. One of these findings of facts, to say nothing of other points in the case, to wit, that Palmer went into possession of the land under his contract with Gilbert, is absolutely conclusive of the correctness of the conclusion reached by the trial justice, and concurred in by the circuit judge, for section 1938 of the Revised Statutes reads as follows: "When any person has gone or shall hereafter go, into possession of any land of another, either as a tenant at will, or under a contract to serve, either as a common laborer or otherwise," etc. The remedy provided for by that section may be applied for and obtained whenever such person shall refuse or neglect to quit the premises so occupied when required by the person letting the same. Now, under such finding of fact, it is very certain that Palmer did not go into possession of the premises as the tenant at will of the plaintiff, but, on the contrary, he went into possession under his contract with Gilbert, and hence the provisions of that section do not apply. It will be observed that this is a special statutory provision, of a somewhat stringent and summary character, and, under the well-settled rule, can only apply to cases falling strictly within the terms of the statute. It cannot, therefore, be applied to a case where a person has not gone into possession as a tenant at will, or under a contract to serve as a domestic servant or common laborer, or other-

wise, but, to render this section applicable, it must be shown that the person to whom it is sought to be applied has gone into possession as a tenant at will, etc. If the person goes into possession as a trespasser, then the remedy provided by section 2432 of the Revised Statutes must be resorted to, or, if he undertakes to hold over after the expiration of his lease, then there are other sections of the Revised Statutes which afford appropriate remedies. So that, even if we were disposed to hold, under the evidence in this case (as we must say that we are not inclined to do), that the abortive agreement to enter into a lease between the plaintiff and the defendant after the latter had gone into possession under his contract with Gilbert had the effect of converting the defendant into a tenant at will of plaintiff, the provisions of the statute under which this proceeding was instituted would not apply, for the reason that the facts do not bring this case within the terms of that statute. We need not, therefore, enter into any inquiry as to the effect of the agreement between plaintiff and defendant to enter into a new lease, identical in terms to that of Gilbert, which had been duly assigned to Palmer, with the plaintiff's consent, which had not only been drawn, but actually executed by the defendant, but not signed by the plaintiff, simply because he failed, without any reason or excuse, so far as appears, to keep his promise to sign it; for if, as claimed by appellant, his failure to sign the new lease rendered it absolutely void, then the whole attempt to enter into a new contract between plaintiff and defendant must be regarded as having failed, and the defendant must be considered as being in possession as assignee of the lease to Gilbert, and entitled to hold the same, at least, until the 31st day of December, 1895. Surely, the appellant cannot be permitted to claim the benefit of a part of the arrangement made with defendant, and repudiate the other part, which failed of legal effect simply because of plaintiff's unexplained refusal or neglect to sign the new lease after promising to do so. He cannot be permitted to say that the parol agreement to enter into a new lease—nothing having been reduced to writing and signed by the parties—had the effect of constituting the defendant a tenant at will when the undisputed evidence shows that such agreement was put in writing, and actually signed by one of the parties, and not signed by the other (the appellant himself) simply because of his unexplained refusal or neglect to keep his promise to do so. The whole arrangement for a new lease must either be entirely ignored, or it must be regarded as having been carried into full force and effect according to the manifest intention of the parties at the time. Any other view would, it seems to us, be subversive of every principle of law and justice, and cannot be sanctioned by this court. We think, therefore, that in any view of the case the judgment appealed

from must be sustained. The judgment of this court is that the judgment of the circuit judge be affirmed.

(45 S. C. 107)

PEEPLS et al. v. CUMMINGS et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

REVIEW ON APPEAL—ASSIGNMENT OF ERRORS.

1. Findings of fact by the court on legal issues cannot be reviewed on appeal.

2. An exception that a decree is contrary to law and the evidence is too general to be considered.

Appeal from common pleas circuit court of Hampton county; J. J. Norton, Judge.

Action by W. H. Peebles and another against C. C. Cummings and others. From judgment for plaintiffs, defendant Cummings appeals. Affirmed.

The decree of the court below is as follows:

"This is an action brought by W. H. Peebles and Mary Annie Mixson, alleging that they are tenants in common with the defendants of a tract of land in Hampton county, and asking partition of the same according to the rights of the respective parties. The defendant C. C. Cummings answers, denying the allegations in the complaint, setting up title in himself, and pleading also the statutes of limitation. L. A. Tuten also answers, disclaiming any interest in the land. The other defendants are infants, and under the protection of the courts. The plaintiffs also claim that the defendant C. C. Cummings committed waste on the land since 23d March, 1891, and ask for an accounting. The testimony clearly establishes that no timber has been cut on the land since C. C. Cummings came into possession, and therefore this question is eliminated from the controversy.

"The only question, therefore, is, have the plaintiffs set up a title to the land which entitles them to a partition thereof? It is, of course, incumbent on the plaintiffs to show titles in themselves by clear and undisputed chain, inasmuch as the defendants deny title; and, before partition can be had, the same strictness of proof is necessary as is required in an action of trespass to try title. The issues are all by consent submitted to the court, jury trial being waived. The plaintiffs have no title deeds whatever to the property, but claim title from Eliza Peebles, who was the mother of the plaintiffs. The deeds through which C. C. Cummings claims are relied on by plaintiffs, supported by the testimony, to show that this defendant claims through a common source, which fact is admitted by the defendant C. C. Cummings. It is therefore adjudged that Eliza Peebles owned the land, and the plaintiffs must prevail unless she conveyed it to W. J. Peebles, or he has held it adversely to her title sufficiently long to acquire a title as

against her and her heirs. C. C. Cummings claims that Abram Peebles and the said Eliza, then his wife, made a note to W. J. Peebles for the sum of \$871 on the 3d day of May, 1860; that, in order to secure the payment of said note, they put said W. J. Peebles in possession of the land in dispute, and authorized him to sell the same, and pay their said note; that subsequently said Eliza executed a deed to W. J. Peebles for said land; that Abram Peebles died in 1865, and W. J. Peebles married said Eliza on 4th January, 1866. In 1860 the note of Abram Peebles and wife was the note of the husband alone, void as to the wife. Her act with her husband putting W. J. Peebles in possession was without consideration as to her, and void. Even if it had been based upon a valuable consideration, the effect would be only to give such right as a husband alone could give; that is, possession during his life. The burden of proof to show that Eliza made valid deed to W. J. Peebles is upon defendant. It is not shown by proof that he once had a deed which was lost (see *Standridge v. Powell*, 11 S. C. 550); for it does not follow that it was made during noncoverture, nor that it had the requisite number of witnesses. W. J. Peebles does not pretend to fix the time, nor does Rigdon Peebles. On the contrary, one would infer from Rigdon Peebles' testimony that W. J. Peebles' possession and claim to sell were derived solely from the transaction between Abram and her, on the one side, and W. J. Peebles, on the other. So no valid deed was executed. W. J. Peebles married Eliza in 1866, and was entitled to the possession of all her lands, and no running of the statutes could occur during coverture. She left minor children, the youngest of which came of age in 1873. About the time he came of age his sister and cotenant, Emma Tuten, died, leaving minor children, and who are still minors, so that there is no statutory bar to recovery in this action. It is adjudged that C. C. Cummings has failed to establish exclusive title to the tract of land described in the complaint, and that a writ in partition do issue in accordance with the prayer of the complaint."

The third exception was that the decree was contrary to the law and the evidence.

C. J. C. Hutson, for appellant. W. S. Tillinghast and A. McIver Bostick, for respondents.

GARY, J. The facts in this case are fully stated in the decree of his honor, Judge Norton, which will be incorporated in the report of the case. Appellant's first and second exceptions are as follows: "(1) Because his honor erred in holding, according to the evidence, that Eliza J. Peebles did not for value convey the premises in dispute to W. J. Peebles, the grantor of the defendant.

(2) Because his honor erred in holding, according to the evidence, that W. J. Peeples did not hold possession adversely to Eliza J. Peeples, and that the statutory bar was not complete by reason of the coverture of Eliza J. Peeples." The findings of fact of which these exceptions complain grew out of the issues raised by the defendant Cummings, who set up title in himself, and pleaded the statute of limitations, both of which are purely legal in their nature. The findings of fact upon such issues cannot be reviewed by this court. *Columbia Water-Power Co. v. Columbia Electric St. Ry., etc., Co.* (S. C.) 20 S. E. 1002. These exceptions are overruled. The third exception is too general for consideration, as has repeatedly been held by this court. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 536)

JONES v. SPARTANBURG HERALD CO.

(Supreme Court of South Carolina. Sept. 7, 1895.)

ACTION AGAINST CORPORATION — INSTRUCTIONS — LEASE — NOTICE OF TERMINATION.

1. A corporation which has simply gone out of business can be sued.

2. An omission to give a charge cannot be urged as error where there was no request that it be given.

3. To terminate a lease from year to year, notice of such intention must be given a reasonable time before the end of the calendar year.

4. Whether the notice of intention to terminate a lease from year to year has been given a reasonable time before the end of the calendar year must be determined by the jury.

Appeal from common pleas circuit court of Spartanburg county; T. B. Fraser, Judge.

Action by W. M. Jones against the Spartanburg Herald Company for rent. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint in this action, begun in December, 1893, was as follows: The plaintiff complaining of the defendant in the above case alleges: "(1) That the defendant is a corporation duly chartered under the laws of this state by an act of the general assembly entitled 'An act to incorporate the Spartanburg Herald Company,' approved December 26, A. D. 1884. (2) That the said defendant rented from plaintiff in December, 1891, an office in the city of Spartanburg, South Carolina, for the sum of \$150 per annum, payable monthly, and in accordance with said agreement paid rent to December 31, 1892. (3) That in December, 1892, the defendant gave notice to plaintiff that unless the rent was reduced to \$100 per annum the said plaintiff would move out of said premises. That plaintiff declined this proposition, but, in a spirit of compromise, offered to reduce the rent for the ensuing year to \$120. The defendant refused this offer, and gave notice that it would vacate the prem-

ises on or before the 1st day of January, 1893. The plaintiff then gave notice to defendant that plaintiff would stand strictly on his legal rights. (4) That defendant did not move out on 1st day of January, 1893, but held over until May 1, 1893. (5) That plaintiff has never released defendant from liability for the full year on which defendant had entered. (6) That 11 months' rent, amounting to \$137.50, has become due, and no part of the same has been paid except the sum of \$45. (7) That payment of said balance due has been demanded and refused. Wherefore, plaintiff demands judgment against the defendant for the sum of \$92.50, and for the costs and disbursements of this action."

The answer was as follows: "J. C. Garlington, upon whom the summons and complaint in this action were served, answering the complaint herein for himself and for the Spartanburg Herald Company, if it is determined that said company has not been dissolved and has been duly and properly served in this action, says: (1) That the said the Spartanburg Herald Company, was at one time a corporation duly chartered and doing business under the laws of the state, but that said corporation has long discontinued business, and that there is now no such corporation. (2) That while the said the Spartanburg Herald Company was in existence and doing business in the city of Spartanburg it rented from the plaintiff certain rooms at \$12.50 per month, but for no definite time; and that in December, 1892, said corporation gave notice to the plaintiff that as soon as it could, after the expiration of three months from that time, it would move out of the building of the plaintiff and surrender same to him; and that thereafter, on or about May 1, 1893, said corporation did vacate said rooms and surrendered them to the plaintiff, after first paying him all the rent that was due him therefor; and that since that time said corporation has never been indebted to plaintiff for any rent whatever. (3) That when the said the Spartanburg Herald Company dissolved and went out of business all the debts then due by the said corporation were assumed by J. C. Garlington, who, up to that time, had been a stockholder in, and managing agent of, said corporation, and he has since that time been responsible therefor, all of which was and is well known to the plaintiff. (4) Denies all the allegations of the complaint not herein expressly admitted. (5) Alleges that, even if the said the Spartanburg Herald Company is a corporation now in existence, it has not been properly and legally served in the action. Wherefore, said J. C. Garlington demands judgment that the complaint be dismissed with costs."

The judge charged the jury as follows: "Gentlemen of the Jury: This is an action to recover the amount alleged to have been due for rent for the year 1893 by the defendant

company to the plaintiff in this case. Well, it is immaterial whether the company has gone out of business or not, if the company is liable for the rent, it is conceded now. Whatever could be collected out of the company is not a matter with which you or I have any business now. If a man rents a house or farm or any real estate,—in '91 it is alleged here,—and no period of time fixed for the rent, and then occupies it for the balance of the year '91, and for the whole of the year '92, and pays rent for '92, then the law raises the presumption of a renting for the year '93. The tenant is bound to keep it for the year '93, unless he gives notice. That is exactly the Charleston case." Mr. Sanders: "Unless he gives notice by the 1st of October." By the Court: "Unless he gives notice. Now, it is contended here for the defense that notice in December was enough. I have always understood the rule to be different, and that Charleston case assumes that three months' notice is necessary in the city as well as in the country. The reason of the rule is one to my mind very plain. A man might pick up a piece of land, or a house or lot, and hawk it about the country, and rent it or find a purchaser for it, and he ought to have reasonable notice that it is going to be vacant, so as to enable him to look out for another tenant for the next year to work it, or make his income on town lots to secure his insurance, if necessary. So I take that to be the law, and that three months is the time. I have always understood it to be three months ever since I have been at the bar. I remember one of the earliest cases in which I was concerned at all, in the old state reporter, which was almost identical with this, puts it down three months." Foreman of the Jury: "Three months before the 1st of January?" By the Court: "Three months before the 1st of January. If he went in in '91 and used it the whole year '92 and paid rent for '92, unless something was done to terminate that lease or that rent, he was bound to keep it the next year unless he gave notice by the 1st of October. That is the law, and the reason of it is as I have said. It is the rule whether in the town or in the country. It is true that the parties may have made a different arrangement afterwards, but if the company had the property, and liable for the rent for '93 at the same rental that he had it for '92, then the company was liable unless there was a change, and I will say to you that mere negotiations for a change are not sufficient, but there must have been some agreement to make a change, particularly if one man, the defendant, offered \$120, and the other said, 'I cannot accept that, and I will stand on my legal rights.' Well, it was for the defendant, or the representative of the defendant, to understand or to ascertain what those legal rights were. If the parties had agreed, as is done generally in renting, that it shall be a renting for one year, then at the end of the year a man is bound to give it up;

but if it is a renting which is indefinite in time, as the testimony is in this case,—indefinite, no period fixed, took it at the rental of \$150,—the contract might have been one year, or might have been ten years. If it had said, though, as is commonly done, 'We rent you this place for the year '92 for \$150,' then no notice would have been necessary on either side. The defendant could not have held it, and the plaintiff could not have turned him out. So that is the rule as I understand it, gentlemen, and I don't think there is anything else for me to say to you about it. The plaintiff claims here eleven months at \$12.50 a month, subject to a deduction of \$45 which he says was paid him or collected, for whatever rent he collected off that place you must give him credit for, whether it be paid by the defendant or defendant's agent, or whether collected from somebody else. If the plaintiff had found it convenient, or found a way of renting that property at its full value, he would have been bound to give credit for the whole amount. If he could have rented that property for \$150, he would have been bound to give credit to this party for the \$150, and he would have had nothing to sue for. So that the action is only to recover the difference between what he did receive and what he claims that he ought to have received." Foreman: "And the interest from the 1st of December, '93?" By the Court: "No, sir; no interest. A claim of this sort does not bear interest. It is not what is called liquidated payments, not reduced to writing, but is a claim which does not bear any interest at all."

The verdict of the jury was for the plaintiff for \$92.50. On the verdict, judgment was thereafter duly entered. Defendant appealed on the ground that the circuit judge erred: (1) In holding and charging the jury that it was immaterial whether the defendant corporation had gone out of business or not, when he should have charged that if said corporation had gone out of business and dissolved it was no longer a corporation, and could not be sued or recovered against as such. (2) In holding and charging the jury as the law applicable to this case that if a man rented a house or farm in 1891, and kept it through 1892, he was bound for the rent of the house for 1893 also, unless he gave notice before October 1, 1892, that he would not be so bound, and would surrender the house. (3) In holding and charging the jury that in all cases of tenancy from year to year, three months' notice before the end of the calendar year is necessary before the tenant can legally surrender the premises, and that any holding over into the next year makes the tenant liable for the rent of said year; and in instructing the jury that this was such a tenancy from year to year, taking from the jury the question of fact as to what the contract really was. (4) In holding that mere negotiations were not sufficient to change the presumption that a holding over was for the whole of the next year; and in

not holding and charging the jury that any holding over into a new year, subject to negotiations between the parties, rebuts the presumption of a renting for the whole of such new year. (5) In not charging the jury that the law only requires reasonable notice to be given in tenancies from year to year; and in not leaving it to the jury to say whether the notice in this case was reasonable or not. (6) In not instructing the jury that if the defendant gave notice in December that they would go out of the building on the expiration of three months—and they did go out on the expiration of said term—they were no longer liable for rent. (7) In not, at least, leaving to the jury to say whether the holding over into the year 1893 was, under the circumstances of this case, an agreement to rent for 1893, and a tenancy from year to year; and in not instructing them that, if not, the plaintiff could only recover for the time defendants had the house.

Bomar & Simpson, for appellant. Duncan & Sanders and Geo. W. Nicholls, for respondent.

GARY, J. The question raised by the appeal in this case will be understood by referring to the complaint, answer, the presiding judge's charge to the jury, and appellant's exceptions, which will be incorporated in the report of the case.

The first exception complains of error on the part of the presiding judge in charging the jury that it was immaterial whether the defendant corporation had gone out of business or not. The appellant's attorneys do not discuss this exception in their argument before this court. The proposition is too plain to admit of controversy that a corporation, by simply going out of business, does not absolve itself from liability to be sued.

The latter part of this exception, also the latter part of exception 4, and exceptions 5, 6, and 7, complain of error on the part of the circuit judge in failing to charge the jury as therein set forth, although there were no requests to charge. Such exceptions will not be considered by this court. *Marion v. Aiken*, 39 S. C. 33, 17 S. E. 511.

The other exceptions raise substantially but two questions to wit: (1) Was there error of law on the part of the presiding judge in commenting on the facts of the case in his charge to the jury? (2) Was it error on the part of the presiding judge to charge the jury that in order to terminate a tenancy from year to year it is necessary to give three months' notice of such intention immediately preceding the end of the calendar year? After a careful consideration of his honor's charge, we fail to find where he commented on the facts and invaded the province of the jury. The exceptions raising the first question are therefore overruled. The authorities in this state show beyond question that a tenancy

from year to year looks to the end of the calendar year for its termination, and in order to terminate it at that time it is necessary to give notice of such intention. *Wilson v. Roderman*, 30 S. C. 210, 8 S. E. 855, and cases therein cited. His honor charged the jury that such notice must be given three months immediately preceding the end of the calendar year. At common law it was necessary to give six months' notice in order to terminate a tenancy from year to year. This rule has not, however, been adopted in this and a number of other states. An impression has prevailed in our state for a long time that it is necessary to give three months' notice in order to terminate a tenancy from year to year, although we have no statute providing for such notice. This impression was caused, perhaps, by the provision of the act of 1808 (set forth in section 11, on page 435, of the Revised Statutes of 1873) that all tenants for years, etc., who shall hold over after the legal determination of their estates, after demand made in writing for delivering possession thereof by the person having the reversion or remainder therein (such tenant holding over for the space of three months after such demand), shall forfeit double the value of the use of the premises recoverable by action. This provision was not incorporated in the Revised Statutes of 1882 nor of 1893. The case of *Godard v. Railroad Co.*, 2 Rich. 346, decides two questions: (1) That in order to terminate a tenancy from year to year it is necessary to give reasonable notice of such intention. (2) That in that case three months' notice was admitted to be the customary notice in Charleston, where the case was tried, and that the difference in the habits and state of society in England and in this state well warranted the substitution of three for six months. That case differs from this in the very material fact that in Charleston it was admitted custom had fixed the notice in such cases, while here there was not even any testimony introduced tending to establish such custom. In the absence of a statute requiring three months' notice, and in accordance with the principles announced in the case of *Godard v. Railroad Co.*, supra, we are bound to hold that the circuit judge was in error in charging the jury that three months was necessary in order to terminate a tenancy from year to year. His honor should have charged that it was only necessary to give reasonable notice, and should have left it to the jury to say whether, in view of all the facts and circumstances of this case, reasonable notice was given. The exceptions raising this question are sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to the court of common pleas for Spartanburg county for a new trial.

(44 S. C. 487)

TINDALL v. McCARTHY.

(Supreme Court of South Carolina. Sept. 3, 1895.)

CONVERSION BY BAILEE—WAIVING TORT—BURDEN OF PROOF—NONSUIT.

1. A complaint for breach of contract by the vendee's failure to return a lighter in which gravel was delivered, claiming as damages the value of the lighter, need not show negligence by defendant.

2. Assuming that a contract by a vendee to return a lighter in which his vendor delivered goods makes him a bailee of the lighter, the vendor may waive the tort of the vendee in failing to return it on demand, and sue him for breach of contract.

3. In an action against the vendee for breach of contract to return a lighter in which gravel sold was delivered to him by plaintiff, a nonsuit on the ground that the plaintiff was not the owner of the lighter is properly refused.

Appeal from common pleas circuit court of Beaufort county; Ernest Gary, Judge.

Action by Albert Tindall against Justin McCarthy for the purchase price of gravel, and for breach of contract to return the lighter in which it was delivered. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas Talbird and Elliott & Elliott, for appellant. W. J. Verdier, for respondent.

McIVER, C. J. In the plaintiff's complaint two causes of action are stated: (1) The sale and delivery by the plaintiff to the defendant of a quantity of gravel at the price of \$25, and the breach of the promise to pay for the same. The second cause of action is thus stated in the complaint: "That the quantity of gravel sold and delivered, as above alleged, to the defendant, was contained, when so delivered, in a lighter, which was also delivered the defendant on said day, for the purpose of unloading and discharging, and which lighter defendant promised and agreed to unload and discharge, and to deliver to the plaintiff at Paris Island aforesaid on the next day, the 3d day of November, 1894; that the value of a lighter so delivered to the defendant as above alleged was four hundred dollars, and that the defendant, not regarding his said undertaking to deliver said lighter to this plaintiff, has not delivered the same, although he was, on the said 3d day of November, 1894, and on divers days since, at said Paris Island, requested by the plaintiff so to do,—to the damage of the plaintiff four hundred dollars." The defendant answered, setting up a denial of the delivery of the gravel as a defense to the first cause of action; and, as a defense to the second cause of action, "the defendant admits that the gravel mentioned in the complaint was brought to Paris Island upon a lighter at about the time mentioned in said complaint, but the defendant denies each and every other allegation of the second cause of action, except the allegation that defendant has not delivered said lighter to the plaintiff." The plaintiff offer-

ed testimony tending to prove the contract as alleged in the complaint, and the failure to deliver to him or his agents the said lighter at the time mentioned, or at any time thereafter, although such delivery was demanded at said time and at several times thereafter, according to the terms of the contract as alleged. At the close of the testimony on behalf of the plaintiff the defendant moved for nonsuit on the second cause of action, based upon the nondelivery of the lighter, upon two grounds: (1) Because the plaintiff was not the owner of the lighter at the time it was lost; (2) because there is no evidence of any want of care on the part of the defendant, and the action cannot be maintained without proof of negligence on the part of the defendant. The circuit judge (his honor, Judge Ernest Gary) refused the motion for nonsuit, saying: "This is not a question of negligence. It is a question of damages for violation of contract. The complaint is that the defendant was to unload this property. The testimony is that the defendant came aboard and said he would have it unloaded by next morning, and he could return and get it. Now, the complaint is that the defendant has not carried out his part of the contract. So I think there is sufficient evidence to go to the jury." The jury returned a verdict for the plaintiff, and, judgment having been entered thereon, the defendant appeals, upon the following grounds: "(1) Because the circuit judge erred in refusing the motion for a nonsuit on the ground of absence of proof as to negligence on the part of defendant. (2) Because the circuit judge erred in holding that the question of negligence was not involved in the case. (3) Because the circuit judge erred in holding that there was sufficient evidence to go to the jury. (4) Because the circuit judge erred in not sustaining the motion for nonsuit on the ground that plaintiff had no such title in the property as enabled him to maintain this action."

It seems to us that the first three exceptions turn upon the question whether it was necessary for the plaintiff to offer evidence tending to show negligence on the part of the defendant, for there certainly was testimony tending to prove the contract as alleged in the complaint, and its breach by defendant. It will be observed that there is no allegation in the complaint of any negligence on the part of the defendant; and, if the theory on the part of the appellant that negligence was a necessary element in the plaintiff's cause of action be sound, then the absence of any such allegation would have afforded good ground of demurrer that the complaint did not state facts sufficient to constitute a cause of action, and there was no demurrer. But, waiving this, let us inquire whether negligence was a necessary element in the plaintiff's cause of action, and, as such, necessary to be alleged and proved. The second cause of action, as stated in the complaint (there being no question raised by this appeal so

far as the first cause of action is concerned), is the breach of a contract, pure and simple. It is not an action in the nature of an old action of detinue or trover to recover possession of personal property by a bailor of such property, or to recover damages for the conversion of such property; nor is it like an action on the case to recover damages for loss of or injury to property of plaintiff caused by the negligence of defendant. But it is like the former action of assumpsit to recover damages for the breach of a promise. In other words, it is an action *ex contractu*, and has none of the elements of an action *ex delicto*. It would seem, therefore, that to maintain such an action it was only necessary to allege and prove the contract, its breach, and the damages flowing from such breach. And as there was testimony as to all these matters, there was no error upon the part of the circuit judge in refusing the motion for a nonsuit based upon the ground that there was no testimony as to defendant's negligence. But, even if it should be conceded that the contract created the relation of bailor and bailee, the plaintiff might waive the tort of the defendant in refusing to deliver up the goods intrusted to his care, and bring his action of assumpsit for breach of the contract to deliver. See 2 Am. & Eng. Enc. Law, p. 58, where it is said, upon the authority of *Lay v. Lawson*, 23 Ala. 377, and *Clapp v. Nelson*, 12 Tex. 370, that "where the bailee contracts to return the bailed goods at a fixed time, and fails to do so, he becomes liable in tort as well as in assumpsit." See, also, on same page of Encyclopedia, where it is said, upon the authority of *McEvers v. The Sangamon*, 22 Mo. 187; *Harvey v. Murray*, 136 Mass. 377; *Drake v. White*, 117 Mass. 10; and *Hyland v. Paul*, 33 Barb. 241,—that "where the bailee contracts to return the goods a refusal to do so, of course, renders him liable in assumpsit." See, also, *West v. Murph*, 3 Hill (S. C.) 284, and *Bryce v. Parker*, 11 S. C. 337. But again, even if the contract in this case should be regarded as creating the relation of bailor and bailee between the parties, and the action based upon such bailment, the burden of proof of negligence would not rest upon the plaintiff, at least in the first instance (see *Story*, Bailm. § 287); for here the testimony tends to show that the property in question, the lighter, was delivered to, and left in the possession of, the defendant, for his convenience in unloading the boat, with a promise to deliver it to the plaintiff on the next day. In such a case, as is said by Mr. Justice Story in the section above cited, "where a demand of the thing loaned is made, the party must return it, or give some account of how it is lost."

It only remains to consider the fourth ground of appeal, which, though not pressed by the counsel for appellant, does not seem to have been abandoned. It is very clear

from the authorities cited by counsel for respondent, to which may be added *Story*, Bailm. §§ 230, 266, that this ground cannot be sustained. It seems to us that, in any view which may be taken of the case, there was no error on the part of the circuit judge in refusing the motion for a nonsuit. The judgment of this court is that the judgment of the circuit court be affirmed.

(44 S. C. 546)

VAUN v. HOWLE.

(Supreme Court of South Carolina. Sept. 7, 1895.)

WITNESS—TRANSACTION WITH DECEDENT—TRIAL—INSTRUCTIONS.

1. In an action by a widow to recover land claimed by defendant under a parol contract of purchase from plaintiff's deceased husband, it appeared that the other two heirs of decedent conveyed their interest in the land to plaintiff. *Held*, that defendant was not a competent witness to prove his parol agreement, and that he had paid decedent in full for the land.

2. Where the cause of action set forth in the complaint is legal, and the defense alleged is equitable, it is not error to refuse instructions based on the equitable defense.

3. A judgment will not be reversed because of an erroneous instruction, which in no view of the case is prejudicial to appellant's rights.

Appeal from common pleas circuit court of Darlington county; J. J. Norton, Judge.

Action by Sarah C. Vaun against Thomas E. Howle to recover real estate. From a judgment for plaintiff, defendant appeals. Affirmed.

The charge of the court is as follows: "The case we are now considering (the case of Sarah C. Vaun v. Thomas E. Howle) is a case of recovery of the possession of a tract of land, and damages for the detention thereof. It is admitted that Josiah T. Vaun was at one time the owner of the land, and the parties claim under him. Each of the parties claim from him. It is what we call a 'common source of title.' It is not necessary to go back any further than him for the title of either party. The plaintiff introduces testimony tending to show that, at the death of Mr. Josiah Vaun, that she (his widow) and two other persons (his brother and sister of the whole blood) were the only heirs, and that afterwards the other two heirs (the brother and sister) conveyed their interest in the tract of land now in dispute to her. If nothing more appeared, and you believe that testimony, why, the title is *prima facie* made out. She was bound to prove her title by the preponderance of the testimony. If you believe that testimony, then the burden of proof would be shifted; that is, the defendant would be obliged, before he could defeat her recovery, to show something in contravention of her title. He sets up his answer, and by testimony tending to prove that he is, if not the legal owner,—that if he has not got the legal title

to the land,—that yet he has an equitable title that he can set up. He sets up that he has bought the land from Vaun, that he went into possession under that purchase, and that he has paid the purchase price for the land. If he establishes those facts by the preponderance of the testimony, to your satisfaction, he would be entitled to recover. Now, what one must prove in order to show that he has this equitable title is laid down by the court of equity: First, the parol agreement to be relied upon must be certain and definite in its terms. While it is the duty of the defendant to prove that, he need not prove it in precise words; that is, it may be done by circumstantial evidence. In this case, as I understand it, the defendant insists that the only necessary terms of the agreement to be proven in this case is that it involves the tract of land in dispute, and that he is entitled upon proof of that, and proof that he has paid the consideration,—whatever the consideration was,—that, having made that proof, that that would entitle him to consider that part of the necessary proof made. And, gentlemen, the question recurs, are you enabled by the testimony that has been offered to say that the contract of purchase and sale in fee has been made by Dr. Howle, the defendant, from Mr. Vaun, the deceased? And are you enabled to say that he has paid the purchase money for this tract of land? That is the first question to be submitted to you, in the establishment of his title. He must establish, secondly, that the acts proving part performance must refer to and result from, or be made in pursuance of, the agreement proved. Now, the defendant contends that he took possession under this contract; that he did not take possession as a tenant, but that he went there originally under his contract of purchase; that the entry was made by the consent of Mr. Vaun; and that he has continued in possession ever since without payment of any rent, claiming the land in his own right. Does the testimony satisfy you—does the preponderance of the testimony satisfy you—that what he claims is true? In the third place, the agreement must have been so far executed that a refusal of full execution would operate as a fraud on the party, and place him in a situation that does not allow any compensation. Now, Dr. Howle says that he not only went on this land, and paid the whole purchase money, but has put improvements on the land, and it would be a fraud on him to deprive him of the possession of it. If that be true, and the other two propositions laid down be true, he would be entitled to the possession of the land, and would defeat the recovery of the plaintiff. You have heard the facts very fully discussed, and these propositions of law I do not understand to have been disputed by counsel either for the defendant or the plaintiff. The defendant has submitted the following requests

to charge: '(1) A mere verbal agreement for the purchase and sale of land, unless there has been a part performance of the agreement, is not binding in law upon either party.' I so charge you, gentlemen. I refuse to charge you, gentlemen, the 2d, 3d, 4th, 5th, and 6th requests to charge, without reading them to you, because, while they are part of the law, as laid down, yet no one of those requests is full. Therefore, I will not trouble your minds by reading them to you. '(7) If the jury believes from the evidence that the defendant, Thomas E. Howle, went into possession of said land under an agreement with Vaun, deceased, to purchase the land, has made improvements thereon, and has paid the purchase money thereof, the land is the property of the defendant, not only against Vaun, were he living, but against the plaintiff and all the heirs at law of Vaun.' I so charge you, gentlemen. '(8) It is not necessary, in order to establish the contract, that either party to such contract, if it existed, should testify to the same upon the stand, provided there is sufficient other evidence in the case to convince the jury that such contract was made and acted upon by the parties.' I so charge you, gentlemen. I refuse to charge you the ninth request, on the ground that it is not full enough to enable me to do so. '(10) If the jury believes from the evidence that Vaun, deceased, made such admissions or declarations as to satisfy the jury that he had sold the land in dispute to the defendant, Howle, and that Howle had gone into possession, and paid the purchase money thereof, such admissions of Vaun are binding upon the plaintiff here. The land, under these circumstances, would belong to the defendant, Howle, and the plaintiff cannot recover in this action.' I so charge you, gentlemen. That is in accordance with the law, as I understand it. You see, then, gentlemen, that this case resolves itself into a question of fact. It is only necessary for me to say to you, in this case, that if you believe the testimony adduced by the plaintiff in chief, then her title is *prima facie* made out, and the burden of proof would then devolve on the defendant. And if you believe that his claim is true, notwithstanding the testimony that has been introduced in rebuttal thereof, then you will find a verdict for the defendant. If you do not believe it to be true, but do believe the plaintiff to have made out her case *prima facie* in the first instance, then you will find a verdict for the plaintiff. Damages are laid in the complaint, but I don't remember any testimony that would enable you to find damages. If you recall any such testimony, then you will find such damages as you think have been proved, if you find for the plaintiff. The form of your verdict will be, 'We find for the plaintiff the land in dispute,' and so many dollars damages,—writing it out in words. If you find

for the defendant, you simply say, 'We find for the defendant.'"

The exceptions are as follows: "First. Because his honor, the presiding judge, erred in holding that the defendant could not testify in this action to a parol agreement made between him and Josiah T. Vaun for the sale of the land in dispute. Second. Because his honor, the presiding judge, erred in sustaining plaintiff's objection to the following interrogatory which was propounded to the defendant, to wit: 'Mr. Howle, was there, or not, any parol agreement between you and Mr. Vaun, relative to the purchase of this property by yourself?' Third. Because his honor, the presiding judge, erred in causing the answer to the following question, which was propounded to the defendant, to be stricken out; that is to say, 'Why did you go to live on that place as a home?' Fourth. Because his honor, the presiding judge, erred in sustaining plaintiff's objection to the following interrogatory which was propounded to the defendant, to wit: 'Now, you were asked the question, "Did you not lease this place from Mr. Vaun, your uncle?" I ask you how you got the place from your uncle.' Fifth. Because his honor, the presiding judge, erred in sustaining plaintiff's objection to an interrogatory which was propounded to the defendant, to wit, 'What did you pay that money for?' Sixth. Because his honor, the presiding judge, erred in holding that all questions propounded to the defendant to elicit answers revealing the transactions between J. T. Vaun and the defendant as to the purchase of the land in dispute by the defendant were obnoxious to section 400 of the Code. Seventh. Because his honor, the presiding judge, erred in refusing to charge the jury the 2d, 3d, 4th, 5th, 6th, and 9th of defendant's requests to charge, which were as follows; that is to say: '(2) There is no reason why there may not be a verbal or parol sale of land, as binding in law, as where the contract is in writing, provided there is sufficient proof of part performance. Actual possession is deemed the most satisfactory evidence of part performance. (3) Where a verbal contract for the sale of land has been partly performed, such as possession by the purchaser, or improvements made in pursuance of that purchase, the contract becomes as effectual and binding, in law, as if the original contract had been put in writing, and the purchaser had paid the money therefor. (4) If the jury believes from the evidence that the defendant went into possession of the land in dispute under an agreement to purchase the same, and, pursuant to such possession, has placed improvements upon the land, such acts on the part of the defendant are sufficient to constitute a performance of the contract, and to relieve the defendant of any necessity to show a written contract. (5) If the jury believes from the evidence that the defendant, Thomas E. Howle, has partly performed an agreement to purchase the land in dispute

from Vaun, deceased, by entering into possession and making improvements on the land, such purchase, if it existed, would be as effectual and binding against the heirs at law of Vaun as against Vaun himself. (6) If the jury believes from the evidence that the defendant, Thomas E. Howle, went into possession of the land in dispute with the consent of Vaun, deceased, under an agreement to purchase, and has made improvements thereon, he has partly performed a contract for the sale of the land, binding against Vaun, and therefore against his heirs at law.' (9) If, therefore, the jury believes the testimony of the witnesses, or any of them, who testified to Vaun's declaration, such testimony is just as effectual as if Vaun himself had testified upon the stand to such facts being a part of the contract.' Eighth. Because his honor, the presiding judge, erred in charging the jury as follows, to wit: 'In the third place, the agreement must have been so far executed that a refusal of full execution would operate as a fraud on the party, and place him in a situation that does not allow any compensation. Now, Dr. Howle says that he not only went on this land, and paid the whole purchase money, but has put improvements on the land, and it would be a fraud on him to deprive him of the possession of it. If that be true, and the other two propositions laid down be true, he would be entitled to the possession of the land, and would defeat the recovery of the plaintiff.'"

Nettles & Nettles and E. O. Woods, for appellant. T. H. Spain and Dargan & Thompson, for respondent.

GARY, J. Josiah T. Vaun died in 1894, leaving as his heirs at law Sarah C. Vaun, his widow, who is the plaintiff herein; A. R. Vaun, his brother; and M. A. King, his sister. Subsequently, the said A. R. Vaun and Mary A. King, by deed, conveyed to the said Sarah C. Vaun all their right, title, and interest of, in, and to three tracts of land, all pertaining to the estate of Josiah T. Vaun, one of which is the tract of land described in the complaint. The said Sarah C. Vaun then brought this action against Thomas E. Howle, the appellant, who claims the premises under a parol contract to purchase from Josiah T. Vaun. At the hearing below, appellant was offered as a witness to prove his parol agreement for the purchase of the premises with Josiah T. Vaun, deceased, and also to prove that he had paid the said Josiah T. Vaun in full for said premises. The presiding judge held this testimony incompetent, under section 400 of the Code. The charge of his honor, the presiding judge, and appellant's exceptions, will be incorporated in the report of the case. In considering the exceptions, we will follow the arrangement adopted by appellant's attorneys in the argument.

The first proposition of appellant is that he should have been permitted to testify in re-

gard to his alleged parol contract with Josiah T. Vaun for the purchase of the land in dispute, and as to payments made to the said Vaun under such parol contract. This proposition embraces the first six of appellant's exceptions. The plaintiff is an heir at law of Josiah T. Vaun, and her right to recover the land in dispute depends in part upon this fact. This is different from the case where the party suing to recover possession of land is simply an alienee of the heirs at law, and is not, to sustain his action, dependent upon his rights as an heir at law. The fact that the plaintiff is an alienee of the rights of the other heirs at law, as well as an heir at law, cannot prevent her from invoking the provision of section 400 of the Code. She comes clearly within the provisions of said section, and her rights cannot be defeated because she is also an alienee of the rights of the other heirs at law. These exceptions are therefore overruled.

The second proposition of appellant is that the presiding judge erred in refusing to charge the jury as requested in the 2d, 3d, 4th, 5th, 6th, and 9th requests to charge. The cause of action set forth in the complaint was legal, and the defense set up in the answer was equitable in its nature. The legal issues were properly triable by the jury, and the equitable issues by the court. The exceptions embraced in the second proposition are all based upon the equitable defense set up in the answer, which the presiding judge was not compelled to submit to the jury, nor any requests to charge based upon such defense. The defendant should have requested the circuit judge to decide the issues arising out of the equitable defense set up in the answer, but he had no right to have such issues passed upon by the jury. The exceptions embraced in the second proposition are also overruled.

The third proposition of the appellant is founded upon the eighth exception, which is simply a quotation from the circuit judge's charge, and fails to point out any particular error. Chief Justice McIver, in delivering the opinion of the court in *Finley v. Cudd* (S. C.) 20 S. E. 33, says: "Before proceeding to discuss this exception upon its merits, it is proper to notice an objection to its consideration at all which has been interposed by counsel for respondents, to wit, that the exception is simply a quotation from the judge's charge, and does not point out any particular error. It is true, this court has taken occasion, in several cases, to condemn this mode of stating an exception; and very possibly, if there was no other error in this case, it would not be considered," etc. Waiving, however, all objection to the form of the exception, we do not think it can be sustained.

Appellant's attorneys, in their argument, claim that it was error on the part of the presiding judge to charge "that if such testimony be true," etc., when there was no such testimony introduced. Even if there was error on

the part of the presiding judge, it was harmless, and in no view was prejudicial to the rights of the appellant. The eighth exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 185)

LUDDEN & BATES' SOUTHERN MUSIC HOUSE v. SUMTER.

(Supreme Court of South Carolina. Sept. 19, 1895.)

ATTORNEY AND CLIENT—AUTHORITY.

An attorney at law, to whom a debt secured by chattel mortgage is sent for collection, has no power to release the mortgage lien without express authority from his client.

Appeal from common pleas circuit court of Sumter county; James Aldrich, Judge.

Action of replevin by Ludden & Bates' Southern Music House, a corporation, against Catherine W. Sumter. There was a verdict for the defendant, and from an entry of judgment thereon plaintiff appeals. Reversed.

Lee & Moise and Haynsworth & Cooper, for appellant. Purdy & Reynolds, for respondent.

POPE, J. The plaintiff's action for claim and delivery of a piano was tried at the October, 1894, term of the court of common pleas for Sumter county, in this state, before his honor, Judge Townsend, and a jury. The verdict was for the defendant, and after entry of judgment thereon an appeal was taken to this court on the single ground "(1) that his honor, the circuit judge, erred in ruling out and holding the question incompetent, propounded to plaintiff's witness, to wit, 'Were you authorized by your client to accept any other security in substitution or in payment of the piano, or not?'" To understand the vitality of the question here under review, to the plaintiff's case, a statement of facts will be necessary. The plaintiff, Ludden & Bates' Southern Music House, sold to the defendant, Mrs. Catherine Sumter, a certain piano, on the 28th day of May, 1890, at the price of \$300; a very large part of the purchase price being on a credit, which was secured by a mortgage. Payments were made from time to time on this indebtedness, but on the 21st day of June, 1892, there was still due, as principal and interest, the sum of \$177.65. The plaintiff, after a month or two before this last-named date, had sent this claim to Messrs. Lee & Moise, of Sumter, S. C., for collection. Finding that payment in money was not in the power of Mrs. Sumter, and inasmuch as Mrs. Sumter was at that time preparing to give a second mortgage on a tract of land, containing 301 acres, to some other creditors, Maj. Moise suggested that the claim of the present plaintiff be secured by that same mortgage. After some delay this was done, to wit, on the 21st June,

1892. The note which represented the claim of the present plaintiff against Mrs. Sumter for \$177.65 was made payable to Lee & Molse, attorneys, and the mortgage was executed to Richard D. Lee, as trustee. After maturity of these notes this mortgage was foreclosed, but, alas! the proceeds of sale only paid about one-half of the price of the first mortgage. Some confusion occurred as to the meaning or purpose of Mrs. Sumter, the mortgagor, and Lee & Molse, the equitable mortgagees, in executing and accepting such mortgage. She claimed that it was in substitution and satisfaction of the mortgage held by plaintiff on the piano, while Lee & Molse contended that it was only a security additional to the chattel mortgage of the piano. It was while Maj. Molse was on the witness stand, testifying as to all these matters, that the question was propounded by plaintiff, "Were you, or your firm of attorneys, authorized by Ludden & Bates' Southern Music House to accept any other security in substitution or in payment of the piano, or not?" It seems to us that this touches the vital question. Clearly, an attorney at law, to whom a claim is sent for collection, has no power to release a lien upon property held by his principal without express authority from his principal. The case of *Mayer v. Blease*, 4 S. C. 14, is directly in point. Here a most excellent gentleman, as attorney at law, obtained a judgment for his client, which was duly entered, and constituted a first lien upon property, assumed the responsibility of accepting one-half the debt in cash, and actually entered satisfaction of the judgment. When Mayer, the principal, heard of it, he disavowed the act of his attorney, and the supreme court held the action of the attorney at law null and void. Now, if the attorney at law had been authorized by his principal to accept one-half in payment of the debt, and enter a discharge or satisfaction of the judgment, the principal would have been bound by such discharge and satisfaction. Generally, it is no part of the attorney at law's business, in attending to the business of his client, to alter or change, by substitution or satisfaction, any liens held by his client, unless he is authorized to do so. And other people deal with such attorneys at law at their peril, when they have such attorneys to change or substitute one security for another. A claim is sent to an attorney at law for collection. He must collect it, dollar for dollar, before he enters any satisfaction of such debt, and before he satisfies any security therefor. Within the scope of his agency, he has great power. Beyond it, he has none. We do not feel called upon to say a word more in regard to this delicate matter, especially as it must be carried again to the circuit court for trial. It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded to that court for a new trial.

(45 S. C. 51)

GLOVER v. GLOVER et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

JUDGMENT—RES JUDICATA—ACCEPTANCE OF DOWER.

1. The mere setting aside to the widow and children of intestate of a homestead, in proceedings by the administrator to marshal the assets of the estate, is not an adjudication that she, as one of the heirs of intestate, could claim a distributive share in the land constituting the homestead, and demand partition of it, so as to enjoy her portion in severalty.

2. Under Rev. St. 1872, p. 441, c. 85, § 10, declaring that acceptance of a distributive share will bar the claim of dower, acceptance of dower bars the widow's claim to a distributive share as heir.

Appeal from common pleas circuit court of Edgefield county; W. C. Benet, Judge.

Action by Mrs. C. F. Glover against John Glover and others for partition. Judgment for defendants. Plaintiff appeals. Affirmed.

Croft & Tillman, for appellant. E. H. Folk, N. G. Evans, and J. Wm. Thurmond, for respondents.

McIVER, C. J. It appears from the record in this case that Mitchell Glover, on the 19th of April, 1875, departed this life intestate, being seised and possessed of a considerable amount of land, and leaving as his heirs at law his widow, the plaintiff herein, and four children, the defendants herein. Soon after his death his administrator instituted proceedings, to which all the parties herein were made parties, to marshal the assets of his estate. Under those proceedings the widow set up her claim of dower in her deceased husband's land, and her claim was allowed, and accordingly a tract of 300 acres of land was set off to her as her dower. Another tract of land, containing 200 acres, which is the subject-matter of the present action, was also set off to the widow and children, as their homestead. Some time in March, 1894, the present action was instituted, in which partition of the homestead tract is demanded, and an account from the defendant John Glover of the rents and profits of said land; it being alleged that the said John Glover had rented said land for the year 1893, "agreeing to pay his cotenants, as rent therefor, the sum of \$459, and that he is still in possession of part of said premises." The defendant John Glover answered, denying the plaintiff's right to partition, substantially, upon the ground that she, having elected to claim and having accepted her dower in the lands of which her husband died seised and possessed, under the proceedings above referred to, is barred from claiming any share or interest in the homestead tract of land, as one of the heirs at law of the said intestate. Wiley Glover, another of the defendants, filed no answer, and, so far as appears, makes no resistance to the claim for partition; and the other two defendants, being minors, submit their

rights to the protection of the court. The parties having waived the right to a trial by jury, the case was heard by his honor, Judge Benet, who rendered judgment sustaining the defense set up by the answer of John Glover; holding that plaintiff, by electing to take dower, had barred her right to take a distributive share of her husband's estate, and was therefore not entitled to demand partition. From this judgment plaintiff appeals upon the several grounds set out in the record, which need not be repeated here, as they present, substantially, but two questions: (1) Whether the defendants are estopped by the proceedings heretofore referred to from questioning the rights of the plaintiff in the tract of land set off as a homestead under said proceedings. (2) Whether the plaintiff, by electing to take dower, has barred herself of the right to claim a distributive share of her husband's estate, as one of his heirs at law.

As to the first question, it might be sufficient to say that it does not appear that any such question was either presented to or considered by the circuit judge. At all events, no allusion is made to it in his decree, which appears to be set out in full in the case. But, waiving that, we do not think the position taken by appellant's counsel can be sustained. The only question as to homestead presented in the previous proceedings to marshal assets was whether plaintiff and her children were entitled to the homestead exemption, and those proceedings must be regarded as conclusive of that question. No question was there presented (and, so far as we can see, could not then have arisen) as to the nature or extent of the rights of plaintiff in the land set apart as a homestead exemption. Here, however, a totally different question is presented,—whether the plaintiff, as one of the heirs at law of her deceased husband, can claim her distributive share in that land, and demand partition of the same, for the purpose of enjoying her share in severalty. The judgment appealed from only denies her right to partition, and does not in any way infringe upon her right, along with her children, to continue in the use and occupancy of the land as a homestead; for, as was said in *Hosford v. Wynn*, 22 S. C., at page 312: "The homestead does not change title, or create new estates. It simply takes property as it finds it, and, carving out a portion, exempts it, for the time being, from levy and sale, and, marking it 'homestead,' put the debtor, or his widow and children, as the case may be, in possession, with the right to hold against all comers. It is a mere protective possession," etc.—that case going to hold that such an interest could not be levied on and sold by the sheriff. We do not understand, therefore, that the present case involves any question as to the right of the plaintiff, with her children, to remain in the enjoyment of this "protected posses-

sion"; the only question here involved being whether the plaintiff has such a legal interest or estate in the premises in question, as one of the heirs at law of her deceased husband, as entitles her to demand partition of said premises.

As to the second question, we agree with the circuit judge that the plaintiff, by accepting her dower in the real estate of her deceased husband, has barred her right to claim a distributive share of his estate as one of his heirs at law. While it is quite true that the statute which was in force at the time (Rev. St. 1872, p. 441, c. 85, § 10), like a similar provision in the act of 1791, does not, in express terms, declare that the acceptance of dower shall bar the widow's claim to a distributive share as heir at law, but simply declares that the acceptance of a distributive share will bar the claim of dower, yet it was settled by the case of *Bulst v. Dawes*, 3 Rich. Eq. 281, cited by the circuit judge, and recognized in *Evans v. Pierson*, 9 Rich. Law, at page 12, that "the right to dower, or thirds, is made convertible by the statute of 1791; and, both being legal rights proceeding to the wife, if she takes one her legal right to the other perishes." Or, as it is expressed by *Dunkin, Ch.*, in his circuit decree in *Bulst v. Dawes*, "although the statute declares that the provision therein made for the widow—her distributive share—shall, if accepted, be in lieu and bar of dower, yet the correlative proposition is not put. Nor was it necessary. It stands upon the acknowledged principles of this court. A party claiming dower would thereby disturb the arrangements of the statute, and, quod hoc, frustrate its provisions. Equity will not permit this, but will put the party to her election." There is no decision in this state, so far as we are informed, which in any wise conflicts with the case of *Bulst v. Dawes*, supra. The cases of *Hosford v. Wynn*, 22 S. C. 309, and *Calmes v. McCracken*, 8 S. C. 87, simply recognize the right of a widow to claim both the dower and homestead out of her deceased husband's estate. But neither of those cases touches the question as to the nature of the widow's interest in the land set apart as homestead, or, rather, the question presented in the case now under consideration, as to whether the widow has such a legal estate in the land assigned as a homestead as would entitle her to demand partition thereof. In *Yoe v. Hanvey*, 25 S. C. 94, the question was presented whether land which had been set apart to the widow as a homestead could be partitioned at the instance of adult children, not living on the homestead with the widow; and the majority of the court denied the claim for partition, notwithstanding the provisions of the fourth section of the act of 1873 (15 St. at Large, 371), incorporated in Gen. St. 1882, § 1997, now to be found in section 2129, Rev. St. 1893, which is in these words: "If the husband be dead the widow

and children, if the father and mother be dead, the children living on the homestead, whether any or all of such children be minors or not, shall be entitled to have the family homestead exempted in like manner as if the husband or parents were living; and the homestead so exempted shall be subject to partition among all the children of the head of the family in like manner as if no debts existed: provided that no partition or sale in that case shall be made until the youngest child becomes of age unless, upon proof satisfactory to the court hearing the case, such sale is deemed best for the interest of such minor or minors." The conclusion in that case seems to have been reached, or at least may possibly be best supported, upon the theory that the homestead provision having been made for the benefit of the family, in order to secure to them a home, a partition of the land assigned as a homestead during the life of the widow and the minority of the children might have the effect of defeating, or at least impairing, the benefits designed to be secured by this beneficial provision. Be that as it may, however, that case is now referred to mainly for the purpose of calling attention to the fact that the statutory provision above quoted does not seem to contemplate any partition at the instance of the widow, for the language is, "and the homestead so exempted shall be subject to partition among all the children of the head of the family," without mentioning the widow as one of the participants in the partition. It may be that the real intent of the legislature was that the land assigned as a homestead should be kept together for the joint use and occupation of the family during the life of the widow, not subject to partition until her death; and not then, if any of the children were minors, unless it was proved to the satisfaction of the court that a partition or sale would be best for the interest of such minors, when the property should be equally divided among "all of the children." If this view be sound, it would afford additional ground in support of the conclusion reached by the circuit judge, denying the plaintiff's right to partition in this case. The judgment of this court is that the judgment of the circuit court be affirmed.

(44 S. C. 533)

JONES v. GARLINGTON.

(Supreme Court of South Carolina. Sept. 7, 1895.)

SALE — FAILURE OF CONSIDERATION — IMPLIED WARRANTY — CALENDARS — HARMLESS ERROR.

1. A seller of stock in a corporation can recover the price agreed to be paid, though the stock was of no value, there having been no fraud or misrepresentation, as there is no implied warranty of value.

2. Code, § 267, provides that if defendant falls to answer the case shall be put on the default calendar, and judgment may be given by default, if the action is for the recovery of mon-

ey only, and the demand be liquidated, and that in all other cases the relief shall be ascertained by a jury. Section 276 provides that there shall be three calendars; that there shall be placed on the first all cases to be passed on by a jury, on the second all cases to be passed on by the court, and on the third all cases where judgments by default are to be taken. Section 279 provides that the issues shall be disposed of as follows; unless the court shall otherwise direct: First, issues of fact to be tried by a jury; second, issues of fact to be tried by the court; third, issues of law. *Held* that, where there was an answer and the case was put on the jury calendar, but, on the case coming to trial, the answer was stricken out, defendant cannot complain that the case was still kept on the jury calendar, and that the jury was directed to find the amount plaintiff was entitled to, though the action was for the recovery of money only under a contract, and the demand was liquidated.

Appeal from common pleas circuit court, Spartanburg county; T. B. Fraser, Judge.

Action by W. M. Jones against J. C. Garlington. Judgment for plaintiff. Defendant appeals. Affirmed.

The complaint was as follows:

"The plaintiff complaining of the defendant in the above-stated case alleges: (1) That heretofore the defendant executed to plaintiff his promissory note in writing, dated March 1, 1892, by which he bound himself to pay to plaintiff the sum of five hundred dollars, with interest from March 1, 1892, at 8 per cent. per annum, according to the terms of said note, a copy of which is as follows: 'Spartanburg, S. C., March 1, 1892. For value received, I promise to pay to Wm. M. Jones, or order, at Spartanburg, S. C., with interest from date at eight per cent. per annum, five hundred dollars, as follows: One hundred dollars on or before May 1, 1892, and the balance on or before Oct. 1, 1892. And, in order to secure the payment of this note, I have deposited with Wm. M. Jones, as collateral security, ten shares of Spartanburg Herald Publishing Co. stock, Nos. 1 to 10, inclusive, being the same purchased by me from said Wm. M. Jones, and in part payment of which this note is given. And in case the said sums, or either of them, are not paid at maturity, I hereby empower the said Wm. M. Jones to sell the said stock, publicly or privately, to the highest bidder, after ten days' notice to me, and apply the same on the payment of this note, and pay over any surplus, if any, to me. J. C. Garlington. Witness: Geo. W. Nicholls.' (2) That no part thereof has been paid, except the sum of one hundred and ninety-two dollars, received June 3, 1892, from sale of the stock deposited as collateral, sold to the highest bidder at public outcry, after due notice and advertisement of same. (3) That there remains due and unpaid thereon the sum of three hundred and twenty-six and $\frac{48}{100}$ dollars, with interest thereon from Oct. 1, 1892, at eight per cent. per annum. Wherefore plaintiff demands judgment against the defendant for the sum of three hundred and twenty-six and $\frac{48}{100}$ dollars, with interest thereon from Oct. 1, 1892, and for the costs and disbursements of this action."

Bomar & Simpson, for appellant. Duncan & Sanders and Geo. W. Nicholls, for respondent.

GARY, J. For a proper understanding of this case it will be necessary to set forth the plaintiff's complaint in the report of the case. The defendant set up in his answer to the said complaint the defense of a failure of consideration. The cause was heard by his honor, Judge Fraser, and when the pleadings were read the plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained, and the answer struck out.

The testimony and the other proceedings were as follows: W. M. Jones, the plaintiff, testified as follows: "Q. Look at that paper [presenting paper]. A paper given you by Mr. Garlington? A. Yes, sir. Q. How much has been paid on it? A. \$192. Q. When? A. Part of it in June, 1892. Q. That is all that has been paid on it? A. That is all that has been paid on it. Mr. Simpson: Have we the right to ask Mr. Jones any questions? By the Court: I don't know. You have no answer in. I don't know that there is any defense for you. Mr. Simpson: Your honor rules we cannot cross-examine him and prove any reason why he cannot recover on that note. By the Court: No, sir. You have set up no reason at all. Mr. Sanders: We have no objection to his asking questions in response to those we have brought out. As to going into a defense, if he undertakes that, we will object. Mr. Simpson: I will ask one question. What company was incorporated by the legislature of this state—Mr. Sanders: We object. Mr. Simpson: Stock in which you sold to Mr. Garlington. What company was that? Mr. Sanders: We object. By the Court: The same thing that was sold was the same thing that was bought. By the Court: Take your verdict [to plaintiff's counsel]. [To jury:] Find out the amount, Mr. Freeman, and sign the verdict." The jury rendered a verdict for the full amount claimed. Immediately upon its return the presiding judge indorsed the following order on the complaint: "An oral demurrer having been interposed to the answer in the within case, and the same having been sustained; and it having been made to appear to my satisfaction, by testimony and by the verdict of the jury, that the amount due to plaintiff by the defendant on the note described in the complaint is three hundred seventy-three and $\frac{8}{100}$,—on motion of attorneys for plaintiff it is ordered that the plaintiff have judgment against the defendant for the sum of three hundred and seventy-three and $\frac{8}{100}$ dollars, and for the costs and disbursements of this action."

Appellant's first and second exceptions complain of error on the part of the presiding judge (1) "in sustaining the demurrer to defendant's answer and striking same out"; (2)

"in not overruling said demurrer and allowing defendant to offer proof of the allegations in his answer." There were no allegations of fraud or misrepresentation in the answer, but simply that there was failure of consideration. In the case of Colburn v. Mathews, 1 Strob. 232, Chief Justice O'Neill, in delivering the opinion of the court, uses this language: "That in the sale of an unnegotiable security therein no implied warranty of either its goodness or money value is too plain a proposition to require law to sustain it." The answer did not state facts sufficient to constitute a defense, and the presiding judge followed the proper practice in sustaining the demurrer and striking out the answer. *Lesly v. Bowle*, 27 S. C. 193. These exceptions are therefore overruled.

The third, fourth, and fifth exceptions will be considered together, and are as follows: They complain of error on the part of the presiding judge: (3) "In ordering the case tried, after answer was stricken out, before the jury, and in refusing on such trial to allow defendant to cross-examine witness for plaintiff, or to offer any testimony." (4) "In holding that defendant had no right to be heard by testimony or in cross-examining plaintiff's witness. The case was a default case, and should have been placed on calendar 3, and judgment applied for and rendered as in other default cases." (5) "In instructing the jury to find a verdict for plaintiff, and not, at least, leaving it to the jury to decide upon what amount, if any, was due to the plaintiff." Section 267 of the Code provides that: "Judgment may be had, if the defendant fail to answer the complaint as follows: 1. In any action on contract the plaintiff may file proof of lawful service of summons and complaint on one or more of the defendants, or of the summons according to the provision of section 151, and that no appearance, answer, or demurrer has been served on him. It shall be the duty of the clerk to place all such cases on the default calendar, and said calendar shall be called the first day of the term. When the action is on a complaint for the recovery of money only, judgment may be given for the plaintiff by default, if the demand be liquidated. * * * In all other the relief to be afforded the plaintiff shall be ascertained either by the verdict of a jury, or in cases in chancery by the judge, with or without a reference, as he may deem proper. The order for judgment in such cases shall be endorsed upon or attached to the complaint," etc. Section 276 of the Code provides that: "There shall be three calendars for the court of common pleas, and the clerk shall arrange the causes thereon as follows: Upon calendar 1 shall be placed all cases and issues to be passed upon by a jury. Upon calendar 2 shall be placed all cases to be passed upon by the court, including all motions and rules to show cause. Upon calendar 3 shall be placed all cases where judgments by default

are to be taken, and on the opening of the court of common pleas this calendar shall be called first in order." Section 279 of the Code provides that: "The issues on the calendar shall be disposed of in the following order, unless for the convenience of parties or the dispatch of business, the court shall otherwise direct: 1. Issues of fact to be tried by a jury. 2. Issues of fact to be tried by the court. 3. Issues of law." The foregoing provisions of the Code show that this was not in strictness a default case. There was an answer, although it was held insufficient in law. This case could not properly have been placed on calendar 3 while the answer formed part of the record in the case. When the cause came on for trial, it was found upon the proper calendar, and the circuit judge was right in rendering judgment on that calendar when nothing else remained to be done in the cause. After the answer was struck out, there was no longer an issue before the court between the plaintiff and defendant. The action was on a complaint for the recovery of money only under a contract, and the demand was liquidated. The plaintiff, therefore, was entitled to judgment, and it was not necessary either to introduce testimony or to submit the case to the jury. The defendant has not been deprived of any right, and cannot complain of error on the part of the presiding judge in doing a nugatory act which was in no respect prejudicial to him. These exceptions are therefore overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 538)

GROESBECK v. MARSHALL.

(Supreme Court of South Carolina. Sept. 7, 1895.)

NOTES—CONSIDERATION—PREVENTION OF PROSECUTION—ESTOPPEL—PAROL EVIDENCE—INSTRUCTIONS—WAIVER OF OBJECTIONS.

1. Where a third person gives his note to the one whose money has been embezzled, for the amount of his civil damages, to prevent a prosecution, it is void as against public policy.

2. One who gives a note to prevent prosecution of another for embezzlement is not estopped to set up, as against an assignee after maturity, its invalidity because of a certificate which he gave, and which was seen by the assignee before purchase of the note, in which he stated that the note was given in settlement of the claims (the nature of which was not stated) of certain persons against M., and that M. had conveyed land to him as security.

3. A note reciting that it was given for "value received" may be shown to have been given to prevent a criminal prosecution, notwithstanding recitals in a receipt given on execution of the note that it was given in settlement of the claims of certain persons against a third person.

4. Error cannot be predicated of a charge that when a party introduces evidence that satisfies the jury that, "more likely than not," a certain state of facts exists, he has established his case by a preponderance of evidence.

5. Objection not having been made to the taking of certain papers to the jury room when the jury asked for them, it is waived, though

objection had previously been made to their introduction in evidence.

Appeal from common pleas circuit court, Richland county; W. C. Benet, Judge.

Action by Jacob Groesbeck against J. Q. Marshall. Judgment for defendant, and plaintiff appeals. Affirmed.

Exhibits B and C were as follows: Exhibit B: "State of South Carolina, Executive Department. Office of Secretary of State. Columbia, 31st July, 1890. Received from J. Q. Marshall six hundred dollars, and his note for eleven hundred and eighty-seven 50-100 dollars, payable on the 1st day of October, 1890, in full settlement of all demands of Bowen F. Wise and John Strough against J. Foster Marshall. John W. Stokes, Attorney for the Above-Named Parties." Exhibit C: "This is to certify that on the 31st of July, 1890, I gave one John W. Stokes a note for \$1,187.50, in favor of himself, and due October 1st, 1890. Also, \$600 in currency. The proceeds of said note for \$1,187.50 to go to Bowen F. Wise and John Strough, respectively, or so much thereof as would be necessary to meet their claims against J. Foster Marshall; and the \$600 in currency, or so much thereof as would be necessary to meet the claims of the following-named parties against J. Foster Marshall, viz. Isaac Griffith, Sam. Spring, and one Kyle, as the said J. Foster Marshall may direct, or wish disposed of. The above-named amounts being due the aforementioned parties, more or less, by the said J. Foster Marshall, who has secured me for advancing this money by conveying to me his interest in real estate in Columbia, S. C. The said \$600 in currency in no wise to be held by the said John W. Stokes until the maturity of the above-described note for \$1,187.50, but to be paid immediately, or so much thereof as would be necessary to meet the claims of Sam'l Spring, Isaac Griffith, and Kyle, and the balance, if any, to be paid J. Foster Marshall; and the said John W. Stokes signed as attorney, and so stated to me that he was such attorney, for Bowen F. Wise and John Strough, a receipt in full of all demands of Bowen F. Wise and John Strough, against the said J. Foster Marshall. J. Q. Marshall."

On the subject of the preponderance of evidence, the court said: "I charge you that should you not be satisfied by the preponderance of the evidence that the defense of the defendant is sustained, then you will have to consider the case as made out by the plaintiff; and then upon him will fall the burden of proof to make out his case by the same standard,—the preponderance of the evidence. By that is meant, Mr. Foreman and gentlemen, the greater weight of the testimony on the issues involved. No court can provide a jury with scales on which to weigh the evidence; but a jury of twelve intelligent men, who have a knowledge of human nature, and, from their observation of life, understand the rules of common sense, are in possession of the best scales on which to weigh evidence.

When a jury comes to the conclusion that a defendant has brought forward evidence that satisfies them that, more likely than not, such and such was the case, then they may say he has established his defense by the preponderance of the evidence; or when the plaintiff satisfies the jury by competent evidence that it is more likely than not that such and such was the case,—not absolutely proved, not absolutely true, because neither the plaintiff nor the defendant is called upon to establish his complaint or make out his defense beyond a reasonable doubt, but, by the preponderance of the evidence, that it is more likely than not that such and such was the case,—then you may safely say that the defense has been made out by the preponderance of the evidence, or that the complaint has been established by the preponderance of the evidence.”

Bachman & Youmans, for appellant. Lyles & Muller, for respondent.

GARY, J. This is an action commenced by Jacob Groesbeck, of Mound City, Mo., against J. Q. Marshall, of Columbia, S. C., upon a promissory note made by the defendant, Marshall, on the 31st day of July, 1890, whereby he promised to pay to the order of one John W. Stokes the sum of \$1,187.50 on the 1st day of October, 1890. Stokes, the payee, indorsed the note, after its maturity, to the plaintiff, Groesbeck. The defendant, contemporaneously with the execution of said note, took from Stokes a receipt marked “Exhibit B,” and, after the maturity of said note, delivered to J. Foster Marshall a certificate marked “Exhibit C,” both of which will be set out in the report of the case. The defendant, in his answer, admitted the making of said note, and that no part thereof had been paid, but alleged as a defense to said cause of action that the consideration had failed, and that it was illegal in its inception, in that said note was given to prevent a criminal prosecution against J. Foster Marshall, the brother of the defendant, upon a charge of embezzlement alleged to have been committed in Missouri. The case came on for trial before his honor, Judge Benet, and a jury. The defendant, Marshall, in his testimony, says: “No consideration whatever was given to me for signing that note that I gave to Stokes, nor for the \$600. I owed Stokes nothing, or Wise nothing. It was given for the sole purpose of having the prosecution stopped. That certificate was given to prevent this new warrant, or this new arrest. Nothing was said about any consideration whatever from Foster Marshall, nothing was said— This was entirely an after matter— Mr. Youmans: We object. Witness (continuing): Given six months after. Q. (By Mr. Muller.) To whom did you give that? A. To Foster Marshall. Q. Why? A. For the purpose of preventing his being arrested. These people thought this note was not going to be paid, and I wanted to show them that it would be paid,—to prevent his second arrest. As soon as his second arrest,

I said I wouldn't pay that note. I would have paid that note, no matter what it was, if he had not been arrested the second time. It was because they broke their promise and faith with me, and had him arrested. * * * Q. (By Mr. Muller.) Was there any other reason why you signed that certificate to J. Foster Marshall, besides to prevent another arrest of your brother? A. To prevent his being arrested, and to let these people know that I would pay the note. I presumed they didn't think that note would be paid. If he hadn't been arrested, I would have paid the note. I don't know of anything else.” Groesbeck, in his testimony, says: “I am the owner of the note sued on in this proceeding, given by J. Q. Marshall to J. W. Stokes, and assigned to me by said Stokes. I gave my note for \$537, signed by myself and J. Foster Marshall, for the note sued on. Bought the note in April, 1891. I was security for Marshall to Holt County Bank for \$300, and for \$1,600 to Mound City Bank. I was to have the difference between the \$537 and the \$1,187.50, when collected, to be applied to these indorsements. * * * I relied upon the papers above referred to [Exhibits B and C], as to the consideration, and the information they contained as to consideration of the \$1,187.50 note. * * * I never heard of any defense to the payment of this note until I heard of it from Mr. Sloan, of South Carolina, in 1892,” etc. The jury rendered a verdict in favor of the defendant. The plaintiff appealed, upon numerous exceptions, which will be set out in the report of the case.

We will first consider whether the defendant had the right to interpose against the plaintiff such defenses as could have been set up against Stokes, the payee of the note. This is not an action for damages alleged to have been sustained by the plaintiff on account of incorrect statements in the instruments of writing aforesaid, inducing him to become the indorsee of the note, nor is it an action by the plaintiff, seeking to be subrogated to the rights of J. Foster Marshall in the property conveyed to the defendant on the ground that, the consideration upon which it was conveyed having failed, he should not longer be allowed to hold the same; but this action is simply upon the note. If the note was given upon the consideration that the prosecution against J. Foster Marshall for embezzlement should be discontinued, such contract would be against public policy, illegal, null, and void. *Williams v. Walker*, 18 S. C. 577, and cases therein cited. The general proposition that an indorsee of a negotiable promissory note after maturity takes it subject to all equities existing between the original parties to the note is not questioned, but it is contended that the defendant is estopped by reason of the fact that J. Foster Marshall, to whom the defendant had delivered the receipt and certificate hereinbefore mentioned, showed them to Groesbeck at the time he became the

indorsee of the note, and thereby induced such action on the part of Groesbeck. Let us analyze the statements contained in the receipt and certificate. The only fact set forth in the receipt which does not appear upon the face of the note is that it was in full settlement of all demands of Wise and Strough against J. Foster Marshall. The facts set forth in the certificate which do not appear upon the face of the note are (1) how the proceeds are to be divided among those to whom the several amounts are due; (2) that J. Foster Marshall had conveyed his interest in real estate in Columbia, S. C., to the defendant as security for the sums therein mentioned; (3) that Stokes signed the receipt in full as attorney, and so stated that he was attorney for the parties therein mentioned; (4) that the \$600 was not to be held until the maturity of the note for \$1,187.50, but was to be paid out immediately. The certificate bears no date, and there is nothing upon the face to show whether it was made before or after the maturity of the note, except the words "until the maturity of the note," which indicates that the certificate was made before the maturity of the note, though the testimony is to the contrary. The certificate does not show the nature of the demands which Wise, Strough, and others held against J. Foster Marshall. A note given by a third person as compensation for the civil injury in a case of this kind is without consideration. In the case of *Williams v. Walker*, supra, the court says: "But where a note is given by a person not liable for the damages sustained by the party injured, for the purpose of stopping a prosecution, even for assault and battery, it will be held void, as based upon an illegal consideration, because in such a case the consideration cannot be referred to the compensation due by the one to the other, for there is nothing due in such a case from the maker to the payee of the note, and the consideration must be referred to the stopping of the prosecution, and is therefore illegal." These views are fully supported by the following cases: *Corley v. Williams*, 1 Bailey, 588; *Mathison v. Hanks*, 2 Hill (S. C.) 625; *Banks v. Searles*, 2 McM. 356; *Gray v. Seigler*, 2 Strob. 117; also, *Hearst v. Sybert*, Cheves, 177. The case of *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49, differs from the case of *Williams v. Walker* in some important particulars: (1) The deed executed and delivered by the third party was based upon a valuable consideration, apart from the compensation made for the civil injury sustained by reason of the criminal act. (2) The contract was executed, the grantee performed his part of the contract, and the grantor acquiesced in his possession for 18 months. Under these circumstances, the court refused to lend its aid, as the parties were in *pari delicto*, especially as the status quo could not be restored, nor had there been any offer to restore it. It does not appear that the plaintiff made any in-

quiry as to the consideration of the note, although he had ample opportunity to do so. There were facts and circumstances sufficient to put him on inquiry, and his failure to find out the facts in the case must be attributable to his own negligence. He should have inquired why J. Q. Marshall, a third party, living in South Carolina, gave a note to settle demands of certain persons in Missouri against J. Foster Marshall. He cannot insist that he was misled by the statement in the certificate that J. Foster Marshall had conveyed his interest in real estate in Columbia for the purpose of securing the defendant for money advanced, as it is not contended that this statement is untrue. This court is therefore, in view of all the foregoing facts and circumstances, of the opinion that the defendant could set up his defense against Groesbeck, the plaintiff.

We will next consider whether parol evidence was admissible to show the illegality or failure of consideration of the note. The note recites simply that it was for value received. In a case of this kind, the case of *McGrath v. Barnes*, 18 S. C. 328, shows that parol evidence is admissible to show the true consideration. When the defense is interposed that a contract is illegal, there is no necessity to cite authorities to show that it is competent to introduce parol testimony as to all the facts and circumstances surrounding the transaction, just as in a case where usury is pleaded. The receipt and certificate were introduced in evidence by the plaintiff for the purpose of showing the consideration of the note. Defendant's testimony was introduced for the purpose of showing the consideration of the note, and not for the purpose of varying the terms of the receipt and the certificate. The receipt and the certificate were to be considered by the jury in coming to a conclusion as to what was the real consideration of the note, but their introduction in evidence did not prevent the defendant from showing the real consideration thereof.

Under the view which we have taken of the action, it was not material to show what was the consideration of the deed to J. Q. Marshall. The exceptions, therefore, bearing upon this question, need not be considered.

The exception (No. 17) complaining of error on the part of the presiding judge in admitting in evidence a copy of the record of the circuit court of Holt county, Mo., fails to point out any specific error, and is too general for consideration. For the same reason the exception (No. 29) as to admitting the general statutes of Missouri in evidence will not be considered.

Appellant contends that the presiding judge, in defining the meaning of "preponderance of evidence," erred in using the words "more likely than not." There was nothing in these words calculated to mislead the jury.

It is insisted that the presiding judge erred in permitting the jury to take to their room

the record from the circuit court of Holt county, Mo. The case shows that when the jury asked for the record no objection was made at the time, although objections had previously been made to its introduction. The plaintiff should have made the objection when the jury asked for it, and, having failed to do so, waived his right of objection.

The exceptions complaining of error on the part of the circuit judge in charging certain requests of defendant cannot be sustained, for the reason that the case shows that they were withdrawn.

Although we have not considered the exceptions in detail, we have endeavored to decide all questions properly arising under them. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 3)

KAMINSKY v. TRANTHAM et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

VENUE—FORECLOSURE OF MORTGAGES—EFFECT OF APPEAL.

1. Rev. St. § 2247, authorizing circuit judges to hear and determine at chambers actions for foreclosure, and issue writs and other processes in such actions, is limited by Code Civ. Proc. § 144, requiring actions of foreclosure to be tried in the county in which the land is situated, so that the judge of the circuit court of one county is without jurisdiction to order the purchaser at foreclosure sale in another county to show cause why he failed to comply with the terms of his bid.

2. An appeal from a decree of foreclosure suspends further proceedings.

Appeal from common pleas circuit court of Kershaw county; Ernest Gary, Judge.

Action by Hyman Kaminsky against W. D. Trantham and others for foreclosure of a mortgage. Judgment for plaintiff, from which one of the defendants appealed. Pending the appeal the land was sold under order of court, W. D. Trantham purchasing for another; and, on his failure to comply with terms of sale, order to show cause why he should not was issued by the judge of a county other than that in which the land was situated. From an order for a resale of the premises, W. D. Trantham appeals. Reversed.

W. D. Trantham, in pro. per. J. D. Kennedy, for respondent.

GARY, J. The proceeding out of which this appeal grows is based upon an action for the foreclosure of a mortgage, brought by the plaintiff, Hyman Kaminsky, as the assignee of John R. Falls, to whom the mortgage was given by the defendant W. D. Trantham. Decree for foreclosure was rendered by the Honorable James Aldrich, presiding judge, at the June, 1894, term of the court of common pleas for Kershaw county, he finding that there was due the sum of \$1,213.50, with interest from date of said decree (which was filed 27th July, 1894), and ordering a sale of the property upon the terms mentioned in his

decree. From this decree, J. T. Hay, one of the defendants, who purchased said premises at a sale thereof on sale day in January, 1893, under judgment of Patterson, Renshaw & Co. v. W. D. Trantham et al., and who was, and still is, in possession of the mortgaged premises, gave notice of his intention to appeal; and on the — day of —, 1894, the return was filed with the clerk of this court. At the September, 1894, term of court of common pleas for Kershaw county (his honor, Judge Benet presiding), an order was made directing the mortgaged premises to be sold on the first Monday in November; Judge Aldrich having previously amended his decree by providing that the sale be made by the sheriff, instead of the master, who, it seems to be conceded, is without authority of law to make such sale in Kershaw county. At the sale on the first Monday in November, 1894, the lands were bid off by W. D. Trantham, attorney, at the price of \$2,000. The purchaser having failed to comply with the terms of sale, he was served on the 18th of December, 1894, with a copy of an order signed by his honor, Ernest Gary, Judge of the Fifth circuit, at chambers in Columbia, S. C., on the 17th of December, 1894, requiring said purchaser to show cause before him, "at chambers in Columbia, S. C., on Tuesday, the 20th day of December, 1894, at 12 o'clock m., or as soon thereafter as counsel can be heard, as to why he has not complied with the terms of said decretal order, and, if sufficient cause be not shown therefor, as to why a resale of said premises should not be ordered." The defendant W. D. Trantham, Esq., pleaded orally to his honor's jurisdiction to sign the rule, or hear the return thereto, at chambers, and without the county in which the lands are situated, and pending appeal to the supreme court. His honor held that he had jurisdiction in the premises. The defendant made return showing that he purchased as attorney, and stating why the terms of sale had not been complied with. Such return was held to be insufficient, and the premises ordered to be resold. The defendant appeals upon three exceptions, the first and second of which are as follows: (1) "Because his honor was without jurisdiction to grant the said rule at chambers, and without the county in which the lands involved in the suit are situated. (2) Because his honor was without jurisdiction to hear the returns to said rule at chambers, and without the county in which the lands involved in the suit are situated."

Section 2247,¹ Rev. St., confers upon the judges of the courts of common pleas certain powers at chambers, but this section must be construed in connection with section 144² of the Code. *Woodward v. Elliott*, 27 S. C.

¹ Rev. St. § 2247, authorizes circuit judges to hear and determine at chambers actions for foreclosure, and issue writs and other processes in such actions.

² Code Civ. Proc. § 144, requires actions for foreclosure of mortgages to be tried in the county in which the land is situated.

368, 3 S. E. 477. The order to show cause was granted, and the proceedings heard and determined, in a county other than that in which the action of foreclosure was instituted and pending. There was not such consent for the hearing of the proceedings as is contemplated by section 144 of the Code, and his honor was without jurisdiction in the premises. These exceptions are therefore sustained.

The third exception is as follows: "(3) Because, an appeal in said cause having been filed in the supreme court of South Carolina prior to the issuing of said rule, his honor was without jurisdiction to grant the same, or to hear the return thereto, or to make any other order in the cause, pending such appeal." The cases of *Bank v. Stelling*, 32 S. C. 102, 10 S. E. 766; *Elliott v. Pollitzer*, 24 S. C. 86; *Le Conte v. Irwin*, 23 S. C. 112; *Hammond v. Railroad Co.*, 15 S. C. 35,—sustain the doctrine for which the appellant contends in this exception. It is the judgment of this court that the order of the circuit court be reversed.

(45 S. C. 33)

BRITISH & AMERICAN MORTG. CO. v. SMITH et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

ASSIGNMENT OF MORTGAGE — BONA FIDE PURCHASER.

A plea of bona fide purchaser will not avail an assignee of a note and mortgage transferred after maturity.

Appeal from common pleas circuit court, Union county; James Aldrich, Judge.

Action by the British & American Mortgage Company against A. Frank Smith and others to foreclose a mortgage. Judgment for plaintiff. Defendant G. D. Peake appeals. Affirmed.

The report of the master was as follows:

"This is an action brought by the British & American Mortgage Company against A. Frank Smith and others to foreclose a certain mortgage. The other defendants are all lien creditors of the mortgagor, Smith, except the defendant John Kennedy, who, on the first trial of the cause, claimed title to the land mortgaged. It was reported heretofore that A. F. Smith was the owner of the land sought to be sold, and that the mortgage of plaintiff was the first lien thereon. The whole difficulty seems to have arisen from some misunderstanding of counsel, for the priorities of the different mortgages were agreed upon at the first reference, and no question arose thereon until the argument before the circuit judge. It has therefore been recommitted to me to inquire and report on the relative priority of claim of defendant Glenn D. Peake and the mortgage of plaintiff. Since the former report was confirmed in all other respects, this is the sole question for adjudication.

"On this branch of the case I have taken considerable testimony, have heard argument, and report the facts to be as follows:

It is admitted that the first lien upon the premises is the amount of the taxes paid thereon by Miss Jane Nott, amounting at the date of this report to the sum of ——— dollars. On January 6, 1888, H. F. Smith executed a mortgage to A. S. and J. A. Corry for the sum of seven hundred and forty-seven dollars. Afterwards, Smith conveyed the land to defendant A. F. Smith, who also executed a mortgage to Corry Bros. amounting to one thousand and eighty-four dollars. This latter mortgage Corry Bros. had indorsed to defendant A. N. Wood, and, upon its maturity, Wood pressed the indorsers for the money, who called upon A. F. Smith to meet it. Mr. Smith, through his attorney, D. A. Townsend, Esq., made application for a loan from the plaintiff company. Mr. Townsend, after making investigation, told him that all prior mortgages would either have to be marked 'Satisfied,' or their priority waived, before the loan could be secured; telling him at the same time to bring down Mr. J. A. Corry, who was an attorney at law, to have this done. This information was conveyed to A. S. and J. A. Corry, and, while the testimony is conflicting, from my knowledge of the character of the witnesses, and all the facts and circumstances, I am forced to conclude that A. S. Corry authorized J. A. Corry to do whatever he thought best about the matter. This view is somewhat strengthened by the fact that J. A. Corry was an attorney at law. When Mr. Corry and Mr. Smith came into the law office of Mr. Townsend, this loan was fully discussed, and it was agreed that the lien of all prior mortgages should be waived in favor of that of the plaintiff company. The testimony of Mr. Townsend and Mr. Smith is very clear and positive upon this point. Mr. Corry went into the office of the register of mesne conveyances, and, after a few minutes, came out, and told Mr. Townsend that the lien of all the mortgages was waived, so far as that of the British & American Mortgage Company was concerned. As a matter of fact, however, Mr. Corry was mistaken, for he seemed to have overlooked the Smith mortgage entirely, and this is the chief difficulty about this case. That it was a mistake, as indicated above, is the only possible solution of the difficulty, for the fine character of Mr. Corry negatives the supposition that his statement was intentionally untrue. Upon the strength of Mr. Corry's statement that everything was all right, the loan was effected, and most of the money went to Corry Bros. Some time after this, and after the maturity of the Smith note and mortgage, A. S. Corry assigned his interest in it to the defendant Glenn D. Peake, who was ignorant of the circumstances above narrated. The only investigation made by Peake before making the loan was an inspection of the record.

"Upon these facts the question arises, should the claim of Peake be paid before

that of the plaintiff? And this is the sole question herein referred. There can be no doubt, granting the facts above found to be true, that J. A. Corry had the right, and actually intended, to waive the lien of the Smith mortgage; and hence the only point to be determined is, was Peake such a bona fide purchaser for value, without notice, as would entitle his claim to priority? We think the question is fully determined by the authorities in this state. The H. F. Smith note and mortgage, having been past due when assigned, passed subject to any and all defenses or equities existing between the parties. Glenn D. Peake stands in A. S. Corry's shoes, and has no higher rights than his assignor. Code, § 133; *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463. The recording acts have no application as contended by counsel for Peake. In this view of the case, it is unnecessary to consider whether A. S. Corry has done enough to estop him, and consequently his assignee. I therefore find that the claim of the British & American Mortgage Company should be paid before that of the defendant Glenn D. Peake, and next after the taxes hereinabove found due."

Bomar & Simpson, for appellant. C. E. Spencer, for respondent.

McIVER, C. J. The only question presented by this appeal is whether the mortgage held by the appellant as assignee has priority over the mortgage held by the plaintiff. So far as this question turns upon conclusions of fact, we are bound, under the well-settled rule, to adopt the findings of the master, concurred in by the circuit judge; for on some of the more material points the testimony is conflicting, and it cannot with any propriety be said that the conclusions reached by the master, and concurred in by the circuit judge, are either without testimony to sustain them, or are manifestly against the weight of the testimony. The only question, therefore, which we are called upon to decide, is whether the assignee of a note and mortgage transferred after maturity can claim the protection of the equity rule in favor of purchasers for valuable consideration, without notice. That question has been so conclusively determined, adversely to the view contended for by the appellant, by the very recent decision in the case of *Patterson v. Rabb*, 38 S. C. 138, 17 S. E. 463, that it is certainly unnecessary, and scarcely proper, to reopen the discussion. Regarding this as the only real question presented by this appeal, we have not deemed it necessary to go into any statement of the facts of the case, for which purpose reference may be had to the report of the master, where the facts will be found clearly and succinctly stated, and therefore that report should be incorporated in the report of this case. The judgment of this court is that the judgment of the circuit court be affirmed.

(45 S. C. 102)

BEARD v. JONES et al.

(Supreme Court of South Carolina Sept. 9, 1895.)

WILLS—CONSTRUCTION—DISPOSITION OF INCOME.

Testator directed his executors to use care in the education of his children, and to this end empowered them to use the income of the estate, or, if necessary, any part of the corpus thereof; that all his real estate be held by the executors as an entirety, and managed by them, till his youngest child was of age (unless the education of his children or some exigency required sale of part of it), when all his property should be divided equally among his children and his wife. *Held* that, till the arrival of the youngest child at maturity, the income was to be kept together, and appropriated by the executors to the maintenance of the family and the education of the children,—there not being more than enough for this,—and not to be divided equally among the children and the wife.

Appeal from common pleas circuit court of Oconee county; Ernest Gary, Judge.

Action by Hannah G. Beard against Cornelia Jones and another, as executors of the will of Christopher Jones, deceased, and others. Judgment for defendants. Plaintiff appeals. Affirmed.

The will of Christopher Jones was as follows: First. "I direct my executors to pay all my just debts and charges, and all just charges against my estate for my funeral expenses, and a suitable monument over my grave, as soon after my death as practicable." Second. "I direct and urge my executors to exercise great care in the education of my children, and, while bestowing due regard to the polite branches of learning, to keep prominently in view it is my earnest desire that especial attention shall be devoted in preparing my children to be good, practical, and useful members of society; and to this end my executors are empowered to use the income of my estate, or any portion of my personal property, or, if necessary, and my personal property should fall or be insufficient, in this event to sell such portions of my real estate for this purpose (after this expression of my desire that my children shall receive a thorough education) as I would reasonably do under the circumstances, if living." Third. "I will and desire that all my real estate which I now, at the signing of this will, own in the county of Oconee, shall be held by my executors as an entirety until my youngest child shall arrive at the full age of twenty-one years, and that no portion thereof be sold until that time, unless by misfortune my estate becomes so reduced as to require that this landed property shall be necessary for the maintenance of my family and the education of my children, which is paramount to any other consideration; but, should this contingency not occur, this said tract of land shall be managed and used by my executors for the joint benefit of my wife and children until my youngest child is twenty-one years old. And, when this period arrives, I will, devise, and bequeath all my estate, both real

and personal, to my dear wife and children, to be divided amongst them, share and share alike,—the child or children of a deceased child take the share of his, her, or their parent would have done if living,—to be held by them and their heirs respectively forever. The share of my estate in this item devised to my wife is in lieu and bar of dower, and she has her election to take this distributive share equally with the children, or to renounce this share and take her dower." Fourth. "Should my wife marry again after my decease, she cannot reasonably claim any portion of my estate, except her dower, which the law allows; and I will and direct, in case she marries, that she thereby forfeits all right to a distributive share in my estate, or any allowance for her support, except her dower."

Plaintiff's grounds of appeal were as follows: "(1) Because the circuit judge erred in holding that the widow, Cornelia Jones, is entitled to be maintained and educated from the income of the estate, at the expense of the adult children, whereas he should have held that she is entitled only to a child's part, to wit, one-eighth of the income of said estate. (2) Because the circuit judge erred in holding that the minor children and the widow were, if so much were necessary, entitled to the whole income of the estate, for their maintenance and education, till the youngest child shall be twenty-one years old, at the expense of all the other adult children. (3) Because the court should have held that the will nowhere makes any distinction between the children, but gives them and the widow, who is given a child's part, each one-eighth of the whole estate, income as well as principal, and the coming of age of the youngest child is only mentioned as the date at which the landed property is to be divided. (4) Because the circuit judge should have held that the will provided that, if each child's part of the income became at any time insufficient to maintain and educate him or her, then the corpus of the estate should be encroached upon for that purpose, and not that the share of the adult heirs should be taken therefor."

Stribling & Shelor, for appellant. Cothran, Wells, Ansel & Cothran and Thompson & Jaynes, for respondents.

McIVER, C. J. While there are other questions presented by the pleadings, the only question presented by this appeal is as to the disposition of the income of the estate of the testator while awaiting the time appointed by the will for the distribution of the estate, which has not yet arrived. That question depends upon the inquiry as to what is the proper construction of the will; and his honor, Judge Ernest Gary, who heard the case on circuit, rendered the following decree: "This case coming on to be heard by me as to the proper construction of the last will and testament of Christo-

pher Jones, deceased, the other questions made in the complaint having been settled by the parties before the hearing of this case, after hearing argument of the counsel for and against the proposition contended for, it is considered by the court, and it is adjudged, that the executor and executrix of the estate of said Christopher Jones, deceased, are authorized and empowered by said will to use all of the income, rents, and profits of said estate for the maintenance and education of the widow and minor children of said testator until the youngest child attains the age of twenty-one years, if so much be necessary for that purpose; and that if the said income, etc., is necessary for the maintenance and education of the widow and minor children of said Christopher Jones, then this plaintiff and the other children of said testator who have passed the age of twenty-one years are not entitled to any portion of the same. It being admitted at the bar by the counsel for plaintiff that said income, etc., up to the present time, has not been more than sufficient for the maintenance and education of the widow and minor children, it is therefore further ordered that the complaint herein be dismissed." From this judgment the plaintiff appeals upon the several grounds set out in the record, which should be incorporated in the report of this case.

The practical question made by these grounds is whether the income of the estate, while in the hands of the executors awaiting the coming of age of the youngest child,—the period at which the testator directs that his whole estate shall be equally divided among his wife and children, share and share alike,—shall be kept together and appropriated to the maintenance of the family and the education of the children, or whether such income, as it is received, shall be equally divided among the wife and children, so that the wife and each child should receive one-eighth part thereof, there being seven children. Of course, the solution of this question depends upon the inquiry, what was the intention of the testator, as disclosed by the terms of his will, read in the light of the surrounding circumstances? For this purpose a copy of the will should be incorporated in the report of this case. That instrument, though not couched in such formal and precise language as would have been employed by an expert, plainly evinces that the primary object of the testator was to secure for his children a good education, and the suitable maintenance of his wife and children while that object was being attained. For this purpose, therefore, he devotes, not only the whole income of his estate, but even goes further, and provides for a sale of so much of the corpus of his estate as might be necessary to accomplish this paramount object if the income should be insufficient for that purpose. There is not a word in the will which indicates any inten-

tion that the income should be divided; and, on the contrary, a division would be wholly inconsistent with the manifest scheme of the will, and would probably frustrate the accomplishment of the main object of the testator. It being admitted that the whole income of the estate has not been more than sufficient to accomplish the primary purpose of the testator, any inquiry as to what should be done with the surplus of the income, if there should be such a surplus, presents a purely speculative question, and hence such an inquiry cannot be entered upon in the present case. The view which we have taken is supported by the case of *McFeely v. Gadsden*, 2 Stro. Eq. 69, cited by counsel for respondents, which, though not directly in point, is quite analogous to the present case. The judgment of this court is that the judgment of the circuit court be affirmed.

(45 S. C. 17)

PICKENS v. BRYANT et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

ENFORCEMENT OF TRUST AGREEMENT — RES JUDICATA.

1. Where heirs appoint a trustee to collect the assets of the estate according to a trust deed by which one of the heirs agrees to pay to the trustee a note executed by them all to the decedent in his lifetime, an action will not lie against the heirs, by the trustee, on their promise to pay the note to the intestate, as the note can be collected only by the legal representative of the estate, but an action will lie to enforce the terms of the trust deed for payment of the note.

2. Where heirs appoint a trustee to collect and divide the assets of the estate according to the terms of the trust deed, by which one of the heirs agrees, for a valuable consideration, to pay to the trustee a note executed by all to the decedent in his lifetime, and a demurrer is properly sustained to a complaint by the trustee against the makers, alleging their promise to pay the note to the decedent, such action cannot be pleaded as *res adjudicata* in a subsequent action by the trustee against them on their promise to pay the note to him.

Appeal from common pleas circuit court of Anderson county; O. W. Buchanan, Judge.

Action by Andrew W. Pickens, as trustee, against M. A. C. Bryant and others, on a promissory note. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

The following are the pleadings in the cause:

"The complaint of the plaintiff, by his attorneys, shows: (1) That on or about the 6th day of November, A. D. 1890, the defendants executed and delivered to N. S. Clardy, now deceased, their certain sealed note in writing, of which the following is a copy, to wit: 'November 6th, 1890. Eight hundred and twenty-six dollars. One day after date we promise to pay N. S. Clardy or bearer eight hundred and twenty-six dollars, with interest at the rate of ten per cent. per annum, paid annually. Value received, as witness our hands

and seals this November 6th, 1890. M. A. C. Bryant. [L. S.] N. K. Bryant. [L. S.] W. J. Bryant. [L. S.]' (2) That thereafter, and before the commencement of this action, said N. S. Clardy departed this life intestate, and all of his heirs at law and distributees, by deed duly executed and recorded in the office of the register of mesne conveyance for the county and state aforesaid, constituted and appointed this plaintiff their agent and trustee to collect the assets due the estate of the said N. S. Clardy, and pay all of the debts due by the said estate, and divide the balance between the parties in interest according to their respective interests in said estate; and, pursuant to the trusts contained in said deed, this plaintiff has collected up a considerable amount of the assets of the said estate, and has paid all the indebtedness due by said estate. (3) That said deed was made by said heirs of N. S. Clardy, deceased, by way of compromise of all the claims, differences, and disputes of said heirs, and for valuable consideration to each of them, as well as for the purpose of saving costs and expenses of threatened and bitter litigation. (4) That the defendant M. A. C. Bryant is a daughter of the said N. S. Clardy, deceased, and one of his heirs at law and distributees, and, for valuable consideration, joined in said trust deed, and covenanted and promised, among other things, in said deed,—the same being in writing under her seal,—that she would 'pay her note of eight hundred and twenty-six dollars and interest to the said A. W. Pickens, trustee, as aforesaid,' said note being the same hereinbefore set out and described. All of which will more fully appear by reference to said deed, which is dated 1st day of March, A. D. 1892, and recorded in register mesne conveyance office for Anderson county, S. C., and to which plaintiff begs reference as often as may be necessary for the purposes of this suit. (5) That by virtue of the said deed of trust the plaintiff, as trustee as aforesaid, is the lawful holder and owner of the said sealed note, and that no part of the same has been paid, and there is now due and owing thereon by the defendants to the plaintiff the sum of eight hundred and twenty-six dollars, with interest thereon from the 7th day of November, 1890, at ten per cent. per annum, payable annually. (6) That the consideration of the said sealed note was the purchase money of a tract of land bought by the defendant M. A. C. Bryant of one — Wiggington, said sum of money being loaned her by N. S. Clardy for the purpose of making said purchase. Wherefore, plaintiff asks judgment against the defendants for the sum of eight hundred and twenty-six dollars, with interest thereon from November 7, 1890, and for the cost of this action."

The following is defendants' answer:

"The defendants, answering the complaint herein, respectfully show to the court:

"For a first defense: (1) That on the 11th day of January, 1894, Andrew W. Pickens, as

trustee for the heirs of N. S. Clardy, deceased, filed his complaint against these defendants, wherein said Andrew W. Pickens, as trustee as aforesaid, was plaintiff and these defendants were defendants, alleging as his cause of action the same note as is alleged in the complaint herein, his title and ownership by virtue of the deed of trust alleged, as will more fully appear by reference to the proceedings in said action. (2) That the defendants interposed a demurrer to said complaint, as follows: First. Because said complaint does not state facts sufficient to constitute a cause of action against these defendants in favor of the said plaintiff. Second. Because it appears upon the face of said complaint that the plaintiff has not the legal capacity to sue in this behalf; and these defendants submit that no one except the duly-qualified administrator of the estate of the said N. S. Clardy, deceased, intestate, can maintain an action on said note. (3) That the cause came on to be heard at the February term of the court of common pleas for the county of Anderson, state aforesaid, whereupon the court, at the February term, 1894, made an order in said cause, as follows: 'On hearing the pleadings in this action, and demurrer of defendants to the complaint, after argument of counsel, it is ordered and adjudged that said demurrer be, and the same is hereby, sustained, and that said complaint be dismissed, with costs.' And these defendants allege and submit that the matter of plaintiff's right and title to said note under said alleged trust deed is res adjudicata.

"For a second defense: (1) These defendants deny that said N. S. Clardy died intestate, as alleged in said complaint; but they allege that said plaintiff has made application for letters of administration on said estate, and the matter is still pending in the probate court on objections, namely, that said N. S. Clardy died leaving in force his last will and testament.

"The defendant M. A. C. Bryant, further answering, says: (1) That she is a married woman, and was such at the time said note is alleged to have been made, and she denies the allegations contained in paragraph 6 of said complaint. (2) That the consideration of said note was money and indebtedness of her husband, and was not for the benefit of her separate property, and she did not charge her separate property with the payment thereof. (3) That the said alleged deed of trust was gotten up mainly in fraud of this defendant's rights, and the alleged agreement on her part to pay said note was put in without her knowledge or consent, and said debt was not her individual obligation, and the parties instrumental in getting up said deed of trust have sought to take advantage of her ignorance, and make her liable in a different manner from the original contract. (4) That this defendant is an ignorant woman, has but little education, and did not understand her rights fully in the premises, and advantage

was taken of her ignorance, as well as of other legatees, to induce them to join in said deed of trust; and the whole thing was gotten up through fraud, misrepresentation, and suppression of the facts and terms of the last will and testament of her father, N. S. Clardy, deceased, and her signature to said deed of trust was obtained through fraud and misrepresentation as to her rights in the premises. (5) That said deed shows on its face that it has not been legally executed by all the heirs at law and legatees of said N. S. Clardy, deceased, and some of said parties in interest in said estate were under the age of twenty-one years at the time of the execution of said deed of trust. (6) That they deny each and every allegation contained in said complaint not herein specifically admitted or explained. Wherefore, these defendants ask judgment that said complaint be dismissed with costs."

The following is a copy of the complaint in the action, and referred to in defendants' answer:

"The complaint of the above-named plaintiff respectfully shows to the court: (1) That on the 6th day of November, 1890, the defendants M. A. C. Bryant, N. K. Bryant, and W. J. Bryant executed and delivered to N. S. Clardy their sealed note, whereby they obligated themselves to pay to the said N. S. Clardy or bearer the sum of eight hundred and twenty-six dollars one day after the date thereof, with interest at the rate of ten per cent. per annum, paid annually, of which said note the following is a copy, to wit: 'November 6th, 1890. Eight hundred and twenty-six dollars. One day after date we promise to pay N. S. Clardy or bearer eight hundred and twenty-six dollars, with interest at the rate of ten per cent per annum, paid annually. Value received, as witness our hands and seals this November the 6th, 1890. M. A. C. Bryant. [L. S.] N. K. Bryant. [L. S.] W. J. Bryant. [L. S.]' (2) That thereafter, and before the commencement of this action, the said N. S. Clardy departed this life intestate, and all of his heirs and distributees, by deed duly executed and recorded in the office of the register of mesne conveyance for the county and state aforesaid, made and appointed this plaintiff as their agent and trustee to collect the assets due the estate of the said N. S. Clardy, and pay all the debts due by the said estate, and divide the balance between the parties in interest according to their respective interests in the said estate. (3) That by the trust above set forth this plaintiff is the lawful holder and owner of the said sealed note. (4) That no part of the said sealed note has been paid, either to the said N. S. Clardy, in his lifetime, or to this plaintiff, or any other person authorized to receive the same, since the death of the said N. S. Clardy; and there is now due and owing to this plaintiff, as trustee as aforesaid, on the said sealed note, by the defendants above named, the sum of eight hundred and twenty-six dol-

lars, and interest thereon from the 7th day of November, 1890, at the rate of ten per cent. per annum, payable annually. (5) That the said sealed note was given to the said N. S. Clardy by the defendants above named for the purchase of a tract of land from him by the defendant M. A. C. Bryant, who is a married woman, and still owns the said land so purchased from him, for which the said sealed note was given. Wherefore, this plaintiff, as trustee as aforesaid, asks judgment against the defendants M. A. C. Bryant, N. K. Bryant, and W. J. Bryant for the sum of eight hundred and twenty-six dollars, and interest thereon from the 7th day of November, 1890, at the rate of ten per cent. per annum, payable annually, and for the costs of this action."

The demurrer of defendants to said complaint is correctly set out in answer above set out.

The following is the order of Judge Buchanan:

"This case having been submitted, by agreement of counsel in open court, on the question of *res adjudicata* raised by the answer of the defendants, after hearing the pleadings in this case, pleadings, and judgment of court relied on as *res adjudicata*, after argument of counsel, it appearing to the court that plaintiff's capacity to sue on the note herein was adjudicated in the former action by him against the same defendants adversely to his capacity, it is ordered and adjudged that the plea of *res adjudicata* be, and same is, hereby sustained, and the complaint herein be dismissed, with costs."

Plaintiff duly served notice of his intention to appeal from said order, and now appeals from same to this court upon the following exceptions:

"(1) Because his honor erred in holding that the question of 'plaintiff's capacity to sue in this action had been adjudicated in the former action by him against the same defendants adversely to his capacity.' (2) Because his honor erred in holding that the question of plaintiff's capacity to sue in this action was decided in the former action, it appearing from the pleadings in the two cases that the complaint in the case now before the court shows plaintiff's capacity to sue by facts not stated in the former complaint. (3) Because his honor erred in holding that the question of plaintiff's capacity to sue was *res adjudicata*, the subject-matter and cause of action in the two cases being different. (4) Because his honor erred in holding that the order made in the former case between the parties herein decided anything other than that the complaint in the former action did not state facts sufficient to constitute a cause of action in favor of said plaintiff against said defendants."

Bonham & Watkins, for appellant. Tribble & Prince, for respondents.

GARY, J. This action was commenced in the court of common pleas for Anderson

county on the 8th of January, 1895, by service of the summons and complaint on the defendants. The defendants answered the complaint, setting up as their first defense that of *res adjudicata*, which, together with the former complaint, to which reference is made in said first defense, the order of his honor Judge Buchanan, and appellants exceptions, will be incorporated in the report of the case. The substantial differences in the two complaints are contained in the additional allegations set forth in paragraphs 3 and 4 of the second complaint, which are as follows: "(3) That said deed was made by said heirs of N. S. Clardy, deceased, by way of compromise of all the claims, differences, and disputes of said heirs, and for valuable consideration to each of them, as well as for the purpose of saving costs and expenses of threatened and bitter litigation. (4) That the defendant M. A. C. Bryant is a daughter of the said N. S. Clardy, deceased, and one of his heirs at law and distributees, and, for valuable consideration, joined in said trust deed, and covenanted and promised, among other things, in said deed,—the same being in writing under her seal,—that she would 'pay her note of eight hundred and twenty-six dollars and interest to the said A. W. Pickens, trustee as aforesaid,' said note being the same hereinbefore set out and described. All of which will more fully appear by reference to said deed, which is dated 1st day of March, A. D. 1892, and recorded in register of mesne conveyance office for Anderson county, S. C., and to which plaintiff begs reference as often as may be necessary for the purpose of this suit."

It will not be necessary to consider the exceptions *seriatim*, as they raise the one question,—whether his honor, Judge Buchanan, was in error in sustaining the defense of *res adjudicata*. The additional allegations, it will be seen, are (1) that the defendant M. A. C. Bryant was a daughter and an heir at law of N. S. Clardy, and joined in the trust deed; (2) the valuable consideration to her for so signing; and (3) a special promise on her part, contained in said trust deed, "to pay her note of eight hundred and twenty-six dollars and interest to the said A. W. Pickens, trustee," said note being the one sued on in this action. There were no allegations in the first complaint to prevent the application of the familiar principle that when a person dies intestate an action can be maintained upon a note belonging to his estate only by his legal representative, through regular administration. *Ex parte Davega*, 31 S. C. 413, 10 S. E. 72; *Haley v. Thames*, 30 S. C. 273, 9 S. E. 110; *Richardson v. Cooley*, 20 S. C. 347; *Trimmler v. Thomson*, 10 S. C. 164; *Richardson v. Gower*, 10 Rich. Law, 109. The demurrer to the first complaint was properly sustained.

The additional allegations in the second complaint materially change the cause of action. When a person dies intestate, seised

and possessed of real and personal property, and there are creditors of his estate, the heirs at law, distributees, and creditors all have an interest in said estate. The heirs and distributees have the right to make such settlement as will only affect their interests. They cannot, however, under such settlement of their interests, make any agreement that would be obligatory on the creditors. We do not understand that the heirs at law and distributees, in entering into the agreement mentioned in the complaint, intended to do more than bind themselves, but not the creditors of the estate. We do not admit that A. W. Pickens, the plaintiff, is an executor de son tort quoad the defendant M. A. C. Bryant. *Halley v. Thames*, supra. But, even admitting that he is an executor de son tort, in intermeddling with the intestate's estate by taking possession of the note and suing thereon, does this enable the defendant M. A. C. Bryant to repudiate her contract, by refusing to pay her note according to agreement? We think not. If the defendant pays the note according to her promise, this would be a legal and valid payment of the note, provided the trustee should distribute the proceeds in such manner as the law directs. Rev. St. § 2038. When she entered into the contract she took upon herself the risk of having to pay the note, through regular administration, in case the proceeds were not distributed by the trustee in making such payments as "lawful executors or administrators may or ought to have and pay by the laws and statutes of this state." We do not see how it can be seriously questioned that the agreement on the part of M. A. C. Bryant, for valuable consideration, to pay money to the trustee, to be expended in extinguishing the indebtedness of the estate, was binding on her and the parties with whom the agreement was made. The present action is simply to enforce performance of that agreement as between the parties bound thereby. The provisions of section 2039 of the Revised Statutes, for compelling executors de son tort to deliver possession of property in their hands to the legal representatives through regular administration are in no wise involved in this case.

Having reached the conclusion that the allegations of the two complaints are materially different, the order sustaining the defense of *res adjudicata* was erroneous. It is the judgment of this court that the order of the circuit court be reversed.

McIVER, C. J. (concurring). The only question presented by this appeal is whether there was error in sustaining the defense of *res adjudicata*, and to that alone should this decision be regarded as responsive. I agree that there was error in sustaining that defense, so far as the defendant M. A. C. Bryant is concerned, for the simple reason that the cause of action in the former case was the breach of a promise to pay the amount stated to the alleged intestate, while here the

cause of action alleged against M. A. C. Bryant is the breach of a promise to pay the said sum of money to the plaintiff. It is true that both promises were made to pay the same debt, but they were made at different times, to different persons, and evidenced by different instruments,—one by the note set out in the complaint, and the other by the trust deed referred to in the complaint in the present action. But, so far as the other two defendants are concerned, I see no error on the part of the circuit judge in sustaining the defense of *res adjudicata* as to them, for there is no new or additional cause of action set forth against them in the present complaint; but, so far as I can perceive, it is precisely the same as that set forth against them in the previous complaint.

(45 S. C. 87)

FINLEY v. CUDD et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

COSTS ON APPEAL.

1. Code, § 326, provides that the clerk shall insert in the entry of judgment on appeal the expense of printing the papers for any hearing, when required by a rule of court. *Held*, that a party who, on account of his poverty, is allowed, under section 343, to substitute manuscript or typewritten, instead of printed, copies of the case and points and authorities, is entitled to his expenses incurred in having such substitutes prepared.

2. Rev. St. § 2551, relating to costs in the circuit court, provides that: "The following costs shall be allowed in all classes of cases, legal or equitable; * * * for making and serving a case or case containing exceptions, ten dollars," etc. *Held*, that an item of costs "for making and serving a case containing exceptions, for the purpose of an appeal to the supreme court," was properly disallowed, that portion of the section not having reference to costs in the supreme court.

Appeal from common pleas circuit court of Spartanburg county; Norton, Judge.

Motion by Joseph Finley against J. N. Cudd and another to tax certain costs. From the order therein made, plaintiff and defendants appeal. Modified.

Duncan & Sanders, for Joseph Finley. Nicholls & Jones, for J. N. Cudd and O. S. Roberts.

McIVER, C. J. It seems that the plaintiff appealed from a judgment rendered in favor of defendants, and succeeded in having the same reversed. 20 S. E. 32. Subsequently, the parties, by their attorneys, appeared before the clerk for the purpose of having the costs and disbursements of said appeal taxed by him. A controversy arose as to two of the items in the bill of costs proposed by the plaintiff: "(1) Making and serving case containing exceptions, \$10, and (2) amount paid for 6 typewritten copies of case and 8 typewritten copies of the argument, \$10." The clerk allowed the first item, but disallowed the second, and adjusted the costs accordingly. To this adjustment both parties except-

ed,—the plaintiff, upon the ground of error in disallowing the second item above stated; and the defendants, upon the ground of error in allowing the item first above stated. Upon these exceptions the case was heard by his honor, Judge Fraser, who rendered judgment overruling plaintiff's exception, and sustaining the exception of defendants. From this judgment plaintiff appeals, upon the grounds set out in the record, which make but two questions: (1) Whether the plaintiff was entitled to tax, as necessary disbursement, the amount paid by him for typewritten copies of the case and argument; (2) whether plaintiff was entitled to tax as costs \$10 for making and serving case and exceptions for the purposes of his appeal.

It seems that the plaintiff, having made the necessary affidavit, was relieved from the necessity of printing his case and points and authorities, and was allowed to present the same typewritten, under section 343 of the Code; and the practical inquiry presented by the first question is whether the plaintiff is entitled to tax, as a necessary disbursement, the amount which he was required to pay for the typewritten copies which he was allowed to substitute for printed copies. We suppose that there can be no doubt that if the plaintiff had used printed, instead of typewritten, copies, he would have been allowed to tax, as a necessary disbursement, the amount necessary to be paid for printed copies, as such printed copies are required by rule 6 (except in cases falling under section 343 of the Code, above cited), and constitute, therefore, a necessary disbursement; and, by section 326 of the Code, the clerk is required to insert in the entry of judgment "the sum of allowances for cost and disbursements, as provided by law, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing, when required by a rule of the court." (Italics ours.) Now, if parties are allowed the expense of printing papers because such printing is required by a rule of the court, surely a party who, on account of his poverty, is allowed to substitute manuscript or typewritten copies for printed copies should be entitled to a similar allowance for the expense incurred in obtaining the authorized substitute; and such, we are satisfied, was the true intent of the legislature. We think, therefore, that the circuit judge erred in disallowing the item charged as a necessary disbursement, in procuring typewritten copies of the case and points and authorities. We desire to add, however, in order to avoid any misapprehension in future, and not as applicable to this case,—inasmuch as the point was not raised either before the clerk or the circuit judge,—that we are not to be understood as saying that a party is entitled to charge for the expense of printing an extended argument, for the rules do not

require the argument to be printed, but only the "points and authorities." See rules 8 and 9 of this court.

As to the second question, we concur with the circuit judge. It is well settled that the right to costs depends wholly upon statute, and hence, when a claim to any given item of costs is asserted, the claimant must be able to point to the statute allowing such item. *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706. Here the item of costs claimed is for making and serving a case containing exceptions, for the purpose of an appeal to the supreme court, \$10; and the statute referred to as authorizing the charge of the item is section 2551 of the Revised Statutes of 1893. From the express terms used in that section, it is very manifest that its provisions relate only to costs in the circuit court, and no reference whatever is made to the costs of an appeal to the supreme court until we reach the third line from the end of the section, where we find these words, after a semicolon: "On appeal to the supreme court, fifteen dollars; on argument in supreme court twenty dollars." Reliance, however, is placed upon the last sentence of the section, which reads as follows: "The following costs shall be allowed in all classes of cases, legal or equitable; for the plaintiff's or defendant's attorneys, for making and serving a case or case containing exceptions, ten dollars; for procuring an order of injunction, five dollars; an appeal to supreme court fifteen dollars; on argument in supreme court twenty dollars." Now, when, as we have said, it is obvious that in the preceding portion of the section, which is headed "Plaintiff's and Defendant's Attorney's Costs in Equity Cases," the reason for the language used in the first part of the last sentence is manifest. The previous portion of the section having been devoted to declaring what costs should be allowed in equity cases, when the provision establishing the amount of costs to be allowed for making and serving a case, or a case containing exceptions, was reached, inasmuch as the necessity for doing that might arise in a law as well as in an equity case, the language used was very natural,—*"The following costs shall be allowed in all classes of cases, legal or equitable,"* etc. It will be observed that the language used is not, as the appellant's counsel has it in his argument, *"in all cases,"* but *"in all classes of cases,"* whether legal or equitable, in order to show that while the legislature, in the previous portion of the section, had provided for costs in equity cases, the intention was that this particular provision should not be confined to equity cases, but should embrace all classes of cases, whether legal or equitable. It will also be observed that in this last sentence the language is not *"in all cases in any court,"* as the argument of counsel for appellant requires us to assume; on the contrary, the language used is entirely ap-

propriate to the idea that the legislature was still dealing with costs in the circuit court, and not until the last three lines of the sentence is reached is there a single word indicating a purpose to provide for costs in any other court; but, when those lines are reached, then, for the first time, the intention to provide for costs in the supreme court is indicated. We do not think, therefore, that either this statute, or any other which has been brought to our attention, provides for costs in making or serving a case, or a case containing exceptions, for the purpose of an appeal to the supreme court, and there was no error on the part of the circuit judge in so holding. The judgment of this court is that the judgment of the circuit court be modified as herein indicated, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

(45 S. C. 11)

MASON & RISCH VOCALION CO., Limited,
v. KILLOUGH MUSIC CO.

(Supreme Court of South Carolina. Sept. 9,
1895.)

ISSUE OF EXECUTION—DOCKETING JUDGMENT.

Code, § 300, provides that the clerk shall keep a book for the entry of judgments, called the "Abstract of Judgments." Section 301 provides that each case shall be entered after judgment. Section 308 provides that "executions must * * * intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, * * * the amount of docketing in the county to which the execution is issued," etc. *Held*, that an execution issued before the judgment was entered in the "Abstract of Judgments" was of no effect.

Appeal from common pleas circuit court of Florence county; Fraser, Judge.

Motion by the Killough Music Company to set aside an execution issued on a judgment previously rendered against it in favor of the Mason & Risch Vocalion Company, Limited. From an order granting the motion, plaintiff appeals. Affirmed.

This cause was heard before Judge Fraser, who made the following decree:

"This case is before me at chambers on a motion to set aside an execution issued in the case, and for other relief. The facts stated in the motion papers are not controverted, and it is not necessary to restate them in this order. I am satisfied, that the clerk had no right to issue the execution before the entry of the judgment, and that a mere filing with the clerk of formal judgment made out by plaintiff's attorneys is not such an entry of judgment as is contemplated by the Code. The judgment, as I understand the cases, is not entered until entered by the clerk in the Abstract of Judgments. I am inclined, however, to think that issuing of the execution the day before the judgment was entered on the Abstract of Judgments was a mere irregularity, and that the execution is not void, but merely voidable. I adopt the view of the

law I find in *Freem. Ex'ns*, § 25, as follows: 'But a very decided preponderance of the authorities is against the first decision above referred to, and in favor of the proposition that the premature issuing of an execution is an irregularity, merely. The execution is erroneous, but, like an erroneous judgment, it must be respected, and may be enforced until it is vacated in some manner prescribed by law. No one but the defendant can complain of it, and even he cannot do so in a collateral proceeding.' If the execution is void, the objection may be made collaterally whenever it may be set up as against the defendant or any one claiming under him. Whether, however, it is void or only voidable, it may be quashed on motion in the cause made by defendant. *Freem. Ex'ns*, § 73.

"The order made by Judge Townsend for leave to enter judgment immediately cannot be reviewed here. The fact that defendant executed a general assignment, between the order of Judge Townsend, the issuing of the execution and the levy thereunder, on the one hand, and the entry of the judgment on the Abstract of Judgments, cannot affect the rights of the defendant on this motion. He certainly has an interest that the amount and value of the property going under his assignment to his creditors shall be as large as possible, so as, at least, to give some inducement to them to accept in full; and, for aught that is known or ought to be known in this case, there may be a surplus coming to him. I do not think the question of notice answering for entry on the abstract has any bearing on this case. It is therefore ordered and adjudged that the execution in this case be set aside, and the levy made by the sheriff be vacated and set aside; and this order is to be without prejudice to the right of plaintiff to issue another execution on said judgment now entered in the abstract in the manner prescribed by law."

The plaintiff herein, the Mason & Risch Vocalion Company, Limited, excepted on the following grounds: "First. Because his honor, Judge T. B. Fraser, erred in not holding that the motion to set aside execution could not properly be made by the Killough Music Company, nor could it appear in court, all its rights in this action having been previously transferred, with all other of its chattel property, to W. M. Brown, as assignee for the benefit of its creditors. Second. Because his honor erred in not holding that the statute directing clerks to enter judgments in the Abstract of Judgments book before issuing execution is directory, and not mandatory, and that the lien of the execution so issued was valid. Third. Because his honor erred in not holding that the levy on the property under the execution constituted a valid lien. Fourth. Because his honor erred in not holding that the failure of the clerk to enter the judgment in the Abstract of Judgments book was a mere irregularity, which could be corrected by amendment, and

said execution was not therefore voidable. Fifth. Because his honor erred in not refusing said motion to set aside execution."

Johnsons, De Jongh & Hancel, for appellant. P. A. Wilcox, for respondent.

GARY, J. On the 12th of September, 1895, the plaintiff took judgment by default against the defendant for the sum of \$858.76, and obtained leave from his honor, Judge Townsend, to enter up judgment immediately, on the ground, as set forth in an affidavit, that defendant had threatened to make an assignment if any judgment was taken against it. Judgment was shortly afterwards signed and sealed by the clerk of court, who also, at the request of plaintiff's attorneys, issued execution upon said judgment. The sheriff, upon the same day, levied upon certain personal property of the defendant. Thereafter, and on the same day, the defendant made an assignment for the benefit of its creditors. On account of the pressure of his duties in the court room, which required his constant presence, the clerk of the court did not enter the judgment in the book called "Abstract of Judgments" until the following day, 13th September. The case then came before his honor, Judge Fraser, at chambers, on a motion by the defendant to set aside the execution, and for other relief. The order of his honor, Judge Fraser, together with appellant's exceptions, will be incorporated in the report of the case. It will not be necessary to consider the exceptions seriatim.

Section 300 of the Code provides that the clerk shall keep, among the records of the court, a book for the entry of judgments, called the "Abstract of Judgments." Section 301 provides how each case shall be entered after judgment or final order. The provisions of this section are substantially incorporated in section 783, Rev. St. Section 308 of the Code is as follows: "That execution must be directed to the sheriff, * * * attested by the clerk, subscribed by the party issuing it, or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment if it be for money, the amount actually due thereon, and the amount of docketing in the county to which the execution is issued," etc. A judgment, as defined by the Code, is the final determination of the rights of the parties in the action. The final determination of the rights of the parties in the action takes place when the court does all that it is required to do in determining those rights; and it is not the less a judgment because certain requirements of the statute have to be complied with so as to enforce it by execution, give it a lien on real estate, make it competent evidence, or effectual for other purposes. In the case of *Clark v. Melton*, 19 S. C. 498, the court says: "To give force and effect, however, to this judgment, it is true that a formula was required to be prepared

and filed in the clerk's office, and to be entered in the book entitled 'Abstract of Judgments'; and, under an act of the general assembly, the clerk in whose office this formula was filed was required to date it and indorse his official signature. It will be observed, however, that this formula, etc., did not constitute the judgment of the court, nor did the date or signing by the clerk with his official signature add anything to its intrinsic character. The judgment issues from the court, not from the attorneys or the clerk. It precedes the formula, and is authority upon which the formula is prepared, but the formula constitutes no part of the judgment. It is only evidence of the existence of the judgment, and enables the plaintiff to have it enforced. The judgment, as we have said, is the judicial determination of the rights of the parties, but it is not self-operating. It cannot enforce itself. It becomes necessary, therefore, that some machinery should be adopted to secure to the successful party the fruits of his recovery. Hence, it was provided by act that a supposed copy of the judgment pronounced by the court should be filed in the clerk's office, which, being done, gave a lien on the property of the debtor, and authorized the issuing of a *f. fa.* for its enforcement; and the object of the act in requiring that this paper should be dated and signed officially by the clerk, no doubt, was that all parties should have the means of knowing of the lien, so that all persons dealing with the debtor might be put upon their guard." In section 108, 1 Black, Judgm., it is said: "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of law upon the facts in controversy as ascertained by the pleadings and verdict. The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. It is the former, therefore, that is the effective result of the litigation. In the nature of things a judgment must be rendered before it can be entered. And not only that, but, though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its vitality remain in abeyance until it is put upon the record. * * * There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right of appeal. And so a judgment must commonly be docketed before it can create a lien upon land; and in some of the states (though not all) the priority among different liens is determined by their respective dates of docketing. And, again, the record entry of a judgment is indispensable to furnish the evidence of it when it is made the

basis of a claim or defense in another court. But, with these exceptions, a judgment is independent of the fact of its entry, and in all cases the distinction between rendition and entry is substantial and important." Section 308 of the Code, hereinbefore set forth, and the other provisions of the Code relative to executions, all show that the law contemplates an entry of the judgment in the book entitled "Abstract of Judgments" before the execution can properly be issued. The failure of the judgment creditor to enter his judgment in the book of "Abstract of Judgments" before issuing execution to enforce the same was an irregularity, and the circuit judge was not in error in granting the order from which the defendant has appealed. Having reached the conclusion that the issuing of the execution before the judgment had been entered in the manner provided by law was an irregularity, it follows, in the light of the unbroken line of decisions in this state, that no one but the defendant in the action in which the judgment was recovered has the right to take advantage of such irregularity. It is the judgment of this court that the order of the circuit court be affirmed.

(45 S. C. 40)

JACOBS v. GILREATH.

(Supreme Court of South Carolina. Sept. 9, 1895.)

**ALTERATION OF NOTE — ACQUIESCENCE —
MATERIALITY.**

1. In an action on a note, a nonsuit on the ground of an alteration of the note was properly refused, where defendant had acquiesced therein.

2. In an action on a note, where the defense of alteration was set up, a charge that the jury should consider "the facts and circumstances under which the change was made, if it was material, and if she consented to or acquiesced in it," and that "if she did not acquiesce in the change she was not liable," is not objectionable as submitting to the jury the question of the materiality of the alteration.

3. Where, after making a payment on a note within the statutory period, the maker acquiesces in its alteration, the new promise implied from such payment will be regarded as a promise to pay the note as altered.

4. Whether an alteration in a note was made with the maker's knowledge and consent is a question for the jury.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.

Action by R. H. Jacobs against Mattie Gilreath on a promissory note. There was a judgment for plaintiff, and defendant appeals. Affirmed.

The charge of the court below was as follows: "This is a suit by the plaintiff, R. H. Jacobs, against the defendant, Mattie Gilreath, to recover the amount due upon a promissory note which is set out in the complaint. It is conceded in the argument that Mrs. Gilreath signed the note, but it is contended that she signed the note as surety to her husband. That is the first question for you to consider.

You will remember that the plaintiff testified that he lent the money to the defendant herself. On the other hand, the defendant testified that she signed the note as surety to her husband. If she did negotiate the loan, and signed the note as principal, she would be liable. If she did not sign it as principal, but as surety to her husband, she would not be liable, under the statute law of this state. If you find that she signed it as surety, you need not go any further. She could not be liable. The next defense set up is the statute of limitations, and, if there has been no payment made by her within six years, she could not be recovered against. It would be barred. If a payment has been made within six years, while the original note would be barred, a recovery could be had upon the new promise. It is important for you to determine who made the payment. If she made the payment, or furnished the money, although the old debt may be barred, she would be liable on the new promise. If, however, a payment was made without her knowledge, and she did not afterwards ratify it by a promise, she would not be liable on the note. If upon her acquiescence, or if she had any part in the payment, she would be liable. The next is a certain alteration of the note. The law is that where a contract has been entered into and signed, no party to it has any right to make any alteration in it without the consent of the other. If any alteration has been made without the knowledge or consent of the party executing the note, it would vitiate it. If an alteration is made without the knowledge or consent of the party, and she afterwards acquiesced in it, it would bind her. So you will take into consideration the facts and circumstances under which the change was made, if it was material, and if she consented to it or acquiesced in it. Those are the facts for you to consider. Here is a direct conflict between plaintiff and defendant. You are to settle that. As I have charged you already, if she signed as surety she is not liable. If she did not make a payment, or if she did not acquiesce in the change, she is not liable."

W. H. Irvine, for appellant. J. I. Earle and T. H. Cooke, for respondent.

McIVER, C. J. This action was commenced on the 8th day of February, 1893, to recover the amount mentioned in a note bearing date the 1st day of January, 1886, whereby the defendant and one H. G. Gilreath (who, it seems, was her husband) jointly and severally promised to pay to the plaintiff, or his order, 12 months after date, the sum of \$550, with interest from date, at 10 per cent. per annum, until paid. The statute of limitations having been pleaded, the plaintiff, by leave of the court, filed an amended complaint, setting forth sundry payments alleged to have been made by defendant, and indorsed on the note, within the statutory period, and also

alleging that plaintiff had, by an indorsement on the note, agreed to reduce the rate of interest, from and after the 1st January, 1891, to 8 per cent. per annum. To this amended complaint the defendant filed her answer setting up the following defenses: (1) That she was a married woman, and signed the note as surety for her husband, and that the contract evidenced thereby was not made with any reference to her separate estate, but for the benefit of her husband, which fact was known to plaintiff. (2) She denies having made any of the payments indorsed upon the note, either directly or indirectly, but says that she supposes such payments were made by her husband. (3) The statute of limitations is again pleaded. At the close of plaintiff's testimony the defendant moved for a nonsuit upon the ground that defendant, being a married woman, could not be made liable upon such an obligation as that set forth in the complaint. The motion was refused upon the ground that there was testimony tending to show that the money sued for was lent to the defendant herself, and therefore it became a part of her separate estate. At this stage of the case the defendant was allowed to amend her answer by setting up, as a further defense, that the note had been altered since its execution, without her knowledge or consent. After further testimony had been offered to sustain and rebut this defense, another motion for a nonsuit was made, upon the ground that the terms of the note had been altered by the plaintiff without the consent of the defendant, and this motion was likewise refused. The defendant having offered her testimony, the jury were charged by his honor, Judge Ernest Gary, as set forth in the case, who found a verdict in favor of the plaintiff, upon which judgment was duly entered. From that judgment defendant appeals upon the several grounds set out in the record, which will now be considered.

The first ground, imputing error to the circuit judge in refusing the first motion for a nonsuit, having been very properly abandoned, need not be considered. The second ground, alleging error in refusing the second motion for a nonsuit, cannot be sustained, as the case very clearly discloses the fact that there was testimony tending to show that the defendant had recognized and acquiesced in the alteration of the note. The remaining three grounds of appeal impute error to the circuit judge in his charge to the jury. The charge itself, as set forth in the case, and which should be incorporated in the report of this case, furnishes its own vindication against these imputations of error; for, as we read it, the law applicable to the case was correctly, clearly, and concisely stated to the jury, and their attention was called to the questions of fact upon which the case turned, without the least indication of the judge's opinion as to any of those questions. In deference, however, to the

zealous effort of the counsel for appellant, we will consider these grounds in detail.

The third ground of appeal is taken in these words: "Because his honor erred in submitting to the jury, as a question of fact to be decided by them, whether or not the alteration was material, it having been the duty of the presiding judge to decide: First, did the indorsement constitute an alteration of the terms of the note? Second, was that alteration material?" This ground, as it seems to us, is taken under a misconception of the judge's charge. We do not find that he left it to the jury to determine, as a question of fact, whether the alteration was material. On the contrary, the whole tenor of the charge on this point shows that the judge assumed that the alteration was material, as it manifestly was, and the only question of fact left to the jury was whether defendant acquiesced in such alteration. What else could he have meant when he said to the jury, near the conclusion of his charge, "If she did not make a payment, or if she did not acquiesce in the change, she is not liable"? The third ground is clearly untenable.

The fourth ground imputes error as follows: "In submitting to the jury to determine whether or not defendant consented to the alteration, or acquiesced in it, when the action was upon the new promise arising by operation of law from certain alleged payments, which payments were made prior to the alteration of the note." We are unable to perceive what difference that circumstance could make, in solving the question of acquiescence. If, as the jury were correctly told, a payment had been made upon the note within the statutory period, that would imply a new promise to pay the amount mentioned in the note, according to its terms; and, if those terms were afterwards altered by the consent or with the acquiescence of the defendant, we are unable to understand how that could impair the validity of her previous promise to pay the amount specified in the note. If she in fact acquiesced in the change of the terms of the note, her previous promise to pay the amount specified in the note according to its original terms must necessarily be regarded as a promise to pay according to the terms as changed by her acquiescence.

The fifth ground of appeal is stated in these words: "In not holding that said note was void, so far as the defendant was concerned,—a material stipulation having been added since its execution and delivery, without defendant's knowledge or consent,—and that there was no evidence entitling plaintiff to a verdict." This ground is clearly untenable, as it called upon the circuit judge to decide questions of fact exclusively within the province of the jury. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 127)

VAN DIVIERE v. MITCHELL et al.
(Supreme Court of South Carolina. Sept. 17, 1895.)

RECORD OF MORTGAGE—NOTICE.

Where a purchase-money mortgage is properly recorded as required by Rev. St. § 1968, it operates as constructive notice to subsequent purchasers, though the deed to the mortgagor was not recorded.

Appeal from common pleas circuit court of Oconee county; Watts, Judge.

Action by Mrs. M. R. Van Diviere against Burt Mitchell, Elizabeth Albritton, and others to foreclose a mortgage. From a judgment for plaintiff, defendant Albritton appeals. Affirmed.

The agreed statement of facts is as follows: "On the 25th day of September, 1884, the defendant Burt Mitchell owned the land described in the complaint, and on that day sold and conveyed the same to one Z. H. Carwile, and, to secure the purchase money therefor, took the notes and mortgage set forth in the complaint. (Notes and mortgage by Carwile to Mitchell, of date September 25, 1884, introduced in evidence and marked 'Exhibit A.')

The deed from Burt Mitchell to Z. H. Carwile was never recorded. The mortgage, Exhibit A, was recorded 25th September, 1884, as appears by indorsement thereon. Soon thereafter, and before they were due, these notes and mortgage were transferred by indorsement, as appears thereon, and by delivery to the plaintiff herein, who paid value therefor, as collateral to secure the note held by her, signed by Burt Mitchell and C. E. O. Mitchell, on which note judgment was entered up, in favor of plaintiff against Burt Mitchell and C. E. O. Mitchell, in the court of common pleas for this county on the 5th day of July, 1893, for the sum of one hundred and sixty-seven dollars and eighty cents debt, and five dollars and ninety cents costs. The amount now due thereon is the sum of one hundred and eighty-nine dollars and sixty-five cents at date of this report, which still remains due and unpaid to the plaintiff. There has never been anything paid to plaintiff on these notes and mortgage, Exhibit A, and she took the same in good faith to secure the loan of money as above set forth. After the execution of the deed above referred to, and the mortgage, Exhibit A, and before the 28th day of May, 1886, Burt Mitchell and Z. H. Carwile agreed to rescind the sale of said land, and did rescind the same; and it is assumed that said Carwile reconveyed the same to Mitchell. On the 28th day of May, 1886, Burt Mitchell was in possession of the premises in dispute, and on that day sold and conveyed the same, for value, to Waddy T. Jaynes, by proper conveyance, which is introduced in evidence and marked 'Exhibit B.' This deed was never recorded. On the 23d day of June, 1888, said Jaynes sold and conveyed, for value, said premises to Edward P. Cox. (Deed introduced in evidence,

and marked 'Exhibit C.')

This deed was never recorded. On the 30th day of January, 1889, said Cox sold and conveyed said premises to the defendant Elizabeth Albritton for value. (Deed introduced in evidence, and marked 'Exhibit D.')

This deed was never recorded. On the same day she received the deed, the defendant E. Albritton, to secure the purchase money therefor, executed and delivered to said Cox her note and mortgage on said premises, to secure the same, which are introduced in evidence and marked 'Exhibit E.'

This was recorded the 16th day of February, 1889, as appears by indorsement thereon. On the 19th day of November, 1889, said Cox, for value, sold and transferred said note and mortgage, Exhibit E, to Peden & Anderson, and the sum of two hundred and forty-five dollars and twenty-five cents (\$245.25) is now due and unpaid thereon to said W. P. Anderson. At all the sales and transfers of the premises above set forth the possession thereof was delivered by the various parties, down to the defendant Elizabeth Albritton, who is now in possession thereof. The defendant Elizabeth Albritton and W. P. Anderson, and all the persons through whom they claim, except the defendant Burt Mitchell, acted in good faith, paying full value, and without notice of the plaintiff's claim or mortgage, except such constructive notice as the recording of plaintiff's mortgage may give, and also the plaintiff was without notice of the various transactions, conveyances, etc., set up by defendant, except such constructive notice as may be given by record of the mortgage, Exhibit E."

The exceptions to the decree were as follows: "(1) Because the circuit judge erred in holding that the delivery of the deed, which was never recorded, from Mitchell to Carwile, the notes and mortgage from Carwile to Mitchell, the record of said mortgage, and the possession of Carwile, and his continuance in possession for some time thereafter, were sufficient to put upon notice this defendant, who was in other respects a subsequent purchaser of the premises for valuable consideration without notice. (2) Because the circuit judge should have held that the agreed statement of facts showed that one W. T. Jaynes, on the — day of —, 188—, purchased, and took proper conveyance for, the premises in dispute, from Burt Mitchell, who was then in possession of the same, and whom the record in office of the register of mesne conveyances for Oconee county, S. C., showed that he held proper title therefor, free from incumbrances, and that said Jaynes conveyed them to Cox, who conveyed to this defendant, all of whom were purchasers for valuable consideration without any notice of plaintiff's said mortgage. (3) Because the circuit judge erred in not holding that the record of the mortgage given by Carwile to Mitchell was not notice to this defendant, or any of his

grantors, for the reason that, the deed to Carwile from Mitchell not being recorded, there was nothing in the record to show that the title had ever passed out of Mitchell's possession, or to connect Carwile in any manner with the premises. (4) Because the circuit judge should have held that this defendant, and those through whom he purchased, back to Mitchell, the common source of title, were all, as to plaintiff, subsequent purchasers for value without notice, and hence defendants were entitled to a dismissal of plaintiff's complaint."

Stribling & Shelor, for appellant. S. P. Dendy, for respondent.

GARY, J. This action was heard by his honor, Judge Watts, upon an agreed statement of facts, which, together with the appellant's exceptions, will be incorporated in the report of the case. The following appears in the decree of his honor, Judge Watts, in addition to the formal provisions for foreclosure of the mortgage mentioned in the complaint, to wit: "It is ordered, adjudged, and decreed that by the execution and delivery of the deed for said premises by Burt Mitchell to F. H. Carwile; the execution and delivery of the notes and mortgage, to secure the purchase money, of the defendant F. H. Carwile to the defendant Burt Mitchell; the due record of said mortgage as required by statute in this state, and the contemporaneous delivery of the possession of said premises by the grantor, Burt Mitchell, to his grantee, F. H. Carwile, and the continuance of his possession of the same for some time thereafter,—which I find as facts from the agreed statement of counsel reported herein by the master,—subsequent purchasers and creditors were affected with notice of plaintiff's mortgage and of possession thereunder, and the defenses of the defendants W. P. Anderson and Elizabeth Albritton, of subsequent purchasers and creditors for value without notice, are overruled."

Section 1968, Rev. St., provides that "all mortgages or instruments in writing in the nature of a mortgage of any property real or personal; * * * and, generally, all instruments in writing now required by law to be recorded * * * shall be valid, so as to affect, from the time of such delivery or execution, the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution in the office of register of mesne conveyance of the county where the property affected thereby is situated in the case of real estate: * * * provided, nevertheless, that the above mentioned deeds or instruments in writing, if recorded subsequent to the expiration of said period of forty days shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such rec-

ord." In order that the mortgage may be valid so as to affect the rights of subsequent creditors and purchasers for valuable consideration without notice, it is only necessary that it be recorded in the manner provided by law, but it is not necessary that the deed of conveyance of the person executing and delivering the mortgage should also be recorded. There is no such requirement in the statute. The mortgage complied with all the requirements of the statute when the mortgage was duly recorded. This case is ruled by the recent case of *Younts v. Starnes* (S. C.) 19 S. E. 1011. In that case it appears that a deed of conveyance of land was executed and delivered in 1882, and a mortgage executed and delivered by the grantee to secure payment of the purchase money. The mortgage was duly recorded, but the deed of conveyance was not placed upon the record. In 1886 the grantee, who had failed to record his deed, because he believed it was defective, asked for and received a new deed as a substitute for the one delivered in 1882. In the spring of 1888 a merchant sold goods on a credit to the grantee, who, in the winter of 1888, in order to secure payment of said account, executed and delivered to the merchant a mortgage of the said land. After the sale of the goods, but before the delivery of the mortgage to the merchant in 1888, the merchant received actual notice of the former mortgage delivered and recorded in 1882, and this was one of the grounds, but not the only ground, upon which the court held that the mortgage executed in 1882 was valid against the mortgage executed in 1888. After speaking of the effect of the actual notice, the court then proceeded to speak of the constructive notice arising from the recording of the mortgage in 1882: "Besides, all this time the mortgage of the plaintiffs was regularly on the record, and we cannot doubt that Wittkowsky must be held bound by this constructive notice that the mortgage of the plaintiffs still existed. 'Mortgagees of land are not bound to give to purchasers from the mortgagor any further notice of their claim than that which the record of mortgage gives.' *Annely v. De Saussure*, 12 S. C. 488. Under these circumstances, we cannot say the circuit judge erred in holding that it was error in deciding that the defendant Wittkowsky was a creditor for value and without notice of the existence of plaintiffs' mortgage. The mortgage, as has been stated, was properly recorded in the proper office long before the debt of Wittkowsky was contracted, and this fact alone would charge him with notice. Besides, he had sufficient notice of facts that would put him on inquiry," etc. The recording of the mortgage being constructive notice to subsequent creditors and purchasers, the exceptions of the appellant are overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 96)

LITTLEJOHN v. SOUTHERN RY. CO.
(Supreme Court of South Carolina. Sept. 9, 1895.)

WRITS—SERVICE ON FOREIGN CORPORATIONS.

The act of 1887 (19 St. at Large, 835; 2 Rev. St. 1893, p. 67) relative to service of process on corporations provides that "service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or when such service shall be made in this state upon the president * * * or any resident agent thereof." The act of 1893 (21 St. at Large, 409) provides that foreign corporations carrying on business in the state shall file in the office of the secretary of state a declaration designating some place within the state at which legal papers may be served on said corporation. *Held*, that service within the state upon the resident agent of a foreign corporation owning property in this state, at a place other than that designated in the declaration filed in the office of the secretary of state, in a cause of action arising in this state, is valid.

Appeal from common pleas circuit court of Greenville county; O. W. Buchanan, Judge.

Action by Lyman Littlejohn against the Southern Railway Company for personal injuries. From an order setting aside the service of the summons and complaint, plaintiff appeals. Reversed.

C. J. Hunt and C. F. Dill, for appellant.
J. S. Othran, for respondent.

McIVER, C. J. The facts of this case are undisputed, and, substantially, are as follows: The plaintiff, desiring to commence an action against the defendant company, a foreign corporation, to recover damages for personal injuries alleged to have been sustained at a point on the line of the Atlanta & Charlotte Air-Line Railway Company, within the limits of this state,—a railway operated and controlled by the defendant company at the time,—served his summons and complaint upon one C. E. Watson, the resident agent of the defendant company at Greenville, S. C., on the 4th of February, 1895. It is conceded that the defendant owns property within this state, is doing a large business here as a common carrier, and has complied with the requirements contained in the act of 1893 (21 St. at Large, 409), the provisions of which will hereinafter be more particularly noticed,—especially, that it had filed in the office of the secretary of state its declaration designating its principal place of business in this state, at which all legal papers may be served on it, to wit, the passenger station heretofore used by the Charlotte, Columbia & Augusta Railway Company, in the city of Columbia, S. C. Upon this conceded state of facts the defendant company made a motion before his honor, Judge Buchanan, to set aside the service of the summons and complaint as illegal. This motion having been granted, plaintiff appeals, upon the several grounds set out in the record, which raise the single question whether service

within this state, upon the resident agent of a railway company which is a foreign corporation owning property in this state, at a place other than that designated in the declaration filed in the office of the secretary of state, is a valid service, where the cause of action arises in this state.

It must be admitted that the question presented is not free from difficulty; arising, as we think, from the frequent changes which have been made in the statutory provisions relating to the mode by which a foreign corporation owning property and doing business in this state may be legally served with process, so as to give the courts jurisdiction over such corporation in an action instituted here, and especially from the fact that the legislature has seen fit to make special provisions as to the mode of service upon certain classes of corporations, of which a railroad corporation is one. It is necessary, for a proper understanding of the question now presented for determination, that these various statutory provisions, commencing with the Code as adopted in 1882, shall be reviewed. Section 155, Code 1882, reads as follows: "The summons shall be served by delivering a copy thereof as follows: (1) If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made, within this state, personally upon the president, cashier, treasurer, attorney, or secretary thereof; provided that the service of a legal process upon any agent of any railroad, telegraph, insurance, or express company, within the limits of this state, shall be taken and held to be a valid service upon such corporation." By the act of 1883 (18 St. at Large, 437), without making any reference to the section of the Code just quoted, it was declared "that service upon any person or persons occupying any office or rooms in any railway station, and attending to and transacting therein the business of any railroad, shall be deemed service upon the corporation, under the charter of which the said railroad is authorized by law, and such person shall be deemed the agent of such corporation," etc. It will be observed that in this act no distinction is made between foreign and domestic railroad corporations, though some of the language used would seem to imply that it related only to corporations chartered by this state. Next comes the act of 1887 (19 St. at Large, 835), by which it was declared that subdivision 1 of section 155 of the Code, as above quoted, be amended so as to read as follows: "(1) If the suit be against a corporation to the president or other head of the corporation, secretary, cashier, treasurer, a director or agent thereof; but such service can be made in

respect to a foreign corporation only when it has property within the state, or the cause of action arose therein, or where such service shall be made in this state, personally, upon the president, cashier, treasurer, attorney or secretary, or any resident agent thereof." The effect of this amendment was to make service upon an agent, instead of a managing agent, of a domestic corporation, good, and to leave out the proviso relating to certain specified classes of corporations; and, as to foreign corporations, the effect was to make service upon any resident agent of such corporation good, provided such service was made in this state. The law, as thus amended, is incorporated in 2 Rev. St. 1893, p. 67.

From this review of the statute law upon the subject, it seems to us that the service of the summons and complaint in this case was good, and that the circuit judge erred in holding otherwise. To make a foreign corporation a party to an action in the courts of this state, all that is required is that such corporation must have property within this state, or that the cause of action arose in this state, or that the president, cashier, treasurer, attorney, or secretary, or any resident agent thereof, should be served personally within this state; and it is conceded that all these requirements were met in this case, for it is admitted that the defendant corporation has property within this state, that the cause of action arose here, and that the resident agent of the defendant was served personally within this state. If an individual comes within the limits of the state, and thus places himself within reach of the jurisdiction of our courts, he surely can be made a party to an action by serving him with process while here; and we do not see why the same principle should not be applied to a foreign corporation. As it can only act through its officers or agents, when, through its officers or agents, it comes into this state for the purpose of doing business here, it is like an individual who voluntarily comes here from a foreign state, and may be served with process just as such individual may be. But as a corporation is an immaterial entity, and cannot, therefore, be personally served, it must necessarily be reached through its officers or agents; and the provisions of our Code simply designate what officers or agents may be served, as representatives of the corporation. The circuit judge based his conclusions upon the case of *Tillinghast v. Lumber Co.*, 39 S. C. 484, 18 S. E. 120, and upon the provisions of the act of 1893 referred to above. But the Case of *Tillinghast* differs widely from the present case in several particulars, only one of which need be mentioned, as it is vital. In that case the attempt was made to validate a service of the summons and complaint upon one of the officers of the defendant company beyond the limits of this state, while here the resident agent of the defendant company was personally served within the lim-

its of this state. To have recognized the service in that case would have been to hold, practically, that process from the courts of this state could run into another state,—a doctrine condemned by all the authorities, some of which are cited in that case. But here no such difficulty presents itself, for here no service was made or attempted outside of the limits of the state; and, on the contrary, the service was made in this state, upon a person who had been designated by statute as a proper representative of the defendant corporation, upon whom service might be made. So that we do not think the case relied upon is in point.

Next, as to the act of 1893, the title of which is as follows: "An act to declare the terms on which foreign corporations may carry on business and own property within the state of South Carolina." It does not purport to be an act designating the mode by which a foreign corporation may be made a party to an action brought in the courts of this state. On the contrary, its whole scope and object, as its title declares, are to prescribe the terms upon which a foreign corporation may carry on business in this state; and throughout its eight sections the only allusion made to the service of process upon the corporation is in the second section, which provides, as one of the terms upon which it is permitted to do business in this state, that it shall file in the office of the secretary of state, within a prescribed time, a declaration designating some place within this state as its principal place of business, "at which all legal papers may [not "must"] be served on said corporation," which was doubtless intended to prevent just such a controversy as had then recently arisen in the case of *Hester v. Fertilizer Co.*, 33 S. C. 609, 12 S. E. 563. At least, there is not a word in the act which indicates a purpose to declare that the mode of service there permitted shall be the only mode by which a foreign corporation can be served. Indeed, the only effect of this provision in the act of 1893 is to extend the facilities for serving a foreign corporation, instead of diminishing them; for, as we have seen, under the provisions of the Code above cited, a foreign corporation could only be made a party to an action by personal service on certain designated officers or agents within the state, while, under provisions of the act of 1893, the service may be made by delivery of the papers to be served to any officer, agent, or even employé, of the corporation, found in the premises designated as its place of business, "or if none such be found thereon, then by leaving copies of the same on the premises." Indeed, to hold that the only mode of serving a foreign corporation is the one permitted by the act would be destructive of some of the important provisions of the act; for, if a foreign corporation fails to designate a place for service of process against it, then under such construction, no action could be commenced against such corporation, and the

provisions of the act authorizing actions against a foreign corporation failing to comply with the provisions of the act would become entirely nugatory. We do not think, therefore, that the act of 1893 can have the effect of abridging the mode of service previously prescribed by law. The judgment of this court is that the order appealed from be reversed.

(45 S. C. 69)

ARMSTRONG v. AUSTIN.

(Supreme Court of South Carolina. Sept. 9, 1895.)

RECORDING MORTGAGE—AFFIDAVIT—OBJECTIONS TO EVIDENCE.

1. Where a statute requires mortgages to be recorded in order to operate as notice, the failure of the recorder to index the record will not defeat its effect, though another statute defining the duties of the recorder requires him to make such index.

2. The mere fact that the index book to public records cannot be found does not prove that the records were not indexed.

3. Rev. St. 1872, c. 82, § 2, providing that a mortgage of real estate shall be recorded in the office of the register of mesne conveyances, did not require such instrument to be recorded in any designated book.

4. It is not essential that an affidavit, otherwise regular in form, and sworn to before a proper officer, be signed by the affiant.

5. Where, in a proceeding before a master, a mortgage was received in evidence, without objection as to the genuineness of the register's signature indorsed thereon, it was error for the circuit court to sustain an objection on that ground.

Appeal from common pleas circuit court of Kershaw county; Benet, Judge.

Action by John A. Armstrong against Robert Austin to foreclose a mortgage. Defendant had judgment, and plaintiff appeals. Reversed.

The cause was referred to L. A. Wittowsky, master for Kershaw county, who on September 1, 1894, reported as follows:

"This is an action for the foreclosure of a mortgage on real estate. In 1871 John Goff and others gave a mortgage of the real estate in question to the plaintiff, J. A. Armstrong. Subsequently Goff sold part of the land to the defendant, Robert Austin. The defendant, Austin, sets up the plea—First, that he was a purchaser without notice of incumbrance upon the land; that the mortgage was not recorded in the book, in the office of the register of mesne conveyances, kept for the purpose of recording deeds and mortgages, and that the law required them to be so recorded in separate books. By reference to the mortgage it will be seen that it was recorded in Lien and Mortgage Book No. 2, pages 356 and 357. Now, I can find nothing in the General Statutes of this state in force at that time requiring the clerk to record mortgages of real estate in a book separate from mortgages of personal property. This mortgage is a mixed mortgage, and, by reference to the set of books in which it was recorded, it will be seen that it was the cus-

tom at that time to so record mixed mortgages in this set of books. So I hold that Robert Austin had constructive notice of the mortgage, and bought subject to it. Another defense raised by defendant's attorney is that the mortgage was not properly probated, the affidavit not being signed. The following is a copy of the affidavit: 'South Carolina, Kershaw County. Personally appeared Wm. M. Shannon, and made oath that he saw J. A. Armstrong, John Goff, W. W. Goff, Sarah Yates, and Margaret Goff sign and seal the within lien and mortgage, and that he, with Arthur P. Linning, witnessed the execution thereof. Sworn to before me, this 13th day of February, A. D. 1872. C. Shiver, Clerk.' Under the head of 'Affidavits,' in 1 Am. & Eng. Enc. Law, I find it laid down that the signing of an affidavit is not necessary unless it is required by statute that the party making the affidavit sign it. While it is the custom in this state for affidavits to be signed, I can find no statute requiring it. So I hold that the probate of the mortgage in question is properly executed. The case of Woolfolk v. Manufacturing Co., 22 S. C. 332, cited by defendant's attorney, does not apply here. There the party who took the affidavits was not duly qualified to take an affidavit in this state. In the Revised Statutes of South Carolina, adopted in 1872, under the chapter of 'Clerks of Court' (section 15), the clerk is invested with the authority to administer oaths, etc. I have made diligent search for the index to Book 2 of Liens and Mortgages, but cannot find it. I found the index to Book 1 of this series, for the year 1871, and also the index from 1876 to the end of the series. The defendant also contends that he entered into an agreement with plaintiff to give plaintiff a certain amount of cotton in satisfaction of his mortgage, and that he did so deliver to the plaintiff the cotton. The evidence shows that Robert Austin did give some cotton to the plaintiff, but it was for rent of the land.

"Therefore I find as matter of fact: (1) That on the 13th day of February, 1872, John Goff and William W. Goff made and delivered to plaintiff their promissory note in writing, and thereby promised to pay to plaintiff the sum of one hundred and fifty-two $\frac{40}{100}$ dollars on or before the first of November, 1872, and if not paid at maturity then to bear interest at two per cent. per month. (2) That at the date of said note, and as collateral for the payment of said note, the said John Goff and W. W. Goff, together with Sarah Yates and Margaret Goff, did grant, bargain, sell, and release, by way of mortgage, to the said plaintiff, the land described in the complaint. (3) That said mortgage was on the 13th day of February, 1872, recorded in the clerk's office for Kershaw county, in Lien and Mortgage Book No. 2, pages 356 and 357. (4) That there is remaining due and unpaid upon said note and mortgage up to date of this report the sum of three hundred and thirty-five $\frac{40}{100}$ dollars (\$335.40). (5) That part of the

mortgaged premises were, subsequent to the date and recording of said mortgage, sold and conveyed by the said John Goff, W. W. Goff, Sarah Yates, and Margaret Goff to the defendant, who is now in possession of the premises described in the complaint. (6) That the defendant, Robert Austin, rented the land in question from plaintiff, and paid the rent in cotton for the years 1885, 1886, and 1887, but refused to pay rent in 1888, and has not paid any since.

"I conclude as matter of law:

"(1) That the defendant, Robert Austin, had constructive notice of the mortgage of John Goff and others to J. A. Armstrong, and bought the land subject to said mortgage.

"(2) That the probate of the mortgage in question is sufficient, and that it was not necessary for the affidavit to have been signed by the deponent.

"(3) That, the condition of the mortgage having been broken, the property should be sold, the equity of redemption barred, and the proceeds of sale applied to the payment of the mortgage debt."

Upon the filing of said report, defendant excepted thereto on the following grounds:

"(1) That the master erred in holding that Robert Austin rented the land in question from plaintiff, such conclusion being irrelevant to the issue, unwarranted by the allegations of the complaint, and contrary to the evidence. (2) That the master erred in holding that Robert Austin had constructive notice of the mortgage of John Goff and others to J. A. Armstrong, and bought the land subject to said mortgage, as said mortgage was recorded in an improper book, and no proof was adduced to show that said mortgage was ever indexed as required by law. (3) That the master erred in holding that the probate of the mortgage in question was sufficient, and that it was not necessary for the affidavit to have been signed by deponent, as the evidence showed that there was no name signed to said affidavit, and there was no jurat affixed thereto, in that there was no seal, and the name of no officer authorized by law to administer oaths, and that said affidavit is inherently insufficient in itself. (4) That the master erred in his third conclusion of law, because it would be inconsistent and illegal if one, any, or all of the exceptions in the premises are correct."

Thereafter the cause came on to be heard before his honor, Judge Benet, who rendered the following decree:

"This is an action for foreclosure of a mortgage on real estate. The cause was heard by me on defendant's exceptions to the report of the master, wherein he decided in favor of the plaintiff, and held that the mortgage should be foreclosed, and the property sold. The testimony on both sides is meager and unsatisfactory, and some of it offered by the plaintiff was inadmissible, but not objected to. The complaint alleges

that on 13th February, 1872, John Goff and William W. Goff made and delivered to this plaintiff their promissory note for \$152.10, to mature 1st November, 1872, with interest at 2 per centum per month after maturity; that, as collateral for the payment of said note, the said John and William Goff, along with Sarah Yates and Margaret Goff, mortgaged to the plaintiff the land in question, some 200 acres; that said mortgage was duly proved and recorded, the mortgage and the recording being of even date with the note; that two payments were made on said note, \$45 on 12th November, 1872, and \$100 on 9th March, 1875; 'that the mortgaged premises were, subsequent to the date and recording of said mortgage, sold and conveyed by the said John Goff, W. W. Goff, Sarah Yates, and Margaret Goff to the defendant, who is now in the possession of said premises.' Austin, the defendant, admits that the parties named above sold and conveyed the land to him, or, rather, 'a part of the tract of land'; and he avers 'that he was a purchaser for valuable consideration without legal notice of any prior incumbrance, the proper index in the office of the register of mesne conveyances for Kershaw county, relating to real estate, not showing that any mortgage on said tract of land had been recorded in the proper books of said office.' And he 'therefore denies that the mortgage set forth in the complaint was properly or duly recorded,' and 'denies that he had legal notice of the same.' For a further defense he alleges that he learned of plaintiff's claim in 1885, and that he agreed to pay him three bales of cotton to satisfy said claim; and that he did pay the three bales, in full satisfaction of plaintiff's claim, paying one bale in 1885, one bale in 1886, and one in 1887. The evidence before the master fails to show at what time, or on what terms, the defendant entered into possession; but the complaint alleges that he purchased and had a conveyance from the makers of the mortgage 'subsequent to the date and recording of said mortgage.' The plaintiff in his testimony admits the payment of the cotton, but says it was paid him as rent. If such be the case, no evidence is adduced to show when the plaintiff ceased to regard the defendant as a purchaser in possession, and began to regard him as a tenant. He says: 'I never received anything from him myself from 1871 to 1885. Mr. McDowall did [his agent].'

"My view of the case, however, makes it unnecessary to clear up the confusion as to this payment of cotton, or to decide whether it was paid as rent or as satisfaction of the plaintiff's mortgage claim. The plaintiff's allegation that the land was sold and conveyed to the defendant subsequent to the date and recording of the mortgage leaves only one question to be decided, viz.: Was the defendant, Austin, a subsequent purchaser for valuable consideration without notice? Indeed, the question may be framed more

simply still, thus: Was the defendant a subsequent purchaser without notice? For no issue is raised as to the consideration. The master held that the defendant must be charged with constructive notice. From this conclusion of law I am compelled to dissent. The mortgage in question was a mixed mortgage,—a lien and a mortgage,—embracing a lien on crops, a lien on mules, and a lien on real estate. It was an agricultural lien, a chattel mortgage, and a mortgage of real estate, all in one. It was executed in 1872, according to the evidence and the pleadings, although on its face it says 1871. At that time the law with reference to recording required that a book of a certain size be used, and that the proof must be recorded with the writing, and that to the records indexes should be prepared, in books of a size prescribed. The law also required that conveyances of real estate should be recorded in books kept for that purpose. See Rev. St. 1872 (chapter on 'Register Mesne Conveyance') p. 188, § 5. The mortgage shows that it was filed 13th February, 1872, and 'recorded same day in Lien and Mortgage Book No. 2, pages 358 and 357.' The report of the master shows that there was no index to this 'Book No. 2,' while there was to 'Book No. 1' and others. There is no evidence that it was recorded in the book kept for the recording of conveyances of real estate. All that is shown by the testimony is that it was recorded in 'Lien and Mortgage Book No. 2,' to which there was no index. As a mortgage of real estate, it surely should have been recorded in the book kept for that purpose. But it is urged that, being a mixed mortgage, it was proper and sufficient to record it in the Lien and Mortgage Book. This view I cannot assent to. It is held that, when a mortgage includes both real and personal property, it should be recorded both as a mortgage of realty and a chattel mortgage. See 20 Am. & Eng. Enc. Law, 558. The position of the subsequent purchaser is to be considered. When he contemplates purchasing a tract of land, and desires to be informed as to prior incumbrances, does the law require him to look in the books of record of agricultural liens and chattel mortgages? Is it not sufficient that he inspect the records of mortgages or conveyances of real estate in books required by law to be kept for that purpose? It must be great injustice, and an undue and unauthorized stretching of the law of notice, to hold that the defendant, Austin, is to be charged in conscience with constructive notice of the Armstrong mortgage. Had the defendant been purchaser of one of the mules covered by the same mortgage, the case might be different.

"In addition to the foregoing ground, the defendant excepts to the finding of the master that the probate of the mortgage was sufficient. This exception must be sustained, and the master's report overruled, on this

ground also. Indorsed on the mortgage is the form of an affidavit of one of the witnesses to the mortgage, the late William M. Shannon, Esq., but it is not signed by Mr. Shannon. And the jurat is signed only 'C. Shiver, Clerk,' in handwriting entirely different from the 'C. Shiver, Clerk,' which follows the indorsement of the filing and recording. Yet both indorsements bear the same date,—13th February, 1872. Assuming that one 'C. Shiver' was clerk of the court at that time, it is assuming too much to say that the 'C. Shiver' of the jurat is his signature. There is no proof that it is his signature, and no evidence as to which of the two signatures is his. Nor does it appear that the writer was clerk of the court,—simply 'Clerk'; not even 'C. C. P.' And there is no seal. It may be that the signature of Mr. Shannon is not necessary to make the affidavit sufficient, as seems to be the holding of the supreme court in *Fuller v. Missroon*, 35 S. C. 331, 14 S. E. 714. It may be that the failure to affix the seal to the signature of the clerk of the court would not prevent due probate. It may be that a court may take judicial notice of the fact that in 1872 one C. Shiver was clerk of the court for Kershaw county. Still, I cannot hold that the mortgage in question was duly and sufficiently probated when the jurat is signed only 'C. Shiver, Clerk,' without any testimony that such was the signature of the C. Shiver who may have been clerk of the court. In the absence of the signature of the affiant, especially, there should be clear proof that the affidavit was made before the officer authorized by law to administer oaths and take affidavits in such cases. There is no such proof. It is therefore ordered, adjudged, and decreed that the report of the master herein be, and the same is hereby, overruled. Ordered, further, that the complaint be dismissed, with costs to the defendant."

The plaintiff excepted to said decree on the following grounds: "(1) That his honor erred in holding that the mortgage of plaintiff was not properly recorded, and was not constructive notice to the defendant. (2) That his honor erred in holding that there is no evidence that the book in which the said mortgage was recorded was a book kept for the record of mortgages of real estate. (3) That his honor erred in holding that the said mortgage was not properly probated for purposes of record. (4) That his honor erred in holding, in effect, that he would not take judicial notice that C. Shiver was clerk of the court at the time of the record of the mortgage, and in holding that his signature, 'C. Shiver, Clerk,' was not a sufficient attestation of the affidavit. (5) That his honor erred in holding that there was no evidence that the signature to the affidavit was in the handwriting of C. Shiver, the clerk, and in partly basing his decree on that ground, when no such question was made before the

master, or in the defendant's exceptions to the master's report, and it was never questioned before the master that the signature was that of C. Shiver, the clerk of the court. (6) That his honor erred in overruling the master's report and dismissing the complaint."

J. T. Hay and W. D. Trantham, for appellant. B. B. Clarke and J. D. Dunlap, for respondent.

McIVER, C. J. The only question presented by this appeal is whether the mortgage sought to be foreclosed in this action was duly recorded so as to affect the defendant, a subsequent purchaser of the mortgaged premises, with constructive notice of said mortgage. In the complaint it is alleged "that said mortgage was duly proved, and on the 13th day of February, A. D. 1872, recorded in the clerk's office for Kershaw county, in the Mortgage Book No. 2, pages 356 and 357." To this allegation the defendant in his answer responded as follows: "This defendant avers that he was a purchaser of a part of the said tract of land for a valuable consideration, without legal notice of any prior incumbrance on same, the proper index in the office of the register of mesne conveyances for Kershaw county relating to real estate not showing that any mortgage on said tract of land had been recorded in the proper books of said office. The defendant, therefore, denies that the mortgage set forth in the complaint was properly or duly recorded in the office of the clerk for Kershaw county, and that he had legal notice of the same." The case was referred to the master, who made his report, sustaining the validity of the mortgage, and recommending that the mortgaged premises be sold, and the proceeds applied to the payment of the mortgage debt, the amount of which was ascertained in his report. To this report the defendant excepted upon the grounds set out in the "case," and the case was heard by his honor, Judge Benet, upon the report and exceptions thereto, who rendered judgment overruling the master and dismissing the complaint. From that judgment plaintiff appeals upon the several grounds set out in the record. We think it due to the parties, as well as to the circuit judge, that the report of the master, together with the exceptions thereto, as well as the decree of the circuit judge and the grounds of appeal therefrom, should be incorporated in the report of the case.

It is very obvious that, if the case should be made to turn upon the only issue (so far as this appeal is concerned) presented by the pleadings, the only question to be decided would be whether the failure to index (if, indeed, there was such failure) would be fatal to the validity of the recording of the mortgage so far as to affect subsequent purchasers with constructive notice thereof. For in the complaint it is distinctly alleged that the mortgage was duly recorded on the day of its

date, and that allegation is not denied in the answer, except in the form above quoted, which is based solely upon the ground of the failure to index, as the defendant says that he "therefore" denies that the mortgage was duly recorded; that is, for that reason, alone, is the validity of the recording denied. So that our first inquiry is whether the alleged failure to index is fatal to the validity of recording. So far as we are informed, we have no direct decision upon that question in the state. We must, therefore, resort to the aid of reason and authorities elsewhere. In the first place, it will be observed that statutes requiring mortgages and like papers to be recorded, so as to operate as notice to subsequent creditors or purchasers, contain no provision requiring such records to be indexed. That requirement is found in another statute, prescribing the duties of registers of mesne conveyances and clerks of court in the counties where such clerks are ex officio registers. It would, therefore, seem that when a paper required to be recorded, in order to operate as notice, had been spread upon the books of the proper office, all requirements of the statute have been complied with, and the fact that the clerk or register has failed to comply with the provisions of another statute requiring such officer to keep an index of such books should not affect the validity or effect of the record. There is nothing in the statute making the indexing any part of the recording; and, therefore, the failure of the officer to perform a duty imposed upon him by a separate statutory provision, while it may subject him to an action at the instance of a party who may suffer by his default, yet cannot affect the validity or effect of the recording. In support of these views we have been able to find two cases from other states in which the point has been distinctly decided, —*Bishop v. Schneider*, 46 Mo. 472, and *Chat-ham v. Bradford*, 50 Ga. 327. So that we think that, even if the record of the mortgage in question was not indexed, it would still, if properly recorded, operate as constructive notice. But we do not think that it has been made to appear in this case that the record of this mortgage was never indexed. The master certainly does not find that as one of the facts of the case. All that he says upon the subject is: "I have made diligent search for the index to Book 2 of Liens and Mortgages [the book in which the indorsement on the original mortgage shows it was recorded], but cannot find it." It may be, for all that appears, that there was such an index, which has either been lost or misplaced.

While, as we have said, this disposes of the only issue, so far as the present appeal is concerned, which is raised by the pleadings, yet, as other objections were made to the record of the mortgage, which, though overruled by the master, were sustained by the circuit judge, we will proceed to consider them. The first of these objections seems to be that the mortgage was not recorded in the proper

book. The certificate which is indorsed upon the mortgage, which was received in evidence without objection, is, after a statement of the names of the parties and the nature of the paper, in the following form: "Filed Feb. 13th, 1872. Recorded same day in Lien and Mortgage Book No. 2, pages 356 and 357. Examined and certified by me,"—and signed "C. Shiver, Clerk." This objection was overruled by the master, but sustained by the circuit judge. Section 1, c. 122, pp. 548, 549, Rev. St. 1872, only required that a mortgage of personal property should be recorded in the office of the register of mesne conveyances, without specifying in what book such record should be made, except that in the county of Richland such a mortgage must be recorded in the office of the secretary of state; and by section 2, c. 82, p. 422, Rev. St. 1872, a mortgage of real estate was only required to be recorded in the office of register of mesne conveyances, without specifying in what book such record should be made. This was the law at the time of this transaction, and by that law must its validity be tested. It was not until ten years afterwards that the law was amended by the act of 1882 (17 St. at Large, 1053), requiring mortgages of real and personal estate to be recorded in different books. It seems to us, therefore, that this, being a mixed mortgage, covering both real and personal property, was recorded in the proper book under the law as it then stood.

The next objection was that the mortgage was not properly probated, and could not, therefore, be properly recorded. There is no doubt, under the express terms of the statute (section 5, c. 23, p. 188, Rev. St. 1872), that no paper can be properly recorded until its execution "shall first be proved by affidavit of a subscribing witness taken before some officer competent to administer an oath." *Woolfolk v. Manufacturing Co.*, 22 S. C. 332. The affidavit to prove the execution of this mortgage, and indorsed thereon, purports to have been made by one of the subscribing witnesses in the usual form, and sworn to before "C. Shiver, Clerk"; but the affiant does not appear to have signed the affidavit. This does not invalidate the affidavit, as may be seen by reference to 1 Am. & Eng. Enc. Law, p. 311, and the cases there cited, as well as the case of *Fuller v. Misroon*, 35 S. C. 314, 14 S. E. 714, unless there is a statute or rule of court requiring the signature of the affiant; and no statute or rule of court has been brought to our attention, making such requirement. The affidavit indorsed on the mortgage was sufficient to warrant its recording, as the clerk before whom it was taken is certainly an officer competent to administer an oath; indeed, is expressly made so by section 15, c. 22, p. 180, Rev. St. 1872. This objection cannot, therefore be sustained. The circuit judge bases his conclusion, in part at least, upon a point not raised before the master, and, so far as appears, not touch-

ed upon in the argument before him on the exceptions to the master's report, and the point, therefore, was not properly before him. *Griffin v. Griffin*, 20 S. C. 486. It may be that, if the point referred to—that is, the supposed variance in the handwriting of the signature "C. Shiver, Clerk," to the certificate of the record of the mortgage, and that of the same signature to the affidavit proving the execution of the mortgage—had been raised, such apparent variance might have been fully explained. But this point was not only not made before the master, or passed upon by him, but, on the contrary, the mortgage, with these indorsements thereon, was received in evidence without objection. At all events, we think it clear, under the case just cited, that there was error in considering a point not raised before the master nor passed upon by him, and not raised by any exception to the master's report.

We are of opinion, therefore, that the judgment of the circuit court should be reversed; but as there is one issue raised by the pleadings—that of payment of the mortgage debt—which was not determined by the circuit judge, as, under the view which he took of the case, it was not necessary for him to do, the case must go back to the circuit court for the determination of that issue, and for such further proceedings as may be necessary under the views herein announced, in case the issue of payment should be determined adversely to the defendant. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to the circuit court for such further proceedings as may be necessary under the views herein set forth.

(45 S. C. 146)

MITCHELL v. CHARLESTON LIGHT & POWER CO.

(Supreme Court of South Carolina. Sept. 17, 1895.)

ACCIDENT FROM ELECTRIC WIRES—NEGLIGENCE—INSTRUCTIONS.

1. An instruction that if a cyclone that could not be anticipated was the cause of the wire falling, and defendant was not negligent in allowing it to remain down for an unreasonable time, it would not be liable, is not misleading, as allowing an inference that, if a cyclone which might have been anticipated was the cause, defendant was liable, though not negligent in allowing it to remain down an unreasonable time, where the court also charged that if it was the act of God it could not be anticipated, and defendant would not be liable, but, on the other hand, defendant was charged with placing the wires so as to withstand ordinary weather, and was liable if the accident was due to the wires being improperly erected, or to their being allowed to remain down an unusually long time on the ground after having been broken down.

2. Nor is such charge open to the construction that defendant would be liable, though not negligent, if the falling of the wire was caused by a class of storm other than a cyclone, or by a storm of not quite the same degree of violence as a cyclone, the word "cyclone" having

been used because the witnesses had testified that the day was cyclonic.

3. An instruction that, if the wire was broken by some cause beyond the control of defendant, no blame could attach to defendant from the fact that it fell and remained lying in the street, unless it was allowed to remain there "after notice" for an unreasonable time, is properly refused; for the negligence of defendant might have consisted in its failure to know the facts connected with the breaking of the wire, it being bound to use diligence to receive information as to the condition of its wires.

4. It is not the duty of the court to strike from a requested charge the part which renders it defective, and give the remainder.

5. The court, on giving plaintiff's request to charge, "When one is placed by the negligence of another in a situation of terror, his attempt to escape danger, even by doing an act which is in itself dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering," said, "If a man is in danger, and in order to avoid that danger, bona fide, does something which is dangerous, that would not be considered, in law, contributory negligence," and that these words should be construed in connection with the request to charge. *Held*, that defendant could not complain of such comments on and explanation of the requested charge, as they were not erroneous in themselves, and did not lay down a different proposition of law from that contained in the request, which was not complained of.

Appeal from common pleas circuit court, Charleston county; Ernest Gary, Judge.

Action by John S. Mitchell against the Charleston Light & Power Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

The charge of the court was as follows:

"It is a matter of congratulation to you, as well as to those engaged in this case, that it is about to draw to a close. After the able argument made on the facts, I trust you will not be delayed in your deliberations in forming a conclusion. Before charging you on what I conceive to be the law of the case, it may be proper to state to you what are the material issues made by the pleadings. The complaint charges that on the 16th day of December last, about a year ago, while walking on one of the thoroughfares of the city of Charleston, the plaintiff came in contact with a wire erected by the defendant, and, by such contact, received injuries to the extent of \$20,000. The defendant joins issue with him, both as to the amount of his injuries, and sets up the affirmative defense that he, the plaintiff, contributed to his own injury, if he sustained any, and that thereby the company was absolved. The defendant sets up the further defense that the injury complained of was due to no fault on the part of the company, but to an act of God, over which the company had no control, and could not reasonably anticipate. These are the issues of fact presented to you.

"I charge you, as matter of law, that a company of this kind, using a thoroughfare or public highway for the purpose of its business, is charged in law with great care, not only in erection of the wires, but in maintain-

ing and keeping them in repair. They must be so kept and conducted that a citizen pursuing the ordinary vocations of life will not come in contact with them. It is the business of the company to so erect them as not to interfere with the safety of the citizens of the community while pursuing their vocations in the ordinary walks of life. The question for you is, were these wires erected so as to anticipate any ordinary occurrence in the weather? Was it the act of God, or was it the careless or loose manner in which the wires were erected, which caused this wire to break? If it were the act of God,—that is, such an act that a business man of ordinary forethought and prudence could not anticipate,—then the company would not be liable under those circumstances. But, on the other hand, the company is charged with so placing their wires, and so keeping them in repair, as to withstand the ordinary weather,—rain, heat, cold, and wind. It is alleged on the part of the company that that wire was broken in consequence of a severe wind-storm. Was it an ordinary windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated. The law does not require impossibilities. If a cyclone, that could not be anticipated or reasonably foreseen, was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, then, under these circumstances, it would not be liable. But if the accident was due to the wires being improperly erected, or improperly maintained in repair, or, having been properly erected, were broken, and allowed to remain on the streets an unusually long time, then, if the injury to the plaintiff occurred under those circumstances, the company would be liable to compensate him in damages. These are the general observations that I desire to call your attention to before passing upon the points of law that I have been requested to charge you. Before reading these requests, I desire to state to you what is negligence, in words you will readily understand. Negligence is the want of due care. That expresses it in a few words.

"The plaintiff requests me to charge you as follows: 'Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under existing circumstances, would not have done, the essence of the fault being either in the omission or commission.' That I charge you as law. 'Second. If the jury believe that the defendant company was notified by telephone from Mr. Street's office that there was trouble with its wires, and failed to take immediate steps to investigate such trouble and rectify the same, if trouble existed, and if a sufficient time between the notice to the defendant of the trouble to its wires and the accident to the plaintiff, for its investigation and attention, had elapsed, and thereafter,

by reason of the failure of the defendant to attend to its said wires, such wire or wires, charged with electricity, hung suspended over the scene of the accident, so as to become dangerous to passengers on the street, then the defendant would be guilty of negligence.' I charge you that which, in plain words, is that if the company was notified that its wires were down, and did not take steps, in a reasonable length of time, to repair them, it would be guilty of negligence, if an accident occurred, in not repairing their wires in a reasonable length of time. 'Third. The degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case, and if the jury believes that electricity was the power used by the defendant in its business, and is a highly-dangerous agency to life, unless exercised with constant and extreme care, then, to such extent, a high degree of care, in its supervision, management, and use, is required of defendant, and a failure on its part to exercise such high degree of care would be negligence.' That, I charge you, is a good proposition of law. 'Fourth. If the jury believe that the defendant was negligent, according to the definitions given above, and that in consequence of such negligence the plaintiff accidentally came in contact with wires charged with electricity, operated and controlled by defendant, and was injured thereby, then the plaintiff would be entitled to recover.' That I charge you to be the law. The fifth and sixth requests I refuse to charge, as having no application to this case. 'Seventh. When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is in itself dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering.' That I charge you as law. If a man is in danger, and in order to avoid that danger, bona fide, does something which is dangerous, that would not be considered, in law, contributory negligence. No issue involving the eighth proposition is made in the pleadings nor in the evidence, and is hence refused. 'Tenth. If the jury find that the defendant is liable, then they should give the plaintiff such damages as he has proved in this case, not exceeding \$20,000; and, in estimating such damages, they must take into consideration the permanent injury to the plaintiff, the shock to his system, his pain and anguish, and a fair recompense for loss of what he might otherwise have earned, and has been deprived of the capacity for earning by the wrongful act of the defendant.' That, I charge you, is to be the rule in estimating damages, if you find that the defendant was negligent, and the plaintiff did not contribute to his injury. You may give him a reasonable amount of compensation for his pain and anguish, and you may take into consideration what he might have earned, and has been deprived of earning by reason of the accident,

in estimating your damages. 'Eleventh. An injury is said to be caused by an act of God when it results immediately from a natural cause, without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care by the party charged with liability by reason of his negligence in permitting said injury to occur; and a defendant so charged with liability, if he invokes the act of God as a defense, has the burden of proof upon him to show, not only that the act of God was the cause, but that it was the entire cause, of the injury, because it is only when the act of God is the entire cause of the injury, and said injury could not have been prevented by the exercise of prudence, diligence, and care by the defendants, that the said defendant can be shielded.' I charge you that, as I have already explained to you. For instance, the law would require the company to guard against ordinary windstorms when it erects an electric wire in a public thoroughfare.

'The defendant requests me to charge you certain propositions of law, and it may appear to you paradoxical that I charge the law on both sides. I put to you a hypothetical case. If you find a certain state of facts to exist, then the law which I give you follows from those facts. The defendant's requests are as follows: 'First. The law does not require impossibilities of any person, natural or artificial, nor does it require that the defendant should have ready for service at every moment, and at every point of exposure, an adequate force to overcome a sudden fracture of wire, or any other like casualty, in the shortest possible time. All that it can be required to do in this connection is to maintain an efficient system of oversight, and to be prepared with competent and sufficient force, ready to furnish, within a reasonable time, a proper remedy for all such casualties, defects, and accidents as, from experience, there was any reasonable ground to anticipate might occur.' That I charge you to be law. Second. I refuse this request for reasons assigned upon the margin. [Written upon the margin was the following: "Refused for the reason that there is no legal obligation on plaintiff to show notice to defendant that the wire was down."] Third. Upon that request I charge you as follows: "That the defendant was entitled to a reasonable time, after the fall of the wire, to repair it, or to remove it out of the way of persons using the street; and, if the jury find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action." If they removed or repaired the wire in a reasonable time, and were not negligent in allowing it to lie upon the streets, then they would not be liable, because want of due care would not be established. 'Fourth. If the jury find that between the time when the defendant received notice of the breaking of the wire, and the time at which the plain-

tiff came in contact therewith, there was not reasonable time in which the defendant could have repaired the wire, or could have removed it out of the way of persons using the streets, then their verdict must be in favor of the defendant.' That I charge you to be the law. Fifth. I have refused this proposition for reasons assigned. [Written upon the margin was the following: "Refused for the reason that the evidence showed that the defendant did not know, nor had any means of knowing, that the wire was charged with electricity. It was not the contact with the wire that caused the injury, but the electricity, which was a hidden force."'] 'Sixth. If the jury find that a want of ordinary care on the part of the plaintiff in any degree contributed to the injury, then the plaintiff cannot recover in this action.' That I charge you to be the law. 'Seventh. If the jury find that the wire was broken by some object, such as a slate or tile, hurled upon it by a storm, the wire being in good condition, the break would be attributable to the act of God.' I charge you that, it would be the duty of the defendant to use precautionary measures not to allow the wire to remain on the streets after it was broken; and if it remained there longer than a reasonable time, and could have been removed sooner, by a due exercise of care, then that was negligence, and the defendant would be responsible. If you find for the plaintiff, you will say, 'We find for the plaintiff' so many dollars and cents; writing it out in words. If you find for the defendant, simply say, 'We find for the defendant,' and sign your name as foreman."

The words written on the margin of defendant's second and fifth requests to charge were not repeated by the judge to the jury on the trial of the case.

Ficken & Hughes, for appellant. Bulst & Bulst, for respondent.

GARY, J. The appellant is a corporation engaged in generating and furnishing electricity in the city of Charleston, S. C., for the purpose of illumination and motive power. On the 16th of December, 1893, during the prevalence of a violent windstorm, one of the electric wires of the defendant, fully charged with electricity, broke, and the two severed ends rested on the ground in one of the thoroughfares of the city. The defendant's testimony tended to show that the wire broke about 2 o'clock, while the testimony of the plaintiff tended to show that it broke at an earlier hour in the day, and that between 12 and 1 o'clock on the day of the accident the defendant was notified that there was some trouble with its wires, and that they were dangerous. At about 3 o'clock p. m. the plaintiff, while passing through this thoroughfare, was injured by the fallen wire. He was instantly shocked, upon coming in contact with it, and fell to the earth unconscious. For some time thereafter he was confined to his bed, during which period he suffered greatly.

His hand was badly burned, and he lost the use of two fingers. This action was instituted to recover damages for such injuries. The plaintiff charged negligence on the part of the defendant, in that it permitted its wires charged with electricity to hang suspended over a thoroughfare of the city, so as to become dangerous to passers on the street, and that the plaintiff, a passenger, in consequence thereof, was seriously injured by the said wire charged with electricity, and was damaged to the extent of \$20,000. The defendant joined issue on these allegations, and set up the defense of contributory negligence on the part of the plaintiff; also, set up the further defense that the injury resulted from the act of God. The jury found a verdict in favor of the plaintiff for \$10,000. The defendant moved for a new trial before his honor, Judge Gary, who granted an order for a new trial unless the plaintiff would remit \$2,500 of the verdict, which the plaintiff did. The charge of the presiding judge will be set out in the report of the case.

The appellant's first exception is as follows: "(1) That the presiding judge erred in charging the jury as follows: 'If a cyclone that could not be anticipated or reasonably foreseen was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, then, under those circumstances, it would not be liable.'" It is not contended that the detached portion of the charge, in itself, states an erroneous principle of law, but that it is misleading, inasmuch as the jury might have inferred that if a cyclone which might have been anticipated, or reasonably foreseen, was the cause of the wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, still, under those circumstances, it would be liable. The appellant also contends "that the presiding judge, in confining his declaration to the effect of the class of storms commonly designated as 'cyclone,' rejected the proposition that any other class of storm, or that a storm of not quite the same degree of violence as a cyclone, would operate to relieve the defendant from liability. were it in other respects free from negligence." Under the numerous decisions of this court the principle is well established that the charge of the circuit judge to the jury must be considered as a whole. When an exception is taken to a certain portion of the presiding judge's charge to the jury, it is the duty of this court, in considering the exception, to look to the entire charge, to ascertain whether or not the detached portion of the charge correctly states the views of the law which the presiding judge intended to convey to the jury. In his charge to the jury touching this question, his honor said: "The question for you is, were these wires erected so as to anticipate any ordinary occurrence in the weather? Was it the act of

God, or was it the careless or loose manner in which the wires were erected, which caused this wire to break? If it were the act of God,—that is, such an act as a business man of ordinary forethought and prudence could not anticipate,—then the company would not be liable, under those circumstances. But, on the other hand, the company is charged with so placing their wires, and so keeping them in repair, as to withstand the ordinary weather,—rain, heat, cold, and wind. It is alleged on the part of the company that the wire was broken in consequence of a severe storm. Was it an ordinary windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated? The law does not require impossibilities. If a cyclone that could not be anticipated, or reasonably foreseen, was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable time, then, under those circumstances, it would not be liable. But if the accident was one due to the wires being improperly erected, or improperly maintained in repair, or, having been properly erected, were broken, and allowed to remain on the streets an unusually long time, then, if the injury to the plaintiff occurred under those circumstances, the company would be liable to compensate him in damages. These are the general observations that I desire to call to your attention before passing upon the points of law I have been requested to charge you." When that portion of the charge set out in the exception is considered in connection with the entire charge on the question, we see no ground for sustaining the objection to it that it might have misled the jury. We come next to a consideration of appellant's second objection to the language of the presiding judge contained in the first exception. The presiding judge used the word "cyclone," in his charge to the jury, because the witnesses had testified that the day when the injury was sustained was cyclonic. The charge was therefore based upon the testimony and applicable to this case. When the charge was considered in its entirety, we do not see how it can be construed as announcing the proposition of law that, if the defendant was free from negligence, it would still be liable, if the falling of the wire was caused by a class of storm other than a cyclone, or by a storm of not quite the same degree of violence as a cyclone. The first exception is overruled.

The second exception is as follows: "(2) That the presiding judge erred in refusing to charge the defendant's second request to charge, viz. that 'if the jury find that the wire in question was broken by a storm, or from some cause beyond the control of the defendant, then no blame can attach to the defendant from the fact that the wire fell, and remained lying on the ground in the public thoroughfare, unless it was allowed to remain there, after notice, for an unreasona-

ble length of time; that is, for a period of time longer than would furnish a reasonable opportunity for the removal of the wire.'" The words "after notice" rendered the proposition of law therein stated unsound, for the reason that the negligence of the defendant might have consisted in its failure to know the facts connected with the breaking of the wire. In other words, the defendant might have been negligently ignorant. *District of Columbia v. Woodbury*, 136 U. S. 463, 10 Sup. Ct. 990; *Branch v. Railway Co.*, 35 S. C. 405, 14 S. E. 808. It was not the duty of the circuit judge to strike out that part of the request to charge which rendered it defective, and then charge so much thereof as embodied a sound proposition of law. *Gunter v. Manufacturing Co.*, 15 S. C. 443, and numerous other cases in this state. The second exception is overruled.

The third exception is as follows: "(3) That the presiding judge erred in refusing to charge, and in striking out from the defendant's third request to charge, the words 'being informed of,' where they occur in said request, immediately following the words 'a reasonable time after.'" The third request to charge is as follows: "That the defendant was entitled to a reasonable time after [being informed of] the fall of the wire, in which to repair it, or to remove it out of the way of persons using the streets; and, if the jury find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action." This exception cannot be sustained. The jury might have found that the injury to the plaintiff occurred before the expiration of a reasonable time after the defendant was informed of the fall of the wire; yet this would not necessarily have precluded the plaintiff from recovering damages, because the negligence of the defendant might have consisted in failing to take proper steps to receive information concerning the condition of its wires. Under this request to charge, if the defendant was not informed of the fall of the wire until a week or a month thereafter, it would still have been entitled to a reasonable time to remove the obstruction, after such notice, although it might have been negligently ignorant. The defendant was bound to exercise due diligence to receive information as to the condition of its wires, and its failure to use proper diligence in this respect would constitute negligence. The third exception is overruled.

The fourth exception is as follows: "(4) That the presiding judge erred in refusing to charge the defendant's fifth request to charge, viz. that 'if the jury find that the plaintiff was injured by coming in contact with defendant's wire, and that by the exercise of ordinary care he could have avoided such contact, then the plaintiff is not entitled to recover anything in this action.'" It would have been error on the part of the circuit

judge to refuse this request, were it not for the fact that he, in substance, charged the proposition of law therein contained in another part of his charge to the jury, to wit, in charging the defendant's sixth request to charge, which is as follows: "If the jury find that a want of ordinary care on the part of the plaintiff in any degree contributed to the injury, then the plaintiff cannot recover in this action." Whether or not the plaintiff had knowledge that the wire was filled with electricity, was a fact to be considered by the jury in determining the question of negligence on the part of the plaintiff in coming in contact with the wire, but the failure to make mention of the electricity in the request to charge did not render the proposition of law therein stated unsound. For the reason that this request was substantially presented to the jury, the fourth exception is overruled.

The fifth exception is as follows: "That the presiding judge erred in commenting upon the plaintiff's seventh request to charge, and explaining the same, as follows: 'If a man is in danger, and in order to avoid that danger, bona fide, does something which is dangerous, that would not be considered, in law, contributory negligence.'" These words are to be construed in connection with the seventh request to charge, which is as follows: "When one is placed by the negligence of another in a situation of terror, his attempt to escape danger, even by doing an act which is in itself dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering." It will be observed that the exception does not question the correctness of the law as charged in the seventh request, but only complains of error on the part of the presiding judge in using the foregoing words after charging said request. When the words used by the circuit judge are considered in connection with the seventh request, it will be seen that they do not lay down a different proposition of law from that contained in said request, and that they are simply explanatory of said request. Even if considered alone, these words do not state an erroneous principle of law, although, in themselves, they are not as comprehensive as might have been desired. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 161)

PICKENS COUNTY v. DAY et al.

(Supreme Court of South Carolina. Sept. 17, 1895.)

COUNTY COMMISSIONERS—DECISION—APPEAL—REVIEW.

1. The minutes of the meeting of county commissioners on a certain day contained a statement, signed by the chairman, that the board decided that the question before them was the approval of the claim of D. & Co., "and, as soon as acted upon, due notice will be

given said parties." On a later day the board approved part of the claim, and rejected the balance. *Held*, that there was no decision on the first day to be appealed from, but only a ruling, and that it was enough for claimants to appeal from the decision thereafter rendered within five days of notice thereof.

2. A board of county commissioners cannot refuse to allow a claimant to introduce evidence to support his claim, as the right to appeal from the commissioners carries with it the incidental right to introduce evidence.

3. On appeal from the decision of county commissioners rejecting part of a claim, judgment for claimant for the full amount of his claim is properly refused, though it is sworn to; the presumption being, in the absence of testimony to the contrary, that the commissioners did their duty.

Appeal from common pleas circuit court of Pickens county; Witherspoon, Judge.

Claim by Elias Day and another against Pickens county. From the decision of the circuit court on appeal of claimants from the decision of the county commissioners, both parties appeal. Modified.

The decision of the court below was as follows: "The above-entitled case was heard by me on appeal by the plaintiffs, Elias Day & Co., from the judgment of the county commissioners refusing to hear the testimony of witnesses offered by plaintiffs in support of their claim presented against Pickens county. After hearing argument of counsel I conclude that it was error as matter of law for the county commissioners of Pickens county to refuse to hear the testimony of witnesses offered by the plaintiffs to sustain the claim presented before said commissioners against Pickens county. While this court cannot control or direct the board of county commissioners in the exercise of their discretion in passing upon claims presented against the county, I do not think that said board is invested by law with the power of refusing to hear or to allow testimony to be introduced by persons presenting claims against the county. If the county commissioners are invested with such arbitrary power, if so disposed, they could refuse to hear testimony, and thereby disallow legal demands against the county, and the appellate court would have no means of ascertaining the grounds upon which their judgments are based. It is therefore ordered that the plaintiffs' appeal from the judgment rendered by the county commissioners of Pickens county in the above-entitled case be sustained, and that the judgment of said board be reversed, upon the ground of error, as matter of law, and that the case be remanded to the board of county commissioners of Pickens county to hear such testimony as the plaintiffs, Elias Day & Co., may present in support of their claim upon a day to be fixed by said commissioners, after due notice to said plaintiffs. In remanding the case to the board of county commissioners, it is not intended by the court to intimate any opinion as to the merits of plaintiffs' claim, as that matter must be left to the discretion of the board of county commissioners. Let a certified copy

of this order be served upon the board of county commissioners of Pickens county."

Defendant's exceptions were as follows: "(1) Because his honor erred in not holding, as he was requested to do, that the claimants, Elias Day & Co., had not appealed from the decision of the board of county commissioners rendered on the 24th day of December, 1892, within five days from that time, and in not dismissing the appeal on that ground. (2) Because his honor erred in not holding, as he was requested to do, that the claimants had only appealed from the action of the board of January 3, 1893, and in not sustaining the action of said board. (3) Because his honor erred in holding that it was error, as matter of law, for the county commissioners of Pickens county to refuse to hear the testimony of witnesses offered by the plaintiffs to sustain the claim presented before said commissioners against Pickens county. (4) Because his honor erred in ordering that the appeal be sustained, and the judgment of the board reversed, upon the ground of error, as matter of law, and that the case be remanded to the board of county commissioners of Pickens county to hear such testimony as the plaintiffs, Elias Day & Co., may present in support of their claim upon a day to be fixed by said commissioners. (5) Because his honor erred in not holding, as he was requested to do, that it was in the discretion of the board of county commissioners whether they would hear testimony on the claim, or not, and that it was not error of law to refuse to hear said testimony."

The claimants' exceptions were as follows: "(1) Because his honor, Judge Witherspoon, erred in not giving judgment in favor of the claimants for the full amount of their claim; there being no testimony against it, and the claim being duly sworn to by the claimants. (2) Because the circuit judge, from all the papers before him, should have rendered judgment in favor of the claimants for the amount of their claim."

James P. Carey, for Pickens County. Julius E. Boggs and Cothran, Wells, Ansel & Hollingsworth, for Day & Co.

GARY, J. *On the 17th day of October, 1892, the claimants, Elias Day and R. E. Bowen, filed a claim in the office of the board of county commissioners for Pickens county for the sum of \$3,346. On the 24th day of November, 1892, at a meeting of the board of county commissioners, the claimants appeared before said board, through their attorneys, and asked to be allowed to introduce testimony in support of their claim. The board refused to allow the claimants to introduce testimony. In the minutes of the meeting on that day appears the following statement, signed by the chairman of said board: "The board decided that the question before them is the approving or disapproving the claim filed in this office by Elias Day

& Co. for \$3,346; and, as soon as acted upon, due notice will be given said parties." On the 3d day of January, 1893, the board approved said claim, to the extent of \$100, but rejected the balance of it. This action of the board was filed in the office of the commissioners. On the 8th day of July, 1893, the attorneys of Day & Co. requested a certified copy of the action of the board on said claim, which was the first notice said attorneys had that said claim had been approved for \$100. The attorneys of Day & Co. served notice of appeal on the 12th day of July, 1893, from the decision of said board, and the case was heard by his honor, Judge Witherspoon, who rendered the decision which will be set out in the report of this case. From this decision both claimants and defendant have appealed, upon exceptions which will also be set out in the report of the case.

The first and second of defendant's exceptions will be considered together. The board of county commissioners simply made a ruling on the 24th day of November, 1892, but did not make a decision upon the claim. In the minutes of their meeting on that day they say, "As soon as acted upon, due notice will be given said parties." Although the decision upon the claim was filed on the 3d day of January, 1893, still the claimants did not have notice thereof until the 8th day of July, 1893, and in less than five days they served notice of appeal from such decision. This was in due time. These exceptions are therefore overruled.

The third, fourth, and fifth exceptions will be considered together, as they raise practically but the one question,—whether the board of county commissioners had the right to refuse to allow the claimants to introduce testimony to sustain their claim. This question was decided by either *Green v. County Com'rs*, 27 S. C. 9, 2 S. E. 618, or *Tinsley v. Union Co.*, 40 S. C. 279, 18 S. E. 794. The law allows an appeal from the decision of the board of county commissioners, and if the board had the right to refuse to allow a claimant to introduce testimony to sustain his claim, then they could practically destroy this right by such refusal. If an appeal should be taken from their decision, the presumption would be that the board had acted correctly; and the appellant would be powerless to overcome this presumption by testimony, thus rendering his appeal nugatory. The right to appeal carries with it the incidental right to introduce testimony to establish the facts of the case. These exceptions are overruled.

We come next to a consideration of exceptions on the part of Day & Co. The first exception cannot be sustained, because, in the absence of testimony to the contrary, the presumption is that the board of county commissioners did their duty in the premises. The case is unlike the case of *Aull v. Newberry Co.* (S. C.) 20 S. E. 61, where the only

testimony was that of the claimant. What we have just said in regard to the first of Day & Co.'s exceptions disposes also of their second exception.

It is the judgment of this court that the case be remanded to the court of common pleas for Pickens county for the purpose of making such changes in the order as are rendered necessary by the recent act of the legislature in regard to the powers and duties of county commissioners, and that in all other respects the judgment of the circuit court be affirmed.

(45 S. C. 61)

STEWART et al. v. BLALOCK et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

ASSIGNMENT OF HOMESTEAD—RIGHTS OF MINORS—LIMITATIONS.

1. The assignment of homestead in lands of an intestate does not affect the rights of the heirs under the statute of distributions, but simply protects the property from creditors.

2. Homestead rights as against creditors must be determined by the homestead law in force at the time the debts were created.

3. Homestead Act 1880 (17 St. 513), § 2, provides that after the proceedings for setting aside the homestead of the head of the family, under process against him, have become final, the title to the homestead so set off shall be "forever discharged from all debts." Section 4 provides that, in case the father be dead, the homestead set apart to the widow and children shall be subject to partition "in like manner as if no debt existed." *Held*, that the homestead so set apart to the widow and children was discharged from all debts, and on the widow's death was subject to partition among the children.

4. A sale under mortgage foreclosure is an alienation within St. 3 & 4 W. & M. c. 14, providing that an action by a creditor to subject real estate of his debtor, which has descended to his heirs, to the payment of the debt, is barred if not commenced until after a bona fide alienation by such heirs.

Appeal from common pleas circuit court of Pickens county; Watts, Judge.

Action by Tempy C. Stewart and others, heirs of Moses M. Jones, and A. C. Wyley and another, creditors of said Jones, against Corrie M. Blalock and others to recover land, and for a partition. From a judgment in favor of the heirs for part of the land, discharged from the claims of the above creditors, the heirs and such creditors appeal. Affirmed.

J. P. Casey and Johnson & Richey, for appellants. Julius E. Boggs and Cothran, Wells, Ansel & Hollingsworth, for respondents.

McIVER, C. J. On the 2d day of October, 1883, Moses M. Jones died intestate, being seized and possessed of the real estate which is the subject of this action, leaving as his heirs at law his widow and children. On the 11th of November, 1884, the widow, Margaret Jones, commenced an action against the other heirs for partition of said land, under which it seems that the creditors of Moses

M. Jones were called in to establish their demands, and the two plaintiffs mentioned in the title of this case as creditors, some time in the year 1885, established their claims. While this action for partition was pending, the widow, Margaret Jones, filed her application for homestead, under which the said land was assigned to her as homestead, and duly confirmed by an order of the court dated 26th September, 1885, and the action for partition was discontinued. The widow, Margaret Jones, on the 17th of June, 1887, executed a mortgage on the said land to the People's Bank, and under proceedings to foreclose said mortgage the land was sold and bought by Frank Hammond, who on the 29th of September, 1889, sold and conveyed the same to W. W. Blalock. Some time after the year 1891, the said W. W. Blalock died intestate, leaving as his heirs at law his widow, the defendant Corrie M. Blalock, his father, the defendant Robert W. Blalock, and his brother, the defendant L. F. Blalock. After the death of the said W. W. Blalock, his widow, the defendant Corrie M. Blalock, had the said land assigned and set off to her as a homestead, and she has ever since been in the possession thereof. In the meantime, to wit, on the 14th of July, 1889, the widow, Margaret Jones, departed this life intestate; and on the 8th of January, 1894, the present action was commenced by the heirs of Moses M. Jones, and also of Margaret Jones, for the recovery of said land, and for partition of the same according to their respective interests, to which action the creditors of Moses M. Jones who had proved their claims under the previous action for partition are made parties plaintiff. The case was referred to a referee, who made his report, ascertaining the facts, and the same came before his honor, Judge Watts, who rendered a decree holding that the widow, Margaret Jones, took an undivided one-third interest in the land in fee, which passed to those claiming under the sale for foreclosure, and that the other two-thirds were subject to partition among the children of Moses M. Jones, discharged from his debts. He therefore rendered judgment that the land be sold, and that the proceeds of such sale, after paying the costs and expenses of this case, and any lien for taxes, be applied as follows: First, to the amount ascertained by the report of the referee to have been paid by the defendant Corrie M. Blalock for taxes on the land; second, one-third of the balance to the said Corrie M. Blalock; third, the remaining two-thirds to the children and grandchildren of said Moses M. Jones, according to their respective interests. From this judgment both the heirs at law and the creditors appeal upon the several grounds set out in the record. By these grounds the heirs at law impute error to the circuit judge in holding that the widow, Margaret Jones, took an undivided third interest in fee, and, on the contrary, contend that she took only a life estate and that upon her death the land was

subject to partition among the heirs at law of Moses M. Jones according to their respective interests; while the creditors contend that they were entitled to have their debts paid before any partition could be made.

It is very evident that the primal question in this case is as to the nature of the estate which the widow, Margaret Jones, took in the land. Was it an estate in fee, so far as her distributive share thereof was concerned, as held by the circuit judge, or was it a mere life estate, as contended for by appellants? If there had been no creditors of the intestate, Moses M. Jones, at the time of his death, there can be no doubt that this land would have descended to and vested in his widow and children, as his heirs at law, in fee simple, subject to partition among them in the proportions fixed by the statute of distributions,—one-third to the widow and the remaining two-thirds to the children. Now, as it is well settled in this state, at least, that the homestead provisions create no new estate, and do not invest estates already existing with any new qualities, or subject them to any restrictions, but simply secure a right of exemption by forbidding the use of the process of the court to sell certain property for the payment of debts (*Elliott v. Mackorell*, 19 S. C., at page 242, and *Chalmers v. Turnipseed*, 21 S. C., at page 136), and as it has been held in *Ex parte Ray*, 20 S. C., at page 248, that the homestead laws are not designed to alter or in any way affect the statute of distributions, it follows, necessarily, that the title to this land, even after its assignment as a homestead, remained vested in the heirs at law. The only effect, therefore, of the assignment of the homestead in this case, so far as the rights of the heirs at law were concerned, was simply to protect the property from the grasp of creditors, and did not in any way disturb or alter the rights of the heirs at law as fixed by the statute of distributions. It is very clear, therefore, that the appeal of the heirs at law cannot be sustained.

Next as to the appeal of the creditors. That appeal practically rests upon the proposition that, upon the death of the widow, the exemption provided by the homestead laws terminated, and the land in question again became subject to the payment of the debts of the intestate, before any partition could be made, so that our first inquiry is whether that proposition is well founded. We are somewhat embarrassed, in pursuing this inquiry, by the fact that it nowhere appears in the "case" where these debts were contracted,—a fact which might become important in one aspect of the case. All that does appear is that these claims were proved, in the first partition suit, some time in 1885, and therefore these debts must have been contracted before that time, but how long before we are not able to ascertain. The cases of *Chalmers v. Turnipseed*, *supra*, and *Trimmier v. Winsmith*, 41 S. C. 109, 19 S. E. 283, are relied upon by these appellants to

sustain the proposition above stated. But it will be observed that both of these cases were decided under the homestead laws as they stood prior to the amendment of the constitution adopted 13th December, 1880 (17 St. 320), and, of course, prior to the act of 24th December, 1880 (17 St. 513), passed in pursuance of the mandate contained in that amendment: "It shall be the duty of the general assembly, at their first session, to enforce the provisions of this section by suitable legislation." For, as was held in *Trimmier v. Winsmith*, *supra*, the right of homestead must be governed by the law in force at the time the debt, to the payment of which it is sought to be subjected, was created; and in both of those cases the debts sought to be enforced were contracted prior to the year 1880. Indeed, in the case of *Chalmers v. Turnipseed* the debts must have been contracted prior to or during 1869, as the intestate died in August of that year. But in the present case the debts sought to be enforced must be regarded, in the absence of any evidence to the contrary, as having been contracted since 1880, as the first we hear of them was in 1885. The proposition contended for must, therefore, be tested by the law as it stood in 1880. This view is expressly recognized by the late Chief Justice Simpson, for, in delivering the opinion of the court in *Chalmers v. Turnipseed*, after noticing the provisions of the acts of 1868, 1872, and 1873, he says: "There has been a subsequent act,—the act of 1880; the one now of force,—but it has no application here, and need not be considered." And, again, he says: "The personal property valued at \$477.15 was set apart to her [the widow], in kind, under the act of 1873, and under that act was subject to partition among the children; but in this case there are no surviving children. Had there been, another difficult question would have been presented. Section 2 of this act does not provide that when the homestead is set off, as the act directs, to the head of the family, it shall be forever discharged from all debts of said debtor then existing or thereafter to be contracted. This provision is also found in the act of 1880, but it is not in the act of 1872 [the act under which the real-estate exemption was allowed in that case]. What effect this section will have on homesteads set off under the act now of force has not been considered here." So that it is very obvious that the question now presented is a new question, and may be stated as follows: Whether there is any such limit to the exemption provided for under the constitution as amended in 1880, or the act passed to enforce the provisions of that amendment, as is contended for by these appellants. A very brief review of the previous legislation upon this subject may throw some light upon this question. The first act (1868; 14 St. 21) expressly provided, in its fourth section: "The estate or right of homestead of the head of any family, existing at his death, shall con-

time for the benefit of his widow and minor children and be held and enjoyed by them until the youngest child is twenty-one years of age, and until the marriage or death of the widow, and be limited to that period." By the fourth section of the act of 1872 (15 St. 230) it is provided "that the homestead, when assigned as herein prescribed shall vest in the heads of the family in fee simple and be freed and discharged from all debts and liabilities whatever, so long as he or she shall remain resident in the state, and no longer"; but in the eighth section of the same act, which secures a right of homestead to the widow and minor children of any deceased father or husband, there is no provision as to the time during which such exemption from debt shall continue. By the second section of the act of 1873 (15 St. 370) it is provided that after the proceedings for setting aside the homestead to the head of the family, under process against him, have become final, by filing the return of the appraisers, "the title of the homestead so set off and assigned, shall be forever discharged from all debts of said debtor then existing, or thereafter contracted"; and by section 4 of said act it is provided as follows: "If the husband be dead, the widow and children, if the father and mother be dead, the children living on the homestead, whether any or all of such children be minors or not, shall be entitled to have the family homestead exempted in like manner as if the husband or parents were living; and the homestead so exempted shall be subject to partition among all the children of the head of the family in like manner as if no debt existed." Next comes the act of 1880 (17 St. 513), which is entitled, "An act to determine and perpetuate the homestead," and seems to be the law now in force, at least so far as the question now presented is concerned. The second and fourth sections of that act are substantially the same as those above cited from the act of 1873. From this hasty review of the legislation upon the subject it is apparent that in the earlier acts an intention to limit the duration of the exemption was expressed; but in the later acts no such intention appears, and, on the contrary, it appears that the intention was to declare the property exempted forever discharged from liability for debt. This intention is expressly declared in the second section of the act of 1880, in the reference to property exempted under process against the debtor, and is necessarily implied from the fourth section of the act, providing for a claim of homestead by the widow and children, by the express declaration that such property is subject to partition among all the children "in like manner as if no debt existed." We do not think, therefore, that the proposition upon which the appeal of the creditors rests can be sustained.

There is also another ground upon which the appeal of the creditors, as against the defendant Corrie M. Blalock, must be dismiss-

ed. While it is quite true that, aside from all question of homestead, a creditor of an intestate may, by proper proceedings, instituted within the proper time, subject real estate of his debtor, which has descended to his heirs, to the payment of his debt, yet, if such real estate has been bona fide alienated by the heir, before the creditor commences his action for the recovery of his debt, his right to subject such real estate to the payment of his debt is gone by virtue of the provisions of the statute of 3 & 4 W. & M. c. 11. So that, disembarassing this case of any question of homestead, if it appears that the land which these creditors are seeking to subject to payment of their debts was bona fide alienated before these creditors commenced their proceedings to recover their debts, their right to do so is barred by such alienation. Now, while a mortgage cannot be regarded as an alienation, under the statute of William and Mary (*Simons v. Bryce*, 10 S. C. 354), yet, if the mortgaged premises are sold under proceedings for foreclosure, that does amount to such an alienation (*Warren v. Raymond*, 12 S. C. 9). So that the inquiry here is whether the sale of the mortgaged premises was made before these appellants instituted their proceedings to recover their debts. The foreclosure sale was made in September, 1889, and these appellants could not have presented and proved their claims in the present case until after that time, for the present action was not commenced until the 8th of January, 1894. It is true that it is stated in the "case" that these appellants presented and proved their claims in 1885, under the first action for partition, but that action was discontinued, as we must assume, by the consent of the appellants; for without their consent the action could not have been discontinued after they had been called in and established their claims. *Adger v. Pringle*, 11 S. C., at page 547, and the cases there cited. If, therefore, the first action for partition was discontinued by consent, it must be regarded as if no such action had ever been instituted, and nothing had been done under it, and hence to determine when these appellants commenced their action for the recovery of their debts, or, what amounts to the same thing, when they presented and proved their claims in this action (*Warren v. Raymond*, 17 S. C. 202), we must look alone to the time when these claims were presented in this action. It seems to us, therefore, that upon this ground these appellants can have no claim, as against the one-third of the proceeds of the sale of the land ordered to be paid to the defendant Corrie M. Blalock, as alienee of the interest of Margaret Jones; for certainly the mortgage of Margaret, though purporting to cover the whole of the land, followed by the sale on foreclosure, operated as a valid alienation to the extent of her interest (one-third) therein. *Young v. Edwards*, 33 S. C. 404, 11 S. E. 1066.

It may not be amiss to add that, while the claims of these appellants are spoken of in the "case" as "judgments," yet we think they are improperly so designated, for it does not appear that any report on claims was ever made, and, until such report was made and confirmed, we do not see how they could acquire any of the attributes of a judgment. The judgment of this court is that the judgment of the circuit court be affirmed.

(45 S. C. 33)

HALL v. HALL.

(Supreme Court of South Carolina. Sept. 9, 1895.)

REVIEW ON APPEAL—FRAUD—ARGUMENTATIVE EXCEPTIONS.

1. Where there is evidence to support the findings of fact made by a circuit judge, they will not be disturbed.

2. Fraud cannot be predicated on a calculation of interest on a bond, after the lapse of 15 years, where neither the bond nor a memorandum thereof has been preserved.

3. Exceptions which are argumentative should not be considered on appeal.

Appeal from common pleas circuit court of Kershaw county; Aldrich, Judge.

Action by Louisa Hall against H. H. Hall to cancel a deed, and for an accounting. From a judgment dismissing the complaint, plaintiff appeals. Defendant died pending appeal, and W. W. Hall, executor, was substituted as respondent. Affirmed.

For prior report, see 19 S. E. 305, 41 S. C. 163.

A. B. Stuckey, for appellant. J. T. Hay, for respondent.

POPE, J. The action was originally between the present plaintiff and Harrison H. Hall as defendant. In this plight it came before the court, when our former judgment was rendered, awarding plaintiff a new trial; and, with these same parties, it came on for a hearing before his honor, Judge Aldrich, at the June, 1895, term of court of common pleas for Kershaw county, in this state. After an appeal was taken from Judge Aldrich's decree, the defendant, Harrison H. Hall, departed this life, leaving a will, of which W. W. Hall was nominated and qualified as executor. So on the 24th day of April, 1895, this court passed an order substituting the said W. W. Hall, as such executor, the party defendant. A full history of the issues involved in this action is set forth in the opinion of Mr. Justice McGowan in Hall v. Hall, 41 S. C. 163, 19 S. E. 305. By that judgment this cause was remanded to the circuit court for a new trial, at which the defendant was required to make it plain that the conveyance made to him in the year 1880 by the plaintiff, Louisa Hall, for the 484 acres of land, was fairly and voluntarily made, upon a separate and independent contract of sale, disconnected from the mortgage contract, and also that the plaintiff

knew the character and effect of the paper she signed, and that she signed it voluntarily and intelligently. Under these specific directions, the whole cause was reheard by Judge Aldrich, who had all the witnesses before him, in giving their testimony, except Mrs. Hall, the plaintiff, whose testimony was taken out of court. After this hearing, Judge Aldrich rendered his decree, wherein he found every issue in favor of the defendant, and dismissed the complaint. The plaintiff is now before this court a second time, on five exceptions, as follows: "(1) His honor erred in holding that the defendant had the right to calculate interest on the mortgage debt at the rate of 18 per cent., up to the time of the making of the deed, when the mortgage called for that rate of interest only up to the maturity of the installments of the debt, and no longer, whereas he should have held that the defendant, in calculating such rate of interest after maturity of such installments, took advantage of plaintiff, an aged and illiterate woman; such advantage being fraud perpetrated upon her, and should have vitiated the deed. (2) That his honor should have held that, whether such calculation of interest was a fraud or a mistake, it inured to the benefit of the mortgagee, placed the mortgagor at a disadvantage, and should have vitiated the deed. (3) Because his honor erred in concluding that a calculation of the interest at 18 per cent. would aggregate the amount, or nearly the amount, of the consideration expressed in the deed, whereas, instead, his honor should have calculated that one or more payments must have been made upon the debt, because a calculation of 18 per cent. interest upon the original debt to the making of the deed would be more, and that a calculation of the interest at 18 per cent. on the installments of the debt until they become due, and 7 per cent. afterwards, would aggregate less, than the consideration expressed in the deed, and that, therefore, it is reasonable to conclude that the 18 per cent. must have been calculated to the time of making the deed, and one or more payments must have been made upon the debt, as testified by the plaintiff and others. (4) That his honor erred in holding that the purchase by the defendant from the plaintiff of the land in dispute was an honest, open, and fair transaction; that the consideration was reasonable, proper, and fair; and, as conclusion of law, that defendant's title is valid, whereas he should have held that the defendant took advantage of plaintiff, an aged and illiterate woman; used his position as mortgagee to influence her; that no new consideration passed between them; no price was agreed upon for the land; that the transaction was not disconnected from the mortgage; that plaintiff did not know the difference between a mortgage and an absolute conveyance,—and should have concluded that said deed was null and void. (5) That his honor erred in

sustaining the plea interposed by the defendant, that the plaintiff, not having brought her action within the six years from the discovery of the fraud, is barred, whereas he should have held that Judge Witherspoon having failed on the former trial of the cause to sustain his plea, and defendant not having excepted thereto, he is now debarred from interposing it."

So far as the first exception is concerned, we fail to notice in the decree that the circuit judge held that the defendant had the right to calculate the interest at 18 per cent. from the date of debt to date of deed. The circuit judge does, in his decree, refer to what was a common practice among our people,—to allow the same interest after maturity as it was stipulated in their notes that they should bear up to maturity. And this practice prevailed until some contract was brought before the supreme court, which held that, as a contract in writing must be governed by its terms, the interest in excess of the legal rate was only contracted to be paid up to maturity, unless the obligation provided by its terms for an extension of such interest in excess of the legal rate beyond the maturity of the note. This court never said that parties to such notes may not have intended differently, and therefore honestly carried out their intentions. So the circuit judge, here, in discussing the question whether the fact that the interest beyond (in excess of) legal interest after the installments of the bond here in question had matured was of itself a badge of fraud, held it was not, and, in the course of his remarks, said: "The parties had the right to contract as they saw proper, and in the absence of all proof to the contrary, and the custom as it existed years ago, where this transaction took place, it seems to me to be only a just and natural conclusion to assume that the parties intended to do just what they did do,—calculate the interest at 18 per cent. There is no fraud here." We fail to see, therefore, that the decree of the circuit judge is liable to the exception of the appellant as she has chosen to phrase it. Now, as to the other allegation in the exception, imputing error to the circuit judge in failing to find that advantage had been taken of this good old lady by the defendant's testatrix. This is a question of fact, and the record discloses an abundance of testimony upon which the circuit judge may have depended in reaching his conclusions; and, under our well-settled rule in such cases, we will not overrule his conclusions as to facts. We may be pardoned for saying that this is the second circuit judge who has heard this testimony, both of whom were alike impressed that the preponderance of the testimony was with the defendant. Notwithstanding the concurrence of the two circuit judges on this point, we have given the testimony a very close study, so that full justice might be done the plaintiff, who is now

more than four score years of age, and also a widow, but we cannot see our way clear to upsetting this transaction on the point here raised.

As to the second exception, it and the third will be considered together. It is difficult to reproduce the calculation of interest so as to reach the amount named in the deed as its consideration. If 18 per cent. interest was charged upon the \$349.70 from its date (15th January, 1877) to date of deed (12th November, 1880) it would amount to about \$609.47; and, as the consideration named in the deed is \$584.10, this would make the debt about \$25.37 in excess of the consideration of the deed. If, however, we apply the rule fixed by law, by calculating interest on each installment from date to maturity at 18 per cent., and thereafter at 7 per cent. up to date of deed, we find that the consideration named in the deed (\$584.10) is about \$76.60 in excess of this calculation of principal and interest (\$507.50). Therefore, relying upon probabilities, the first mode, as is suggested by the circuit judge, was that adopted by the parties; and it may be that the small payment testified to by the good plaintiff, of \$19, may, when interest is allowed, account for the \$25.37. It must be apparent that a distance of 15 years, nearly, from the time these witnesses testified as to what occurred in November, 1880, would necessitate some inaccuracy as to the details of a settlement. This might easily have been corrected by the parties themselves, if the original bond had been preserved, or a memorandum of the calculations of debt and interest had been preserved. Such differences, however, after this interval (15 years), cannot be made to play such an important function as that of convicting a reputable citizen of willful or even legal fraud. It is due the bar that we should say that these exceptions are objectionable in form. They are really argumentative. And, if this court would enforce its rules strictly, such exceptions would not be considered. We have not enforced the rule, because its enforcement was not demanded by the respondent. Let the exceptions be overruled.

So far as the fourth exception is concerned, it really relates to a finding of fact by the circuit judge. We are not prepared, by any means, to say that this conclusion of the circuit judge is without any testimony to support it, or is opposed to the overwhelming weight of the testimony. Therefore, under our rule in such cases, we will not disturb the finding of the circuit judge.

Lastly, we will dispose of the fifth exception. When the circuit judge decided that the defendant, with the burden of proof upon him, had successfully maintained all the requirements of this court in its judgment granting a new trial of all the issues without prejudice, there was no necessity for his having passed upon the plea of the statute of limitations, to wit, that the plaintiff had

full knowledge of all the facts she claims will establish fraud for more than six years before she instituted her action to set aside the deed she had made on the ground of fraud practiced upon her by defendant's testator. If the facts constituting fraud did not exist, what use was there for any plea of limitation? However, the circuit judge did pass upon this plea, as affected by the facts proved, and sustained such plea. His conclusion is an abstraction, so far as this case is concerned, but we cannot say that, as an abstract proposition of law, it is incorrect. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 27)

TEAGUE v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Sept. 9, 1895.)

CARRIERS OF GOODS—CARRYING BEYOND DESTINATION—DAMAGES—APPEAL FROM JUSTICE'S COURT—RECOMMITMENT.

1. In an action by a consignee against a common carrier to recover for the carrying of goods beyond their destination, plaintiff should be allowed, where the breach of the contract is admitted, to give evidence of any general or direct damages which he may have suffered.

2. On appeal from a trial justice, it is not error to send the case back for a new trial, though neither party has asked for such a disposition.

Appeal from common pleas circuit court of Greenville county; Buchanan, Judge.

Action by John M. Teague against the Southern Railway Company to recover damages consequent upon the defendant's carrying certain goods consigned to him beyond their point of destination. From a verdict before the trial justice in favor of plaintiff, defendant appealed, and from an order of the circuit court sending the case back for a new trial it again appeals. Affirmed.

J. S. Cothran, for appellant. C. J. Hunt and C. F. Dill, for respondent.

POPE, J. On the 31st day of January, 1895, plaintiff commenced his action before Nathan P. Whitmire, Esq., as a trial justice in and for Greenville county, in this state, against the defendant. The following is a copy of the summons issued by said trial justice, and served upon the defendant: "State of South Carolina. Trial Justice's Summons for Debt. County of Greenville. By N. P. Whitmire, Esq. To the Southern Railway Company, a Corporation Doing Business in This State, and Entitled to Sue and be Sued in the Courts of This State: Complaint having been made unto me by John M. Teague that you are indebted to him in the sum of fifty dollars, on account of damages, to wit, that on the 16th day of November, 1894, E. B. L. Taylor, as the agent for complainant, delivered to the defendant one box of fruit trees and vines, of the value of eighty-five dollars, to be shipped

by the defendant to central South Carolina, and delivered by it to this plaintiff or his agent on or before the 20th day of November, 1894,—this day having been fixed by said plaintiff to deliver said trees and vines to his customers; that, by reason of the negligence and carelessness of the defendant's agents and servants, said box of fruit trees and vines were carried past their destination, and were not delivered to this plaintiff until after the said 20th day of November, 1894, to his damage fifty dollars: This is to require you to appear before me, in my office in Greenville city, South Carolina, on the 20th day from the service of this summons, exclusive of the day of service, at 10 o'clock a. m., to answer to the said complaint, or judgment will be given against you by default. Dated Greenville, S. C., Jan. 30, 1895. N. P. Whitmire [Seal], Trial Justice." This case was tried by said trial justice, without a jury, on February 21, 1895, whereupon he adjudged that the defendant should pay the plaintiff \$25. From this judgment the defendant appealed to the circuit court on nine grounds. This appeal came on to be heard by his honor, Judge Buchanan, who adjudged as follows: "The above case came on to be heard before me at Greenville. It involved several questions, all going, more or less, to the main objection to the proceeding below, i. e. that the trial justice had permitted the plaintiff to introduce and make out his case by special and remote damages, instead of laying down the liability for general and proximate or direct damages. It will be observed from the evidence taken that there was no testimony showing special notice of any unusual damage that might arise from a violation of duty on the part of the defendant. The special circumstance requiring special diligence was not brought to the attention of the railroad company at the time of the shipment. The amount of injury, therefore, against which they contracted, was that which would arise naturally and generally, and unaffected by any special circumstances. The case of Hadley v. Baxendale, 9 Exch. 341, is the most prominent case upon the point. This case was called to the attention of both counsel, and its application to the present case remarked. Counsel for the defendant admitted the negligence in carrying the trees past the place of delivery contracted for, and their detention, but contended that they were only liable for general damages, and that inasmuch as the evidence admitted below was of a special damage, and no general damage at all, the judgment should be reversed in toto. I did not take exactly the same view of it. True, as I remarked, Hadley v. Baxendale contains the principle by which it was decided special damages should not be allowed under his contract, but it did not follow from this view that the plaintiff was not entitled to show, if he could, what his general damages were, in the

face of the fact that defendant had admitted its violation of duty in carrying the trees to another and more distant station. Besides, in the court below, it is possible (indeed probable) he paid no attention to general damages; being, no doubt, advised that more and special damages were the rule. He therefore did not put in evidence of any general damages. In fact, the presumption would seem to be the other way. The plaintiff, at least, should be given the chance to show his general damages, if he has any. Those reasons in favor of substantial justice between the parties show why I did not agree with the views of either side, but decided that the case be sent back pursuant to these views." The judgment was, "Let the papers be sent back to the trial justice, with instruction to allow evidence of general damages only." From this judgment the defendant now appeals to this court, on the following grounds: "(1) Because the presiding judge erred in not rendering judgment in favor of defendant; he having ruled out the evidence of consequential damages, and there being no evidence of general damages. (2) The presiding judge erred in not sustaining the defendant's ninth ground of appeal from the judgment of the trial justice, which was as follows: 'That the trial justice erred in not granting a nonsuit, there being no evidence of any legal damages resulting from defendant's negligence.' (3) The presiding judge erred in not sustaining defendant's eighth ground of appeal, which was as follows: 'That the measure of damages in a case of ordinary delay from negligence of a carrier is the difference in the market value of the goods on the day on which they should have been delivered; and, the evidence being that there was no difference in the market value of said trees on the 20th and 21st of November, the trial justice erred in not limiting the plaintiff to that difference.' (4) The presiding judge erred in sending the case back for a new trial, when neither party asked for such disposition; thus allowing the plaintiff a second opportunity for making out his case, which he admittedly failed to do."

Before dismissing the ground of appeal, we deem it best to dispose of the application of the respondent,—that, in case we fail to agree with the circuit judge in his order for a new trial, then that this court will confirm the judgment of the trial justice. This application by the respondent is not set up in the case. It only appears in the argument of the respondent's attorneys. It has been stated, time and again, that we cannot be governed by the statement of facts that appear for the first time in the argument of counsel. With how much more force does the reason of the rule shut out from our view application for action on our part which only appears in the argument? The object of the rule is most praiseworthy. It is to limit arguments to the points made, as they

appear in the case. If we were to consider this application from the respondent, it would be, virtually, allowing him the right of appeal, where none had been taken. We shall therefore decline this application. Now, as to the first ground of appeal: Under the statute (section 368 of our Code of Civil Procedure), the circuit court, in disposing of appeals from the judgments rendered in trial justices' courts, is directed to "give judgment according to the justice of the case without regard to technical errors and defects that do not affect the merits." Now, in the case at bar, according to the theory of the circuit judge, which is sustained by the appellant, it was the duty of the trial justice to have confined himself to hearing testimony, at the trial before him, "of general and proximate damages only." A new trial was ordered by the circuit judge because this was not done at the first trial, when the result was that the trial justice gave judgment in favor of plaintiff for \$25. According to the circuit judge and the appellant, this condition of things arose from the trial justice's having considered testimony relating to consequential damages. This court is not so much concerned with the reasons advanced to support a judgment. What concerns us most is the question, Is the judgment sound in law? when an appeal is taken in a case on the law side of the court. No appeal is taken by the respondent. So that our judgment is confined to the questions raised by the defendant or appellant. We suppose, if a circuit judge does not affirm a judgment, but sends it back for a new trial, the only party that ought to be heard, in complaining of that course, would be the plaintiff, and not the defendant. But the plaintiff does not complain, and the defendant does. So we will deny him any relief, as against the judgment directing a new trial. To make our meaning perfectly plain, we think the case of *Nettles v. Railroad Co.*, 7 Rich. Law, 190, has a direct bearing upon the case at bar. Here the Southern Railway Company contracted to deliver this box of fruit trees and vines at Central,—a station 26 miles from Greenville, S. C., the place of shipment. The goods were delivered for shipment on the 16th day of November; were carried by the defendant railroad company past Central station, and discharged as freight at Tuccoa, in the state of Georgia. The defendant admits that it was guilty of negligence in so doing. When consignee calls for his goods at Central station, on the 20th day of November, he is told the goods are not at Central. The telegraph service in use by defendant discloses their presence at Tuccoa, in the state of Georgia. However, the plaintiff is made to disappoint his customers. He is a nurseryman, and, of these customers, some refuse to take his trees and vines, and some take them at a discount. But in the delivery to his customers he has to pay expenses of extra board bill, buggy hire, etc.

Now, under the case cited, the plaintiff had a right to have his case considered by the trial justice. The circuit judge having so ordered, it was not error, so far as this exception is concerned. And the second exception partakes of the nature of the first exception. We think what we have said in disposing of the first exception will show that there is no error here.

As to the fourth exception, we think the presiding judge did not err as here complained of. The plaintiff did not appeal, but the defendant did, from the trial justice's judgment. If the circuit judge had been convinced that the justice of this cause called for simply a reversal of the trial justice's judgment, he would have so ordered. The effect of such a reversal would have been either a dismissal of the complaint, or a new trial. He chose the latter. We see no error here. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 111)

LUDDEN & BATES SOUTHERN MUSIC HOUSE v. HORNSBY.

(Supreme Court of South Carolina. Sept. 10, 1895.)

LEASE OR MORTGAGE OF PERSONALTY—REPLEVIN—COUNTERCLAIM.

1. An instrument purporting to be a lease of a chattel for a term of months, at a stipulated monthly rental, and containing a proviso that the lessee "may, at any time within said term of rental, purchase * * * by paying the above valuation therefor; and, in that case, only, all amounts theretofore paid as rental or advance deposit shall be deducted from the price,"—is a lease, and not a mortgage.

2. In an action to recover possession of a specific chattel, held under a lease which in terms provided that at any time the lessee might purchase the property, and be allowed, as a deduction from the price thereof, all amounts theretofore paid as rental, the defendant may counterclaim in equity, on the ground of fraud in the execution of the contract, for a cancellation thereof, or that the title to the chattel be adjudged in him, or that he be permitted to hold the property until the money paid by him has been refunded.

Appeal from common pleas circuit court of Richland county; Benet, Judge.

Action in replevin by the Ludden & Bates Southern Music House, a corporation, against Martha A. Hornsby. Defendant answered, setting up a counterclaim in equity, and, upon reference of the case to a master, plaintiff's demurrer thereto was sustained. From an order of the circuit court reversing the ruling of the master, and ordering the case back to him for trial, plaintiff appeals. Affirmed.

The following are the exceptions referred to in the opinion: "The defendant excepts to the report of the master, * * * and will ask for a reversal thereof: (1) For that said master sustained the demurrer to the defendant's answer. (2) For that said master declined to entertain defendant's defense, as set up in her answer, or the testimony offered to sustain the same. (3) For that said master re-

fused to entertain said defense, on the ground that he failed to perceive how an answer could change a law case into an equity case.

(4) For that said master held that the case at bar was similar in principle to an action to recover possession of chattels mortgaged, after condition broken, and relied upon the cases as to chattel mortgages for authority in deciding the issues raised by the demurrer. (5) For that the master held that defendant limited her right to hold possession of the property at issue to the single plea that 'she reserved the right to become a purchaser for the sixty-five dollars paid under the terms of the agreement, and accordingly refused to surrender possession when demand therefor was made upon her,' whereas said defense was one of two interposed by said defendant, and, in any event, she was entitled to any relief set up in her answer, supported by the proof and pleadings, and authorized by the subject-matter of the controversy. (6) For that said master decided that plaintiff is entitled to a decree adjudging that it is entitled to the possession of the organ in question, and to recover of the defendant the sum of twenty-five dollars as a reasonable counsel fee for the attorney in this case. (7) For that the master declined to entertain the defendant's plea, and yet considers and discusses it throughout his report, and bases much of his adverse decision upon proof adduced in support of the allegations affirmatively set out in said pleadings."

The order referred to is as follows:

"The plaintiff, a corporation duly incorporated under the laws of the state of New Jersey, brings its action in claim and delivery against the defendant, and alleges that, under the terms of a 'lease,' hereto attached as an exhibit, it leased a certain musical instrument, to wit, an organ, to the defendant, upon the terms, and subject to the conditions, therein particularly set forth, which permitted her to buy said organ for the sum of one hundred and fifteen dollars. The defendant, in answering said complaint, admits the execution of the paper termed a 'lease,' and alleges that certain payments, aggregating sixty-five dollars, have been made by her under its terms; that, after paying said sum, she has discovered that a fraud has been practiced upon her by the plaintiff, whereupon she has refused to make further payments, and has offered to restore the organ to plaintiff upon the return of the money obtained from her by reason of the fraud and imposition complained of. The alleged fraud, as charged in the answer, amounts to this: That at the time of, and before, the signing of the lease under which plaintiff proceeded, the plaintiff represented to defendant that the instrument in suit was a new one, which had never been out of its storeroom, and that it was, in all respects, in good order; whereas she has discovered that it is a worn and second-hand instrument, worth no more than the sum already paid by her to plaintiff, whereupon she

has refused to pay any more of the installments claimed by said plaintiff. Thereupon a consent order was made, referring the case to the master for Richland county, with instructions to take the testimony and report upon all matters of law and fact. At the first reference held by that officer the plaintiff interposed an oral demurrer to the answer, on the ground that the affirmative defenses set up in the answer did not state facts sufficient to constitute a cause of action. At first the master overruled the demurrer, but, after the testimony was all in, he entertained and sustained it, and, having dismissed the affirmative defenses interposed in the answer, reported to this court his finding that the demurrer was well taken. Upon exceptions having been filed by the defendant, the case comes before me for consideration.

"I shall not address my remarks to the exceptions as filed, but rest my decision upon the ground, raised by the answer, that fraud and imposition were practiced upon the defendant in obtaining her signature to the contract of lease which is the foundation of the pending controversy. It is hardly necessary to make refutation of the master's position that an answer cannot change a law case into an equity case. The case (*Maxwell v. Thompson*, 15 S. C. 612) which he cites to sustain that doctrine does not apply here, where a consent order has been made, based upon an equitable defense, referring all issues of law and fact to him for his determination. See *Adicks v. Lowry*, 12 S. C. 108; *Parker v. Jacobs*, 14 S. C. 118; *Chapman v. Lipscomb*, 18 S. C. 233. It is very true that the supreme court, in the case entitled *Music House v. Dusenbury*, 27 S. C. 464, 4 S. E. 60, has interpreted the paper here sued on as a lease, and not as a chattel mortgage. But it is equally true that the extreme doctrine therein enunciated has been limited by the later case, decided by that same tribunal, entitled *Manufacturing Co. v. Smith* (S. C.) 19 S. E. 132, where it is declared by Mr. Justice McGowan, as the mouthpiece of the court: 'It is difficult for one to sell and deliver property, and at the same time to remain owner of it. After careful consideration, I feel constrained to concur with his honor, Judge Izlar, that the contract between these parties was not a lease, but, substantially, a sale of the machine for fifty-five dollars,—ten dollars in cash, and the remaining forty-five dollars in small installments. * * * We think that a lease is generally executed by the owner of the property. This paper was signed by the person negotiating for a purchase of the article. The defendant could not secure the credit portion of the purchase money until some interest was conveyed to him by the company.' Neither can I agree with the plaintiff or the master that the case under consideration, and the answer interposed by defendant, are settled by *Manufacturing Co. v. Smith*, supra, or by *Talbott v. Padgett*, 30 S. C. 167, 8 S. E. 845, because those cases decided no such issues

as are raised in this case. On the contrary, they rightfully decided, in keeping with the unbroken line of precedent, that the defendant in claim and delivery is not entitled to an accounting, nor can he interpose a counterclaim in his answer. The defendant, however, has a right, under the new practice, to interpose an equitable defense, which puts in issue the making of the contract itself,—call it what you may: lease, conditional sale, or chattel mortgage. And such a defense is properly pleaded and a proper matter of investigation in a court of equity, and, when sustained by legal proof, entitles the party to the protection of this court when, in a case of claim and delivery, or in any other law case, it can be shown 'that, at the time of entering into the agreement to purchase said organ, said plaintiff, its agents and servants, assured this defendant that the organ she was purchasing was new, and had never been in use, that it was in first-rate condition, and that it was as represented; that this defendant, by reason of said representations fraudulently made to her, was induced to sign the agreement herein sued on, when said plaintiff, its servants and agents, well knew at the time of the sale to this defendant, and before said sale, that said organ was an old one, which had been out of their possession under a similar agreement to the one herein sued on, and had, after months of use, been returned to said plaintiff, who deliberately disposed of it to defendant at a price charged for a like instrument new and in good order. when it was known to be a worn-out and second-hand instrument.' See *Riggs v. Wilson*, 30 S. C. 172, 8 S. E. 848, and *Parker v. Jacobs*, 14 S. C. 118, where it is said: 'Since the enactment of the Code, the question is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or equitable defense against the plaintiff's claim, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for. Or, as is said by *Saunderson, J.*, in *Grain v. Aldrich*, 38 Cal. 514: "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to no relief either at law or in equity." ' See, also, *Cobbey*, Repl. §§ 794, 824, 1148.

"Now, inasmuch as defendant is interposing an affirmative equitable defense, and is asking its consideration, under the well-settled rule of pleading, by virtue of the consent order herein, where all matters of law and of fact were referred to the master, why is that officer not bound to give heed to the defense which declares that fraud and imposition were practiced upon the defendant in obtaining her

signature to the paper sued on,—a paper which related to an article of a particular kind, which plaintiff solemnly assured her she was buying, when it would appear that a different and inferior article was fraudulently palmed off on her? For the purpose of this discussion, everything is true contained in this answer. The plaintiff admitted as much when it interposed its demurrer. It would be a hardship too vital to the rights of litigants in the court of equity to have them stripped of everything they may have paid on one of these supposed purchases under the terms of such a paper as that here sued on. It purports to be a lease, and so *Music House v. Dusenbury*, supra, would appear to hold. But these instruments, cunningly devised by the most astute conveyancers, are prepared for the sole protection of the vendors, and they bear such an interpretation as would lead any other than a careful student of the law to believe that in making the payments provided for he was paying purchase money, and not rent money. This view seems to have influenced the latest decisions on this question, viz. *Manufacturing Co. v. Smith* (S. C.) 19 S. E. 132, where Justice McGowan intimates an interpretation in some measure doing away with the harshness of the first decision quoted, and giving a purchaser under such a paper as that herein considered the right, at least, whatever that right may be, to invoke the aid of the court of equity to protect him from just such exactions as are complained of by the defendant, M. A. Hornsby, one feature of which is the finding of the master that plaintiff's attorneys are entitled to a fee of twenty-five dollars for services which ought surely to be paid by the actor itself, rather than by a defendant who has been led to sign a paper which is a fraud upon her rights, in that it would make her consummate a bargain which she never made, and never intended to make. There is doubt enough in my mind as to the position of the master sustaining the demurrer to constrain me to overrule his findings. And it is so ordered. Let the case be remanded to the master for him to pass upon the law and the facts in keeping with the terms of this decree."

Barron & Ray, for appellant. Andrew Crawford, for respondent.

POPE, J. The defendant, under her hand and seal, on the 20th day of June, 1886, executed a lease of "one Packard organ, style 13, No. 2,507," for the term of 22 months, at a rental of \$5, to be paid on the 1st of each of the 22 months, with a proviso in said lease that the said defendant "may, at any time within said term of rental, purchase the said instrument by paying the above valuation [\$115] therefor; and, in that case, only, all amounts theretofore paid as rental or advance deposit shall be deducted from the price of the instrument." Thereafter, from month to month, the defendant paid to said plaintiff the sum of \$5 until her payments aggregated \$65.

She then refused to pay anything more to plaintiff, and refused to turn over such Packard organ to the plaintiff. Thereupon this plaintiff, on the 2d of March, 1893, commenced this action for claim and delivery. In the complaint the foregoing facts are set forth. By the answer of defendant she admits the execution of the paper writing under her hand and seal, as alleged by the plaintiff, but, as an affirmative defense, she alleges: That, immediately after she made her last payment of \$5 (which occurred on the 30th November, 1887), she learned that the assurance made to the defendant, on the day she executed the agreement,—to wit, 25th day of June, 1886,—by the plaintiff, its agents and servants, that the organ in question was new, and had never been in use, and that it was in first-class condition, was fraudulently made to her, whereas the truth was that such instrument, instead of being new, and never having been in use, and in first-class condition, was an old one, which had been out of plaintiff's possession, under a similar agreement made to the plaintiff by this defendant, and after months' use had been returned to the plaintiff. That the plaintiff thus deliberately disposed of the organ to defendant at a price charged for a new instrument, and in good order, when the plaintiff knew it was selling to the defendant a worn and second-hand instrument, worth only what such an instrument would sell for. That she realized that in paying to the plaintiff \$65 she had paid more than such an instrument, being worn and second-hand, was worth; and that, owing to these facts, she paid nothing more to the plaintiff, and has refused to turn over the instrument to it. That, realizing that she had paid the full value of the second-hand organ in question, she had elected to become its purchaser at the price she had already paid. She demands that her contract should be surrendered and canceled under the judgment of the court, or that she be adjudged the owner of said organ, or that she be permitted to hold the same until the \$65 she has paid be refunded to her. Under the order of Judge Hudson, passed on the 25th October, 1893, all issues of law and fact were referred to the master, John T. Seebels, Esq. When the case came on to be heard before said master, the plaintiff demurred to the answer because it failed to set forth facts sufficient to constitute a defense. This demurrer was eventually sustained by the master, and he recommended, among other things, that plaintiff have all relief demanded in its complaint. To this report the defendant excepted, and when the same was brought on for trial before his honor, Judge Benet, he reversed the master's report, and ordered the case back to the master for a trial. From Judge Benet's order the plaintiff now appeals to this court. Let the order and the exceptions be set out in the report of the case.

We may as well remark at the outset that the decision of this court in the case of *Music*

House v. Dusenbury, 27 S. C. 464, 4 S. E. 60, fixes the character of a lease to the paper sued on in this action. It is true the case of Manufacturing Co. v. Smith, 40 S. C. 529, 19 S. E. 132, did hold that the paper writing then in question was not a lease, but a mortgage; but it is well to remember that the terms of the latter's instrument were different from that in Music House v. Dusenbury, supra, and also that this court did not undertake to overrule the case just cited. This being so, we must recognize its authority as controlling here, certainly as fixing the character of the paper sued on. The circuit decretal order of Judge Benet, now under appeal, is bottomed upon the principle that now, under the principles of our Civil Code of Procedure, there is no longer a separate tribunal for the trial of actions on the law side, nor is there a separate tribunal for the trial of equity actions. Both are to be heard in the court of common pleas. A suitor may embody in his complaint a statement of facts entitling him to legal relief, and in the same complaint a statement of facts entitling him to equitable relief, growing out of the same transaction. So far as to defendants, they may set up in their answers legal and equitable barriers to plaintiffs' recovery, provided they relate to the same transaction. Here the plaintiff brought its action for claim and delivery and demand on the law side of the court. The defendant, however, admitting the legal demand of plaintiff, endeavored to show why, in equity, the plaintiff was not entitled to the judgment prayed for, by alleging that plaintiff's legal demand originated in fraud. The difficulty that plaintiff alleges to be in the way of the defense interposed by defendant is that arising under some of our decisions. Talbott v. Padgett, 30 S. C. 171, 8 S. E. 845; Manufacturing Co. v. Smith, supra. It occurs to us that the parties here overlooked the case of Irby v. Williams, 15 S. C. 458, where this court held that a counterclaim could not be interposed in an action for claim and delivery, except where equitable relief may be demanded, under exceptional circumstances, and quoted with approval section 767 of Mr. Pomeroy's work on Remedies and Remedial Rights, which section reads thus: "It would seem that, in an action to recover possession of specific chattels, no counterclaim is possible, *unless, perhaps, equitable relief may be demanded, under some exceptional circumstances.*" (Italics ours.) In the case last cited this relief upon the ground of equity was denied the plaintiff, because the facts wherein it was claimed iniquity arose were separate and distinct from the matter in contention between the parties to that action. Thus it will be seen that this court has not denied that there may be an equitable demand in the defendant against the plaintiff's action for claim and delivery. With how much more force does the propriety—nay the right—in the defendant having her equitable defense considered appear when, in her answer, she alleges

that she was induced to sign this contract by a fraud being practiced upon her in regard thereto. It is not alleged as fraud practiced upon her in a collateral or distinct manner, but a fraud practiced upon her when she was induced to sign the lease. It makes no difference how perfectly instruments may be drawn, if fraud is practiced therein, the court of equity will lay bare the transaction. It must be remembered that no opinion was intended to be expressed by the circuit judge, nor does this court express any opinion, as to the truth of the allegations set out in the answer. The demurrer admits all these allegations, for the time being merely, to contest their sufficiency in law as a defense. At the trial all these matters will be fully investigated, and the defendant will be put to the proof of what she charges in her answer to be true. We do not feel that any further discussion by us is necessary. The circuit judge was correct in overruling the demurrer and ordering the cause back for trial. It is the judgment of this court that the order appealed from be affirmed, and the cause is remanded to the circuit court to carry out Judge Benet's order.

(45 S. C. 123)

DAVIS v. CHILDERS et al.

(Supreme Court of South Carolina. Sept. 17, 1895.)

EQUITABLE MORTGAGE—PAROL AGREEMENT—REMEDY OF MORTGAGEE.

1. An agreement, founded on a valuable consideration, to give a mortgage on chattels, constitutes an equitable mortgage.

2. It is not necessary that the agreement for such mortgage be in writing.

3. An equitable mortgage of chattels, containing no words of alienation, does not authorize the mortgagee to seize the property on default, but the mortgagee's remedy is in a court of equity.

Appeal from common pleas circuit court of Anderson county; Watts, Judge.

Action by A. A. Davis against S. D. Childers and another. Judgment for plaintiff. Defendants appeal. Affirmed.

The charge to the jury was as follows:

"This is an action brought by A. A. Davis against Messrs. Childers and Laboon. The complaint, in substance, states that the plaintiff was in lawful possession of one open-top buggy, worth \$60, and one set of harness, worth \$6, and that on the 3d of November, 1893, the defendant Laboon entered his premises and seized and carried it away, without any authority of law, and turned it over to Mr. Childers, and that he (Laboon) entered, as agent for Childers, and took possession of the buggy and harness in a high-handed way, and that he (plaintiff) was damaged in the sum of \$2,000. That was on the 3d of November, 1893. He also alleges that on November 11, 1893, the agent (Laboon) entered and took from his premises a horse which he claims was worth \$150, and that by

reason of that high-handed seizing he has been damaged in the sum of \$5,000. The defendant Childers says that he did send Laboon there to seize the property, but that he had an equitable mortgage on the property; and that he had gone on a note for Davis, and that Davis had agreed to give him a mortgage on the horse, mule, wagon, and buggy, and crop; and that he did go on that note for Davis, and that he had to pay it, and that by reason of that he sent his agent (Laboon) there to take possession of the property, and, he says, to take peaceable possession of it. The defendant Laboon admits that he went there and took the property, and he says that he took it in a quiet and in a peaceable way. Now, you have heard a good deal of testimony in the case, and you have also heard a good deal of law read by counsel. You are the sole judges of the testimony, and it is my duty to give you the law; and you apply the testimony to the law as I give it to you, and find your verdict accordingly. It is also my duty, too, to construe any written instrument which is offered in evidence here for you. I charge you as a matter of law that if these defendants here took possession of that property under the mortgage, which had the indorsement on the back appointing Mr. Laboon as his agent, I charge you that that was an illegal seizure, because that mortgage was not signed, sealed, or delivered. It was drawn up for that purpose, but it was never done; and it does not matter that he did agree to sign it. If he lied about it, and, by deceiving Mr. Childers, got him to sign the note for him, and promised to give him a mortgage on that property, and then did not sign the mortgage, that does not create such a mortgage as will allow a man to deputize a man as his agent to go and seize it. So, that being the case, it will be your duty to find a verdict for the plaintiff in this case. He had no right under that paper to send his codefendant (Laboon) there to take the property. Childers admits that Laboon was his agent, and therefore Childers becomes responsible for all of the acts of Laboon. So, if the testimony satisfies you that the property was taken in such a high-handed, riotous, illegal way, or anything of that sort, it is for you to say, under the testimony, what damages you will give, if you give any, and what damages you give (for that will be as smart money) as vindictive damages. There is also some complaint here, and damages asked for, for being kept out of that money. So both are before you,—the actual damages and the punitive damages.

"Now, in the case of *Samuels v. Railroad*, Mr. Justice Pope says: 'It must be borne in mind, whenever a tort sounds in exemplary damages, that it belongs to a particular class of actions. It is one species of that class. A tort that sounds in exemplary damages is where some right of person or prop-

erty is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obligations. The terms "maliciously" and "wantonly" are used in this definition in the sense that they are applied by writers in connection with the subject here considered. To entitle a plaintiff to exemplary damages, he must not only prove the elements that enter in to make up this cause of action, but he must, in the first place, in his complaint set up distinctively the elements that make up this cause of action; and, if he fails to do so, his complaint should be dismissed.' 35 S. C. 501, 14 S. E. 943. Well, that has been done here, and it is for you to say whether the testimony given here on the stand bears out the allegations in the complaint of the plaintiff here. Were the premises of the plaintiff invaded by these defendants, and the seizure made with malice, violently and wantonly? Now, in the case of *Duckett v. Pool*, 34 S. C. 311, 13 S. E. 542, about the same law is laid down. Under my view of the law of the case, as I have already given you, the plaintiff is entitled to the value of, or the recovery of, the property. You will remember what the plaintiff said about the value of the property at so much. You can find the value of the property of the plaintiff, and then whatever damages the plaintiff has suffered by reason of being kept out of this property; and if you believe the property was seized in a high-handed, violent, and malicious manner, as described, it is for you to say what punitive damages you will give him. It is for you to say what damages, if any, he should recover. Under my view of the law, the property seized must be returned, or, in case it cannot be had, then the value of it to be found for the plaintiff.

"Now, the plaintiff has requested me to charge you: (1) 'That even if the court should hold, from the evidence, that the defendants had a right to an equitable mortgage on the property seized, that such mortgage would give no right to seize the property, but the mortgagee must go into equity and establish his mortgage.' I charge you that. (2) 'That the act of the agent, Laboon, was, in contemplation of law, the act of his principal, Childers, and Childers is liable in damages for any wrongful act of the agent, Laboon, within the scope of his agency.' I charge you that. (3) 'That, in assessing the damages, the jury may take into consideration any acts of aggravation or wanton disregard of plaintiff's rights, and may award punitive or exemplary damages for such disregard or aggravation.' I charge you that as law. (4) 'That if the jury find that Laboon took the property in dispute, or any of it, by force, he was a trespasser in such taking, had thereby violated the law of the land, and the jury, in its discretion, may award punitive or vindictive damages for such unlawful taking.' I charge you that as good law. (5) 'That, it being admitted by the defend-

ants that Laboon was the agent of Childers to seize the property in dispute, every act of Laboon done in such seizure was the act of Childers.' I so charge you.

"I am requested by the defendants to charge you as follows: (1) 'That an agreement founded upon valuable consideration to give a mortgage on a chattel creates an equitable mortgage on the principle that equity regards what ought to have been done as having been done.' I charge you that as law, with this addition: 'Provided that that is not a parol or verbal agreement, but that it is reduced to writing.' (2) 'That the signing of a note as surety for another is a sufficient consideration to sustain an agreement to give a mortgage to indemnify the surety.' I charge you that, with this addition: 'That, while it would be a sufficient consideration to create an agreement to give a mortgage, in this case the agreement to give a mortgage ought to have been reduced to writing, and not to be a parol agreement.' (3) 'That one having an equitable mortgage founded on valuable consideration has the right to the possession of the property covered by it as soon as default is made in the payment of the obligation which same was intended to secure.' I charge you that, with this addition: 'That that agreement to give an equitable mortgage must be in writing.' (4) 'If the plaintiff, Davis, agreed to give the defendant Childers a mortgage on the property in dispute, to indemnify him against loss, in consideration that said Childers would sign a note as surety for him, and Childers did sign such note as surety, such agreement on the part of said Davis would constitute an equitable mortgage on said property.' I refuse to charge you that as law. (5) 'That if said Childers signed a note for said Davis as his surety, and said Davis, in consideration thereof, agreed to give said Childers a mortgage on said property in dispute, to indemnify him against loss, and said Davis did not pay said note when due, and said Childers paid off the same by giving his own note, secured by mortgage of real estate, said Childers had the right thereupon to enforce said agreement as a mortgage, and to take possession of the property covered by the same wherever he found it, and sell it, and apply the proceeds to indemnify himself.' I refuse to charge you that. That is not the law of this case, according to my view of it. (6) 'That, if said Childers had the right to the possession of the property in dispute, he had the right to take it wherever he found it, and to use so much force as was necessary for that purpose, if he did not violate the criminal law.' I refuse to charge you that, because I have already given you what I conceive to be the law in this case. (7) 'If said Childers had the right to the possession of said property, he had the right to take it wherever he found it, and to use so much force as was necessary for that purpose, and

would not be liable to an action for damages unless he used more force than necessary for the taking of said property, and then only for the damage accruing from the use of such excessive force.' I refuse that request, because I have already charged you that, under my view of the law, Mr. Childers did not have any equitable mortgage there, and that he had no right to take this property, because the plaintiff had the right to have possession of the property, or the value thereof. I have charged you as to punitive damages. (8) 'That if said Childers had the right to the possession of said property, and used no more force in taking possession than was necessary for that purpose, he would not be liable to the plaintiff in this action, even though he used such force as amounted to a violation of the criminal law.' I refuse to charge you that.

"Now, as I have said before, you have heard the testimony, and I have given you the law, and you will apply the facts to the law as I have given it to you. The form of your verdict will be: 'We find for the plaintiff the property in dispute, or, in case the property cannot be had, the value thereof, and so many dollars damages,'—if you find damages,—and sign your name as foreman. If you find for the defendants, say: 'We find for the defendants,' and sign your name as foreman."

Defendants' exceptions were as follows: "(1) Because his honor erred in charging the jury that if defendant Laboon took possession of the property in dispute under the mortgage, which had the indorsement of authority, it would be an illegal seizure, because that mortgage was never signed, sealed, and delivered; and it made no difference if Davis had agreed to sign it, if he lied about it, and, by deceiving Mr. Childers, got him to sign the note for him, and promised to give him a mortgage on the property, and then did not sign the mortgage, that did not create such a mortgage as would allow a man to depute a man as his agent to go and seize it. (2) Because his honor erred in charging the jury that the plaintiff was entitled to recover the property sued for, or the value thereof. (3) Because his honor erred in charging the jury as requested by plaintiff in his first request to charge, to wit, that, even if the court should hold from the evidence that the defendants had a right to an equitable mortgage on the property seized, that said mortgage would give no right to seize the property, but the mortgagee must go into equity and establish his mortgage. (4) Because his honor erred in charging the jury as requested by plaintiff in his fifth request to charge, to wit, that if the jury found that Laboon took the property in dispute, or any of it, by force, he was a trespasser in such taking, and thereby violated the law of the land, and the jury, in its discretion, may award punitive or vindictive

damages for such taking. (5) Because his honor erred in not charging the jury as requested by the defendants in their first request to charge, to wit, 'that an agreement founded upon valuable consideration to give a mortgage on a chattel creates an equitable mortgage, on the principle that equity regards what ought to have been done as having been done,' without adding the following: 'Provided that that is not a parol or verbal agreement, but that it is reduced to writing.' (6) Because his honor erred in not charging defendants' second request to charge, to wit, 'that the signing of a note as surety for another is a sufficient consideration to sustain an agreement to give a mortgage to indemnify the surety,' without adding the following qualification, to wit: 'That, while it would be a sufficient consideration to create an agreement to give a mortgage in this case, the agreement to give a mortgage ought to have been reduced to writing, and not be a parol agreement.' (7) Because his honor erred in not charging the jury defendants' third request to charge, to wit, 'that one having an equitable mortgage founded on valuable consideration has the right to the possession of the property covered by it as soon as default is made in the payment of the obligation which the same was intended to secure,' without adding the following, to wit: 'That that agreement to give an equitable mortgage must be in writing.' (8) Because his honor erred in refusing to charge the jury as requested by defendants in their fourth request to charge, to wit: 'If the plaintiff, Davis, agreed to give the defendant Childers a mortgage on the property in dispute, to indemnify him against loss, in consideration that said Childers would sign a note as surety for him, and Childers did sign such note as surety, such agreement on the part of said Davis would constitute an equitable mortgage on said property.' (9) Because his honor refused to charge the jury as requested by defendants in their fifth request to charge, to wit: 'That if said Childers signed a note for said Davis, as his surety, and said Davis, in consideration thereof, agreed to give said Childers a mortgage on said property in dispute, to indemnify him against loss, and said Davis did not pay said note when due, and said Childers paid off the same by giving his own note, secured by mortgage of real estate, said Childers had the right thereupon to enforce said agreement as a mortgage, and to take possession of the property covered by the same wherever he found it, and sell it and apply the proceeds to indemnify himself.' (10) Because his honor erred in refusing to charge the jury as requested by the defendants in their sixth request to charge, to wit: 'That, if said Childers had the right to take the possession of the property in dispute, he had the right to take it wherever he found it, and to use so much force as was necessary for that purpose, if he did not violate the

criminal law.' (11) Because his honor refused to charge the jury as requested by defendants in their seventh request to charge, to wit: 'If said Childers had the right to the possession of said property, he had the right to take it wherever he found it, and to use so much force as was necessary for that purpose, and would not be liable in an action for damages unless he used more force than was necessary for the taking of said property, and then only for the damage accruing from the use of such excessive force.' (12) Because his honor erred in not charging the jury as requested by defendants in their eighth request to charge, to wit: 'That if said Childers had the right to the possession of said property, and used no more force in taking possession than was necessary for that purpose, he would not be liable to the plaintiff in this action, even though he used such force as amounted to a violation of the criminal law.' (13) Because his honor erred in charging the jury that a parol agreement, founded on valuable consideration, to give a mortgage on a chattel, would not constitute an equitable mortgage, and that such parol agreement would give no right to the possession of such chattel, though the obligation which same was intended to secure was due and unpaid. (14) Because his honor erred in not leaving it as a question of fact to the jury to say, from the testimony, whether or not Davis, the plaintiff, had made a parol agreement with defendant Childers to give him a mortgage on the property, in consideration of said Childers signing a note for him as surety, and not charging them that if they found from the evidence that such agreement had been made, and that said Childers had so paid said note, relying on said agreement, he had the right to enforce said agreement as a mortgage, and to take possession of the property so agreed to be mortgaged, and sell the same to save him harmless."

Shuman & Dean, for appellants. Bonham & Watkins and Tribble & Prince, for respondent.

GARY, J. This action was commenced in January, 1894, by the plaintiff against the defendants, to recover possession of a buggy, set of harness, and one horse, of the alleged values, respectively, of \$60, \$6, and \$150; also, to recover \$5,000 damages for the alleged wrongful and malicious seizure of said property. It is alleged in the complaint that the defendant S. D. Childers procured and directed the defendant J. B. Laboon to seize and take from the possession of the plaintiff said property, during the absence of the plaintiff from home, and in defiance of the direction and command of the plaintiff's wife, who forbade such taking. It was further alleged that defendant J. B. Laboon seized and carried away said property without any authority of law or right whatever, and delivered it to the defend-

ant S. D. Childers, or kept or disposed of said property under the direction of said Childers, and that the defendants refused to deliver possession of said property to the plaintiff. The defendants answered said complaint by separate answers, alleging that about the 6th day of January, 1890, the plaintiff, wishing to borrow the sum of \$292 from John Tompkins, requested the defendant S. D. Childers to sign a note with him to said Tompkins for said amount, as surety of the plaintiff, and he agreed to sign it if plaintiff would execute and deliver to him a mortgage on said property, and other property not in dispute here, to indemnify and save him harmless on account of such suretyship; that the plaintiff agreed to execute to said Childers said mortgage, and that Childers, relying upon the said agreement of the plaintiff, signed said note as surety for him; that, after Childers signed said note as surety for the plaintiff, he refused to execute and deliver to him the said mortgage, as he had agreed to do; that, said plaintiff having failed to pay said note at maturity, the said Childers was compelled to and did pay the same; that, having requested the plaintiff to execute and deliver the said mortgage according to his agreement, and he having refused to do so, the said Childers, being advised that said agreement to mortgage constituted an equitable mortgage, with the right in said defendant to seize said property and sell the same for the purpose of indemnifying himself, caused said property to be seized and sold, and the proceeds applied to reimburse him and save him harmless, and that the same was done in a peaceable manner. And they alleged, further, that the said agreement constituted an equitable mortgage, giving said Childers the right to seize said property, and sell the same for the purpose of saving himself harmless,—he having paid the note which he signed as surety,—and that he caused said seizure to be made by his codefendant, J. B. Laboon, whom he appointed as agent for that purpose. The cause came on for trial at the October, 1894, term of the court for Anderson county, before his honor, Judge Watts, and a jury. The note and mortgage, which it is alleged the plaintiff agreed to sign, are set out in the case, upon which is this indorsement: "South Carolina, County of Anderson. I hereby appoint J. B. Laboon my agent to execute the within mortgage. November 13th, A. D. 1893. S. D. Childers." In the "case" the following statement appears: "On line 8, page 44, and on line 20, page 45, appears the name of A. A. Davis, as signed to the note and mortgage therein set forth; whereas, it was never signed by Davis, he being unable to write, nor did he ever authorize any other person to sign his name or affix his mark to the said note and mortgage, but, on the contrary, when the same had been prepared and presented to him, he refused to sign the same. His name was written by the person who prepared the papers, in the anticipation of his affixing his mark

to it, but this he refused to do." The jury rendered the following verdict: "We find that the plaintiff is entitled to recover the possession of the property sued for, and, in case delivery cannot be had, for the value thereof, one hundred and seventy-five dollars, and for two hundred and thirty-five dollars damages." The charge of the presiding judge to the jury and the appellants' exceptions will be set forth in the report of the case.

In considering the questions raised by the exceptions, we will follow the arrangement adopted by the appellants' attorneys in their argument before this court, to wit: (1) Whether or not an agreement founded on valuable consideration to give a mortgage on a chattel constitutes an equitable mortgage. (2) "If such agreement does constitute an equitable mortgage, whether or not it must be reduced to writing, in order to have that effect, or, in other words, whether or not a verbal agreement, founded on valuable consideration, to give a mortgage on a chattel, constitutes an equitable mortgage." (3) "Assuming that such agreement does constitute an equitable mortgage, whether or not the equitable mortgagee, having taken possession of the property covered thereby, after default in the payment of the obligation which the same was intended to secure, and having sold the same for the purpose of paying such obligation, can successfully plead such agreement in defense to an action brought against him for the possession of said property."

The cases of *Read v. Simons' Adm'r*, 2 DeSaus. Eq. 552, *Dow v. Ker*, Speer, Eq. 413, and *Parker v. Jacobs*, 14 S. C. 112, show that the first of said questions must be answered in the affirmative. 3 Am. & Eng. Enc. Law, p. 179, under the head of "Chattel Mortgages," and 1 Cobbey, Chat. Mortg. §§ 14, 15, show that such mortgage may be created by parol, and that it is not necessary that the agreement to give such mortgage should be in writing.

We come next to a consideration of the exceptions raising the third question. Chattel mortgages are divided: (1) Into legal and equitable mortgages. (2) The equitable mortgages are divided into those containing words of alienation sufficient in form to pass the legal title to property, but where the property at the time of the execution of the mortgage is not in esse, and those where there are no words of alienation sufficient in form to pass the legal title to the property mortgaged. When the mortgage contains words of alienation as aforesaid, and the property mentioned therein is not in esse at the time the mortgage is executed, the mortgagee has the right to take the property into his possession when it comes into existence; but his right to seize the property is based upon the words of alienation contained in the mortgage. When there are no such words of alienation, the mortgagee must seek the enforcement of his rights in a court of equity. By observing this distinction is the only way in which the cases of

Perkins v. Bank (S. C.) 20 S. E. 759, **Whilden v. Pearce**, 27 S. C. 44, 2 S. E. 709, and **Moore v. Byrum**, 10 S. C. 452, can be harmonized with the case of **Green v. Jacobs**, 5 S. C. 280. There was in the case before us only an equitable mortgage, without words of alienation, and his honor, Judge Watts, was right in charging the jury that such a mortgage did not confer upon the mortgagee the right to seize and sell the property in dispute. Although it was error on the part of the presiding judge in charging the jury that it was necessary that the agreement should be in writing, in order to create an equitable mortgage, such error was harmless, as, under the view which we take of the case, the defendants had no right to seize the property, even admitting that Childers had an equitable mortgage. The allegations of the answer do not constitute a defense to the plaintiff's cause of action, not because there may not be merit in them, but because the defendants, by their wrongful act, have estopped themselves from interposing such defense in this proceeding. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 181)

LITTLEJOHN v. RICHMOND & D. R. CO.
(Supreme Court of South Carolina. Sept. 19, 1895.)

ACCIDENT AT RAILROAD CROSSING—DUTY TO GIVE SIGNAL BEFORE STARTING—ADMISSIONS IN PLEADINGS.

1. A train standing across a highway is within 1 Rev. St. p. 576, providing that, if the engine or cars shall be at a standstill within a less distance than 100 rods of such a crossing, the bell shall be rung or the whistle sounded for at least 30 seconds before the engine is moved, and shall be kept ringing till the engine has crossed such highway.

2. Plaintiff need not prove that the train by which he was injured was defendant's, defendant having admitted the allegation of the complaint that defendant was operating the road on which the accident occurred, and running their cars and engines thereon.

Appeal from common pleas circuit court of Spartanburg county; Wallace, Judge.

Action by J. R. Littlejohn against the Richmond & Danville Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

Bomar & Simpson, for appellant. J. S. Cotheran and Duncan & Sanders, for respondent.

POPE, J. This action came on for trial at the August, 1893, term of the court of common pleas for Spartanburg county, before his honor, Judge Wallace, and a jury. By the complaint it was alleged that the plaintiff, on the 19th of August, 1891, while passing between a train of freight cars drawn by an engine of defendant (who was lessee of the Air-Line Railroad), in the town of Gaffney, in this state, was so injured by said cars that a portion of his foot was amputated; that when the plaintiff started to pass

between said cars the train was stationary, and had been so for 10 or 15 minutes preceding his effort to cross; that the defendant's train was put in motion by the engine drawing the same, without any warning being given, either by blowing the whistle or ringing the bell, as the law requires; and that where the plaintiff attempted to cross between the cars was a public highway leading to his home from said town of Gaffney; and that defendant's train of cars was across this highway. The defendant's answer admitted the control of said Air-Line Railroad, and that it operated the same by its engine and cars, both passenger and freight; but it denied all the facts as to the injury of the plaintiff, and claimed that, if he was ever injured, it was occasioned by his own fault. After the plaintiff had closed his testimony, which tended to show that the plaintiff had received the injury as set out in his complaint, the defendant moved for a nonsuit, which was granted. From this judgment the plaintiff now appeals.

We gather from the case that the circuit judge was influenced in granting the same by the fact that he construed section 1685 of the civil statute law of South Carolina (1 Rev. St. p. 576) not to require the whistle sounded or the bell rung, in case the train was stopped across a highway, before it was moved from across the same. The appellant contends that this was error. We are inclined to agree with the appellant. The language of the section, so far as this point is concerned, is as follows: "Sect. 1685. * * * And if the engine or cars shall be at a standstill within a less distance than one hundred rods of such crossing, the bell shall be rung or the whistle sounded for at least thirty seconds before the engine shall be moved, and shall be kept ringing until the engine shall have crossed such public highway or street or traveled place." The testimony was that some of the cars were above, some on, and some below, the street crossed by this train. The words of the statute, "within a less distance than 100 rods," are fully answered by some of these cars being below the street in question. Hence, the duty to sound the whistle or ring the bell for 30 seconds existed with this railroad, so far as this defendant was concerned. And if the railroad neglected this duty a prima facie case of negligence was established. There was some testimony on this point. Hence, the cause should have been submitted to the jury.

But the respondent insists that the appellant failed to show that it was defendant's train of cars that did the plaintiff injury. We do not see that it was incumbent upon the plaintiff to prove this fact, in view of defendant's admission of the third paragraph of the complaint; for it was there asserted that defendant was operating the said road, and running its freight and passenger cars and locomotives over the said

leased road. The other claims of defendant (respondent), that the evidence showed beyond contradiction that the injury complained of was caused by his own act; that the evidence showed that plaintiff took his own risk, in attempting to cross through and between the cars in question; and that there was no proof that injury was caused by any negligence of defendant (respondent),—all these present questions of fact, that ought to have been passed upon by the jury, and not the judge. It follows that the circuit judge was in error. It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

(45 S. C. 184)

GIBBES et al. v. McCRAW.

(Supreme Court of South Carolina. Sept. 19, 1895.)

EVIDENCE OF DEBT—OFFER OF COMPROMISE.

1. One cannot testify as to an indebtedness set out in a contract which alone gave him any knowledge of it.

2. The defendant, on refusing to accept a draft of \$188.75, drawn on him by plaintiff, alleging defects in the property bought, wrote defendant a letter containing the following: "But I am willing to pay you \$175. If you will accept, write me, and I will remit the amount." Held, that the extract was inadmissible, being an offer of compromise.

Appeal from common pleas circuit court of Spartanburg county; Aldrich, Judge.

Action by W. H. Gibbes, Jr., & Co. against T. G. McCraw. Judgment for defendant. Plaintiffs appeal. Affirmed.

Ralph K. Carson, for appellants. Duncan & Sanders, for respondent.

POPE, J. Plaintiffs sued defendant to recover \$188.75 for goods sold and delivered, to be paid for on 1st November, 1891, alleging that the elevator included in the account for \$185 was purchased by plaintiffs, from the makers of the same, for the defendant, on his order, and that plaintiffs have paid the makers therefor. Defendant denied in his answer all the facts alleged in the complaint, except that plaintiffs are partners. The action came on for trial before Judge Aldrich and a jury at the February term, 1895, of the court of common pleas for Spartanburg county. After plaintiffs closed their testimony, defendant moved for a nonsuit on the ground that there was no legal evidence to be submitted to the jury on which they could find a verdict. The circuit judge granted the nonsuit, and, after judgment was entered thereon, the plaintiffs appealed upon the following grounds: (1) That his honor erred in granting the motion for a nonsuit, made by defendant's attorney, upon the ground that there was no legal evidence to be submitted to the jury on which they could find a verdict. (2) That the circuit judge erred in refusing to admit in evidence the letter from defendant to plaintiffs, dated November 10,

1891, marked "Gibbes No. 3," or any part thereof, upon the ground that it contained an offer of compromise by the defendant. (3) That the circuit judge erred in ruling and holding that there was a difference between the parties, and that the letter "Gibbes No. 3" was an offer to compromise the difference.

As to the first ground of appeal, it seems to me to be untenable, in light of the "case," for there Mr. Gibbes very frankly admits that his knowledge of the indebtedness is based upon a certain contract in writing, as the primary source thereof. This contract, although in court, and exhibited and identified by this witness as in his possession, is withheld from the court and jury. Of course, it was incompetent for this witness to state an indebtedness set out in that written contract, which alone gave the witness any knowledge thereof. It is idle to waste words upon such a contention.

As to the second and third grounds of appeal, it seems to us that they are no longer material, in view of what we have said as to the first ground of appeal. The circuit judge did not hold that the letter marked "Gibbes No. 3" could not be introduced in testimony from its beginning down to the word "but." On the contrary, he held it was admissible so far. However, he declined to allow what was stated in that letter, from the word "but" to the close of the body of it, to be introduced, upon the ground that it was an offer of compromise made by McCraw to Gibbes & Co., and, under the law governing such matters, it ought not to be admitted in testimony. The language objected to was as follows: "But I am willing to pay you one hundred and seventy-five dollars (\$175). If you will accept, write me, and I will remit the amount; and oblige." When it is remembered that a draft for \$188.75 had been drawn by plaintiffs on defendant, which he declined to pay, and also that the reason the defendant gave for not paying the draft for \$188.75 was that "the machinery that I bought of you has given me considerable trouble to make work, and I have had to make some changes on it. Don't think you ought to charge me full price. Will return draft,"—it must be evident that in the offer of \$175 the defendant proposes to adjust by mutual concession the dispute as to the amount due. It seems to us that the circuit judge was not in error as pointed out in these exceptions. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 57)

PRICE v. PRICE et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

REVIEW ON APPEAL—EXCEPTIONS TO MASTER'S REPORT—TIME TO PERFECT APPEAL.

1. Where the evidence of an issue was conflicting, the findings of the master, confirmed by

the circuit judge, will not be disturbed on appeal.

2. Where appellant failed to take an exception to the report of the master, so that the issue was not presented to the circuit judge, it will not be considered on appeal.

3. Code Civ. Proc. § 349, provides that when any party shall omit, through mistake, to do any act necessary to perfect an appeal, the supreme court may, in their discretion, permit such act to be done, etc. *Held*, that where appellant's attorneys showed bona fide mistake, and that during the time when the case should have been prepared they were engaged in the discharge of important public duties, the court would, in its discretion, grant further time to perfect the appeal.

Appeal from common pleas circuit court of Anderson county; Watts, Judge.

Action by Julia M. Price against James A. Price, Henry C. Summers, and others. From a judgment for plaintiff, defendant Henry C. Summers appeals. Affirmed.

Cole L. Blease and A. M. Boozer, for appellant. Whitner & Heyward and Tribble & Prince, for respondents.

Motion for Further Time.

PER CURIAM. This is a motion by appellants, addressed to the discretion of this court, under section 349 of the Code of Civil Procedure, for further time for the preparation of the papers necessary to the perfection of their appeal. That section provides that "when any party shall omit, through mistake or inadvertence, to do any act or acts necessary to perfect an appeal, or stay proceedings, the supreme court may, in their discretion, permit such act or acts to be done at any time to perfect the appeal on such terms as may be just, provided that the court shall be satisfied that the appeal was taken bona fide, and provided that notice of the same was given as now required by law." In this case the affidavits show, and it is not disputed, that notice of the appeal was given as required by law; otherwise, this court would have been without power to interfere. So that the first question is whether the appellants are entitled to the relief they seek, by reason of the omission to do any act "through mistake or inadvertence." It appears that appellants' counsel made an application for further time to prepare their case, and that this application was made, within 30 days from the service of the notice of appeal, to a single justice of this court, but they were then advised that they should have given notice. This was their first mistake. Appellants then gave notice within 30 days of a motion before a single justice, to be made on a day which was after the expiration of 30 days. Appellants' second mistake was in seeking relief before a single justice of this court. This motion now before us was then made on the first day thereafter when this court was in session. We think that mistake or inadvertence has been shown. So, then, the next question is whether this court shall exercise its discretion in granting relief, for the law does not imperatively require the re-

lief to be given, but leaves the matter to the discretion of this court. We are of opinion that we ought to grant the motion, for the affidavits show that, during the time within which the proposed case should have been prepared, both of the counsel for appellants were engaged in the discharge of important public duties,—one as a member of the board of state canvassers, and the other as a member of the legislature.

On the Merits.

POPE, J. This action was commenced on the 20th day of June, 1893, in the court of common pleas for Anderson county, and came on for trial before his honor, Judge Watts, at the fall, 1894, term of that court. The decree was filed on the 12th November, 1894, whereupon the defendant H. C. Summers appealed on three grounds, as follows: First. Because his honor erred in confirming the report of the master, when he should have reversed the finding of the master that "the bill of sale from Price to Summers, coupled with the subsequent acts and conduct of the parties, established a mercantile partnership between them," and when he should have decided that the bill of sale from Price to Summers did not establish a partnership between them, and that the subsequent acts of the defendant H. C. Summers did not make him a partner of James A. Price. Second. Because his honor erred in sustaining the report of the master, who decided that the mortgages executed to the Bank of Pendleton were valid mortgages, and under the facts constituted a first lien upon both stocks of goods embraced therein, when he should have decided that the stock of goods at Pendleton should first be applied to the payment of said mortgages. Third. Because his honor erred in ordering J. H. Payne to turn over to Julia M. Price all original books of accounts and all other choses in action, together with all the moneys collected thereon since the action was begun, belonging to James A. Price & Co., heretofore conducted at Calhoun, S. C., when he should have held that there was no partnership between James A. Price and H. C. Summers, and that the goods at Calhoun, bought by Summers, were not liable for the debts of James A. Price & Co., or James A. Price.

From the case, we learn that James A. Price, on the 16th January, 1893, owned a mercantile establishment at Pendleton, S. C., and also one at Calhoun, S. C. He was needing money, both to pay current bills, as well as to keep up his stock of goods. On that day he, having already taken an inventory of all his mercantile assets, or "having taken stock," as it is said, by his deed therefor conveyed a one-half interest in all the assets of each store (Pendleton and Calhoun) to Henry C. Summers, at the price of \$1,222.22. As it will be seen from the exceptions, the contest is made over this paper and what followed its execution. The plaintiff claims that it was the initial step in the association of James A.

Price and Henry C. Summers as partners under the firm name of James A. Price & Co., while the defendant contends that although a bill of sale absolute on its face, of one-half interest in the firm assets, it was designed as a security for money he had already loaned Price, and an additional sum he was to furnish him, in the conduct of his business. Quite an array of witnesses on each side were examined, and they vary in their statements. There are some facts sworn to which are not denied. One is: James A. Price held out said Summers as his partner, under the firm name of James A. Price & Co. This was done soon after the 16th January, 1893. It was done to the Pendleton Bank. It was done to persons from whom goods were purchased. Another is: Papers, both notes and mortgages, were executed in the firm name. It was in evidence that said Summers spent a good deal of his time in the storehouse of James A. Price & Co. at Pendleton, and often visited the store at Calhoun in company with James A. Price. One of his own witnesses proves that on one occasion, when he (the witness Payne, who clerked at Calhoun for James A. Price & Co.) was going to be absent for the day, he left the defendant Summers in charge of the business there, and told him a note of the firm would be presented for payment at Calhoun on that day; that the said Summers paid the note on that day. On the other hand, however, Summers denies the partnership. Some of his witnesses swear that James A. Price told them, severally, on the 17th May, 1893, that Summers was not his partner. The master found as a fact that such partnership existed. The circuit judge confirmed this finding. Therefore, under the well-settled rule in such cases, the concurrent finding of fact by the circuit judge and master will not be disturbed by us, unless without testimony in its support, or unless it is manifestly against the weight of the testimony. Certainly, there is testimony to support the finding, and it is not opposed to the weight of the testimony. This exception must be overruled.

The second exception cannot be considered by us. When the master made his report, the said Summers excepted thereto on the following grounds: First, because the master erred in deciding, as a matter of law, that "the bill of sale from Price to Summers, coupled with the subsequent acts and conduct of the parties, established a mercantile partnership between them"; second, because the master omitted to report the admitted claim of E. H. Shanklin as an assignee, which should be paid; third, because the report of the master is in other respects contrary to the law and the evidence. Now, it thus appears that Summers failed to except to the report of the master on the ground embodied in his second exception, now being considered. Having so failed, no such issue was presented to the circuit judge, and it is now too late for him to do so for the first time in this court. The exception is overruled.

The last exception is in the same condition as the second. No exception was taken to the master's report on the ground here set out. If such exception was not taken to the master's report, it could not be considered by the circuit judge. The ground cannot be taken for the first time in this court, and it must be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 189)

WESCOAT et al. v. CRAWFORD.

(Supreme Court of South Carolina. Sept. 19, 1896.)

FRAUDULENT CONVEYANCES—CHATTEL MORTGAGES—RECORDING—POSSESSION BY MORTGAGOR.

1. A chattel mortgage is not void merely because the mortgagor is allowed to retain possession of the property after condition broken.

2. A stipulation in a mortgage of a stock of goods that the mortgagor shall retain possession, and buy, sell, and carry on business, till the debt is paid or the mortgage is foreclosed, goods purchased to take the place of those sold, does not render it void, or put on the mortgagee the burden of proving that it was not fraudulent.

3. A chattel mortgage need not be recorded; the only effect of the omission, in the absence of a fraudulent agreement between the parties, being that the mortgagee loses priority of lien, as to subsequent liens.

Appeal from common pleas circuit court of York county; Aldrich, Judge.

Action by Julius J. Wescoat and others, partners as Marshall, Wescoat & Co., against Edward A. Crawford. Judgment for plaintiffs. Defendant appeals. Affirmed.

The charge, and reasons of the judge for refusing a new trial, were as follows:

Charge.

"The pleadings in this case present the issues which you are called to pass upon. Those pleadings have been read in your presence, and to you, and I shall not undertake to reiterate or to read those pleadings to you a second or third time, but will briefly summarize the substantial or material allegations in the complaint and the allegations contained in the answer. Therefore, briefly stated, this action is a special proceeding, brought under the provisions of the law of this state which regulates actions for a claim and delivery of personal property. The property the subject-matter of this action is alleged to be the stock of mercantile goods described in the complaint, owned by a Mr. Gelzer. The plaintiffs contend and allege that they are entitled to the possession of those goods by reason of the rights conveyed to them by Mr. Gelzer in certain notes and mortgages. Those mortgages are what you term 'chattel mortgages'; that is, liens upon personal property,—in this case, alleged to be the stock of goods to which I have alluded. It is the law of this state that the owner of chattels may give a mortgage upon them to secure his indebtedness, and if such mortgages are drawn properly, so as to be

sufficient and in compliance with the law; it vests in the mortgagee the rights it purports to convey, namely, that it is a security for the debt therein described; and the law is that upon the maturity of the debt—that is, upon the expiration of the credit given by the mortgagee to the mortgagor—that the 'condition,' as it is so frequently termed, is broken, and the mortgagee then has the right to peaceably and legally take into his possession those goods and chattels, and sell them, either in the manner provided by the statute for the sale of chattels under such circumstances, or in the manner specifically stipulated in the mortgage. Upon condition broken, if the mortgagor refuses to give up possession of those chattels covered by the mortgage, or those chattels are in the custody of any outside party, and such party refuses to render or to deliver the possession thereof to the mortgagee, then the mortgagee (the owner of the mortgage) has a right to bring his action of claim and delivery in the court for the recovery of the possession of those chattels; and if he establishes that his mortgage is a valid and sufficient mortgage, and the first lien, or that he is entitled to the possession of those goods under that mortgage, then the courts award the possession to him, and will put him in possession of the goods. To apply that doctrine: It is alleged here that Mr. Gelzer was the owner of this stock of goods, and that he gave first a mortgage to one J. J. Wescoat, trustee, for the amount therein specified. The second is to the Savings Bank of Rock Hill, and the third is also given by John Gelzer to the Savings Bank of Rock Hill, S. C. All these mortgages, it is alleged, have been assigned to, and now are the property of, Marshall, Wescoat & Co., the plaintiffs in this action. And perhaps, before going to the other questions, it may be better for me to take up these mortgages, and explain them to you, as it is made the duty of the court to construe the meaning of all written instruments, and instruct the jury as to their force and effect.

"All three of these mortgages, broadly speaking, are drawn in compliance, and executed in compliance, with law, and, upon their face, appear to be regular and correct. The first mortgage, namely, that to J. J. Wescoat, trustee, is given to secure a debt of \$700, forty days after date, to wit, August 17, 1892, due by John Gelzer to J. J. Wescoat, trustee. That mortgage, as I stated, and the note it was given to secure, are, upon their faces, apparently regular. The first mortgage—and that is the one that I wish to call your attention to, because it is incumbent upon me to construe this note and this mortgage with reference to certain questions that have been mooted and argued in your presence—the first mortgage is dated the 21st of January, 1893, and is given to secure a note, which reads as follows: 'Rock Hill, South Carolina, January 21st, 1893.

One day after date I promise to pay to the order of the Savings Bank of Rock Hill, S. C., the sum of two thousand dollars, with interest from date at the rate of eight per cent. per annum, payable annually, until the whole be paid, negotiable and payable at the Savings Bank of Rock Hill, S. C.; and in case it shall become necessary to collect the said sum and interest, or any part thereof, by action at law, then I agree to pay the additional sum of ten per cent. on the amount due for attorney's fees. Value received. [Signed] John Gelzer.' And the mortgage refers to that note, and purports to be given to secure it. That note is dated January 21, 1893, and payable one day after date, and the point to which I wish to direct your attention just now is this: If this is an agreement to pay money rising out of the transaction out of which the money, or money's worth, is derived, and the note is the evidence of the existence of that debt, the note does not merely, because it is a written note, make the debt. It is evidence of that which is already in existence, because it is said to be given for value received, and the note be renewed, and if it is renewed, in law, the meaning of it is that the debt is continued, and the promise to pay is renewed; and it is a question of fact, when, as in this case, a check is presented to the bank by Gelzer, and afterwards notes are taken, then, upon its face, the check is an order to pay money in there. A note, upon its face, is a promise to pay a debt, but if it is intended as a renewal of an old debt, and the jury are satisfied that it is a renewal of an old debt, it is merely evidence of the continuance of the former debt; and under this mortgage,—this chattel mortgage that I hold in my hand, to wit, of January, 1893,—the mortgage would secure and protect the renewal of a note. But, in passing, just now, this paper, upon its face, purports to be—this note—for two thousand dollars, and this mortgage of January, 1893, is given to secure it; and if the defendant here, either from constructive notice, such as by recording, or actual notice, had obtained information or notice of the existence of these papers, it would only serve as a security to the bank to the amount of two thousand dollars, and the interest fixed in it. It couldn't go above that amount, because it says so upon its face. The third mortgage, dated the 2d of December, 1893, purports to be given as security to insure the payment of \$3,100, for which, in his mortgage, Mr. Gelzer recites, 'I have given my promissory notes as follows,' and enumerates several notes, in the aggregate amounting to \$3,100, and the notes to which the mortgage refers are alleged to be the notes that are in evidence before you. If on that date (the 2d day of December, 1893) Mr. Gelzer owed the savings bank \$3,100, he had a perfect right (Mr. Gelzer did) to give, if he did it honestly and bona fide, the security to secure that \$3,100; and it would make no difference whether he had

other security, either direct or collateral, to secure that debt, or a part of the debt. Whether he had that security for the sum of \$3,100, or only for \$2,000, he would have the right to give the mortgage, and the savings bank would have the right to take it as additional security, or as further security, because I know of no law which limits the amount of security which one may give to another. That is a matter for their own individual agreement, which the law does not purport to regulate. Now, we go a step further. Under our law, the mortgage, as between the mortgagee and the mortgagor (the parties to it, who have notice), the execution and delivery thereof makes it binding and valid upon them (the mortgagor and the mortgagee). But as to subsequent creditors, and subsequent purchasers for value, the law says that, in order that subsequent creditors and purchasers shall have some notice of these liens, the mortgagee shall record his mortgage within forty days, and if he records his mortgage in forty days the recording of such, under the law, constitutes constructive notice to all subsequent purchasers and creditors, because they are bound by the law of the land, and it is incumbent upon a man dealing with another (or it is his privilege, at least) to search the records, and see whether the property upon the faith of which and concerning which he is dealing is unincumbered. And therefore recording a paper is constructive notice to subsequent purchasers, if recorded according to law; that is, within forty days, and in the place the statute provides in regard to chattel mortgages. That is, that they must be recorded within forty days, and if the mortgagor is residing in the state it must be recorded in the office of the register of mesne conveyances of that county in which the mortgagor resided at the date of its execution or delivery; and, if he is not in this state, then it must be recorded where the property is situated. Now, in regard to Mr. Wescoat's mortgage, the first in the line of mortgage, and as requested by defendants in their tenth request to charge: 'In order that a mortgage of personal property may avail against the claims of subsequent creditors without notice, the mortgage must be recorded in the office of the register of mesne conveyances of the county in which the mortgage debtor resided when the mortgage was executed.' That I charge you, with the statement that it is in exact conformity with the statute,—in the county in which the debtor resided when it was executed or delivered. The second mortgage—that of January, 1893, for \$2,000, which I have already referred to, and endeavored to explain to you—was recorded in the office of the register of mesne conveyances for the county of York on January 5, 1894. It was dated in January, 1893, and therefore it was not recorded within the time—the forty days—provided by the law. Now, as to the question of whether Mr. Gelzer at that time—in January, 1893, and in

December, 1893—was a resident of York county, or not, I cannot express an opinion. That is a question of fact. The mortgage of 1892 recites on its face that at the time that mortgage was executed and delivered he was a resident of the county of Charleston. The mortgage of January, 1893, recites: 'Whereas, I, John Gelzer, of the county and state aforesaid' (that is, the state aforesaid, and York county, as recited above in that mortgage); and I believe the third mortgage recites that he was a resident of the county of York. If he resided here, then York county was the proper place to record that mortgage. The third mortgage,—John Gelzer to the Savings Bank of Rock Hill, S. C.,—dated December 2, 1893, was recorded the 5th day of January, 1894. That was within the forty days, according to the date of the mortgage and the recital, and that is also headed: 'State of South Carolina, County of York. Whereas, I, John Gelzer, of the county and state aforesaid.' If John Gelzer then was a resident of York county, and executed that mortgage and delivered it in December, 1893, and it was recorded in York county on the 5th of January, 1894, then that mortgage was recorded in the office where, by law, it should be recorded, and was recorded within the time which the law directs, and is valid against subsequent creditors and purchasers, if nothing else appears, because then, under that mortgage, the constructive notice is given which the law provides by means of recording.

"The defendant now, in his answer, sets up numerous defenses; and I will not undertake to recapitulate what I have said once, but go to some of the other issues. He charges (the defendant charges) that this mortgage given by Gelzer (John Gelzer) to Wescoat, trustee, and the two given to the Savings Bank of Rock Hill, S. C., and transferred to Marshall, Wescoat & Co., who say they are now the owners of all of them, was given for the purpose of securing an advantage to the defendant Gelzer, agreed to or acquiesced in by the mortgagees, and that they gave him a benefit, and therefore the mortgages are fraudulent, and, as a necessary consequence, illegal and void. Now, that raises a question of fact, upon which you will have to determine, to a certain extent, and the defense set up here involves questions upon which I will give you some instructions. The first is this: That in this state, I charge you, gentlemen, that a merchant (for instance, John Gelzer, in this case)—a merchant doing business—had a right to give a mortgage to secure a valid indebtedness, covering his stock of goods, and he had a right to include in that mortgage not only the stock of goods then in existence, but after acquired; and as those goods came into the store, and became mingled with the stock, the lien of the mortgage fixed upon and fastened those after-acquired goods. And, furthermore, I charge you that it is not

imperatively incumbent upon a mortgagee, upon the very day the mortgage falls due or the condition is broken, that he is obliged to go forward and foreclose the mortgage, and take charge of the property. The law is not so harsh. It is not now, and never was, the law of this state. But the law requires that when he goes forward, whether it be the day the condition of the mortgage is broken, or whether it be a considerable time afterwards, that, when he takes those goods, he takes them, how? Under the law, certainly since the act of 1892, he does not take them as absolute owner. He takes possession of them as mortgagee. And even after they go into his possession his possession is that of a mortgagee, because the statute of 1892 provides that the mortgagor, up to the very day of the sale, may come in, and by payment of the money due on the mortgage, and the expenses incurred by seizing the property, he can redeem and take the goods from under the hammer of the auctioneer that has not fallen. So that we come next, in the natural order, to the question whether there was any collusion,—any fraud; and that is a question for the jury,—for you. There is an old maxim, that fraud is abhorred by the law, and, whenever fraud enters into a transaction conceived in sin and brought forth in iniquity, it is outlawed,—under the ban of the law,—and no one can retain any rights tainted by fraud, especially by moral fraud.

"Now, counsel, in their argument, have contended that in the mortgages, the words stated therein being: 'It being hereby stipulated that I' (that is, John Gelzer) 'am to buy, sell, and carry on the hardware business with the said stock until the said debt is paid, or this mortgage foreclosed. All goods purchased to take the place of those sold.' I am requested to charge you that that, in itself, is fraud. I refuse the request, and decline to charge you that. As I have already charged you, the meaning of a mortgage is the security which passes to the mortgagee to secure his debt; and if, after maturity,—after the condition is broken,—he has a right to go upon the goods and take them into his possession, and sell them to pay the debt, any longer or further holding of the goods permitted by the mortgagee is for what? Is as security for the payment of the debt, until that debt is paid or the goods seized. Therefore, that request I refuse. Now, the question comes back: When Gelzer executed this mortgage to Wescoat, was it fraudulent, in itself? Was the debt merely a paper debt, and put there with a purpose to hinder, delay, and defeat the creditors, or to deceive any one? Was that the intention entertained by Gelzer and Wescoat, and acted upon together? Did they carry it out? Then, if that be so, if it be a fraudulent debt (that is, a made-up debt or device), then that would be fraud,—would destroy it. But the law goes further. Even

though the debt be valid, though the consideration given be full and ample, yet if the creditor and debtor arrange, through the device of a mortgage, or any other way, to secure by means of that mortgage and those notes a benefit to the debtor; in this case, if Wescoat or the Savings Bank of Rock Hill, though the debt to them was justly due and owing by Gelzer, and you so find, yet if they used that debt to draw up notes and mortgages, which carried a benefit to the defendant Gelzer, and it was so intended, and that was to be at the cost of any innocent creditor or purchaser (subsequent creditor or purchaser), and that the papers were used for that purpose,—why, that would be fraudulent, and would destroy the notes and mortgages. So that comes back to this question: Was there any agreement, direct and expressed, or, whether direct or expressed, was there an understanding and agreement between them, in any shape or form, that Gelzer was to derive any special benefit from these mortgages, and that Wescoat or the savings bank participated in that agreement, to the detriment of subsequent creditors or purchasers, or to deceive any creditor,—it don't matter whether he was younger or older? Was that so? If it is, then that is fraudulent, and cannot be sustained. Now, in regard to recording. The mortgagee is not bound to record his paper. It is a good paper without recording. He is only required to record it when he desires to obtain the priority of lien over the property covered by his mortgage. That is the purpose. Now, in this case, the defendant, Mr. Crawford, as set up in the answer, says that he took possession of these goods under a warrant of attachment issued from the clerk of this court, and held them as such. That warrant of attachment has been put in evidence. Upon its face it is righteous, and it was the duty of the sheriff to obey the mandate of that warrant; to go forward and seize the property of Gelzer, as directed in that warrant; and he says, under that warrant, he took possession of this property,—seized and held it under the warrant issued in this case of the Tabb & Jenkins Hardware Company against John Gelzer. Now, there is no dispute, that I have heard, but that that warrant of attachment was properly issued; that it was regular upon its face; that the plaintiff the Tabb & Jenkins Hardware Company had a valid debt. That is admitted. So that the question, then, in its last analysis, resolves itself down to this: Who has the better title, or who has the better right, to the possession of these goods,—Marshall, Wescoat & Co., as the owners of these mortgages, the condition of which has been broken, if their mortgages be valid, as I have stated to you, or this Tabb & Jenkins Hardware Company? That question you must settle upon the face of the papers under the last mortgage, given on the 2d of December, and recorded in the county in

which it is executed. If that mortgage is valid upon its face, and is not invalid for fraud, then, I charge you, the mortgagees, Marshall, Wescoat & Co., should have a verdict in their favor. If, however, that mortgage is invalid,—is tainted with fraud in any way I have endeavored to explain to you,—then it is as nothing; it passes out of the case, and the Tabb & Jenkins Hardware Company's attachment would be the first lien (valid lien) upon the goods, and the sheriff would be entitled to his claim. Now, in regard to the damages— But, before going further, the defendant makes certain requests to charge. There are eleven requests. 'Eleventh. If the jury are satisfied from the evidence that plaintiffs have failed to show that the mortgage of J. J. Wescoat, trustee, was recorded in Charleston county, where the mortgage recites John Gelzer resided when the mortgage was executed, the record of said mortgage in York county cannot avail against the claim of subsequent creditors without notice; and the mortgage, as to them, is null and void.' That I charge you as a substantial request. There are four solid pages of typewritten matter, covering nine other requests to charge. I have looked over them all carefully, and considered them, and have either refused to charge them as requested, or qualified them to a certain extent. Except as charged, modified, or qualified, for the benefit of counsel, the other requests are refused on all the four pages.

"Now, as to the damages. This complaint does not charge or allege that the plaintiffs, if you find that they are entitled to the recovery or possession, are entitled to any vindictive damages (that is, smart money, punitive damages), but it only alleges, and you, as jurors, can only give, such damages as are the natural and proximate consequences of the sheriff in taking the goods under that attachment, if you find that the plaintiffs should recover the goods. What I mean by that is, the sheriff's fees are not included in that, nor the fees of individuals. You could not include the attorney's fees that these plaintiffs have paid. You couldn't include their travelling expenses, and so on. On the contrary, it must be damage to the goods, sustained by reason of their unlawful taking by the sheriff, and, I might say, damage to the goods. That covers all actual and necessary expenses in caring for the goods, or looking after them or preserving them, or depreciation in value caused by the detention. Under agreement of counsel, Mr. Foreman, if you find for the plaintiff, write on this separate paper, 'We find for the plaintiffs the property,' and so many dollars damages, writing out the amount of damages that you think they are entitled to. If, on the other hand, you think the verdict should be for the defendant, you will just write, 'We find for the defendant,' and sign your name to it, and the word 'Foreman' under your name."

Reasons for Refusing New Trial.

"This is a motion for a new trial, asked for upon the following grounds:

"First. That the judge charged the jury that the mortgages were regular on their faces, thus confining jury to matters dehors mortgages to establish fraudulent collusion between bank and Gelzer.

"The duty of the court is to construe all written instruments, and all that I said was in explanation of them. I explained the writing as it appeared to me, and, at most, it was my duty to do so. I did nothing more than that.

"Second. For not construing the stipulations in the mortgages.

"If by that exception is meant that I did not tell the jury whether or not it was evidence of actual fraud, I will say this: that that was a question for the jury. It was my duty, as judge, to construe those papers according to their written effect, and I endeavored so to do; and, in doing so, I explained to the jury what, in my opinion, the writing meant. If, as to this matter, it is meant that I ought to have charged the jury that those stipulations were not per se fraudulent, and vitiated the notes and mortgages, then I can say that I don't think so, and need not reiterate what I have already said in the body of my charge in that respect. I am well aware that it brings up different questions. The counsel, learned in their profession, bring up difficult questions of law. It is with diffidence that I decide those issues, knowing that the counsel have studied the issues, and are well prepared; but the duty is upon me to decide it as best I could, and I laid down the law as I thought applicable to the case.

"Third. For charging the jury that the mortgage for \$3,100 took precedence over attachment, instead of qualifying the same to the amount actually due thereon,—about \$2,600.

"The basis of this action was the right to the possession of the goods, and, if plaintiffs had a right to the possession, then they were entitled to a verdict to that effect. This action was not as to the amount due. It was a question as to who was entitled to the right of possession, and I can't grant a new trial on that, especially when what I say here is to be taken with my general charge. The lien of the attachment certainly could not be displaced on the excess, Marshall, Wescoat & Co. having purchased the mortgages with knowledge of the attachment. Well, as I remarked in the first part of this error, or alleged error, the subject-matter of that action was the possession of the goods, and that is the main question submitted to the jury,—who was entitled to the possession?

"Fourth. For not charging the jury that the stipulations in mortgages were for the benefit of Gelzer, and rendered paper fraudulent per se.

"That is the fourth ground. That brings

up the question of law which was argued, and, I believe, was substantially covered by the requests to charge, and I can only say that I expressed in my charges on that subject what I apprehend to be the law.

"Fifth. Ruling out testimony of Jenkins and Sawyer.

"I don't remember anything about ruling out the testimony of Jenkins and Sawyer.

"Mr. McCaw: They were offered to prove the custom of banks in regard to renewals.

"Ruling out the testimony of Sawyer and Jenkins. That is the fifth alleged error. I think counsel is laboring under misapprehension. What I meant was that where a debt exists, and the question comes up whether a subsequent note is a renewal or payment thereof, it is not established by the testimony of expert witnesses as to the custom of banks, but that question was to be settled according to law, and that the law was that it was a question of fact, in each case, susceptible of proof.

"Sixth. Badges of fraud is the sixth ground.

"It is very general in its terms, and I overrule that, also, because I think I covered the law,—at least, all that occurred to me, and all that was discussed in court by counsel; and for these reasons, taken in connection with the charge in general, the motion for a new trial is refused."

Defendant's grounds of appeal were as follows:

"First. For that his honor erred in refusing to charge the jury, as requested by counsel for defendant, 'that the mortgage executed by John Gelzer to Savings Bank of Rock Hill, S. C., dated January 21, 1893, due and payable one day after date, in the sum of \$2,000, contains this stipulation, which was entirely unnecessary for the security of the savings bank, but benefits the mortgage debtor, John Gelzer, and injures his other creditors, viz.: "It being hereby stipulated that I am to buy, sell, and carry on the hardware business with the said stock of goods until the said debt is paid, or this mortgage foreclosed; all goods purchased to take the place of those sold." By means of this stipulation in the mortgage, it was agreed between the savings bank and John Gelzer that the latter should retain possession of the stock of goods, not only until maturity,—that is, one day after date of mortgage, the 21st day of January, 1893,—but also after that time, indefinitely, until the debt should be paid, or the mortgage foreclosed. Until payment of the debt, or foreclosure of the mortgage, both the possession and the right of disposition remained with the mortgagor, John Gelzer. He was to deal with the property as his own, sell it at retail, and use the money thus obtained to replenish his stock. There is no covenant to account with the mortgagee, nor any recognition that the property is sold for his benefit. Instead of the mortgage being directed solely to the bona fide security of the debt then existing, and its payment at maturity,

one day after its date, it is based on the idea that the debt may be indefinitely prolonged. All this, appearing on the face of the mortgage itself, renders same, as to subsequent creditors without notice, fraudulent per se; that is to say, fraudulent by force of its own terms and stipulations, which are not susceptible of explanation.' (a) Erred, further, in refusing to charge the jury, as requested by counsel for defendant in their second request, the following: 'The mortgagee, having accepted the foregoing mortgage with the stipulation urged as the special vice therein, necessarily assented to all that was contained in said stipulation. Both mortgagor and mortgagee are guilty of fraud. The debtor, Gelzer, gains what he is not entitled to, at the expense of creditors, and enjoys the property embraced in the mortgage, independently of them, while the savings bank, the favored creditor, gains a preference by enabling the mortgage debtor to commit this injustice to the rest of his creditors.' (b) Erred, further, in refusing to charge the jury, as requested by counsel for defendant in their third request, the following: 'That the mortgage executed by John Gelzer to the Savings Bank of Rock Hill, dated December 2, 1893, due and payable December 15, 1893, to secure notes aggregating \$3,100, contains on its face the identical vice pointed out in the mortgage dated January 21, 1893. For the reasons indicated in the first request to charge, this mortgage is also fraudulent, by force of its own terms and stipulations.' (c) Erred, further, in charging the jury: 'Now, counsel, in their argument, have contended that in the mortgages, the words stated therein being: "It being hereby stipulated that I" (that is, John Gelzer) "am to buy, sell, and carry on the hardware business with the said stock until said debt is paid, or this mortgage foreclosed. All goods purchased to take the place of those sold." I am requested to charge you that that, in itself, is fraud. I refuse the request, and decline to charge you that. As I have already charged you, the meaning of a mortgage is the security which passes to the mortgagee to secure his debt; and if, after maturity,—after the condition is broken,—he has a right to go upon the goods, and take them into his possession, and sell them to pay the debt, any longer or further holding of the goods permitted by the mortgagee is for what? Is as security for the payment of the debt until that debt is paid or the goods seized. Therefore, that request I refuse.'

"Second. For that his honor erred in not charging the jury as requested by counsel for defendant, as follows: 'In South Carolina, when a mortgagor is suffered to remain in possession of personal property, goods, and chattels embraced in a chattel mortgage, after maturity and condition broken, by failure of the mortgagor to pay the mortgage debt at maturity, it is settled law, that the character of the possession becomes a question of fact

and must be submitted to the jury, with the burden of proof upon the mortgagee (in this case, the bank and its assignees) that the possession is not retained by the mortgagor, Gelzer, for his own benefit.' (a) And further erred in refusing to charge the jury, as requested by counsel for defendant: 'The exception to this rule being, when the mortgage, by its terms and stipulations, on its face, shows that possession was retained by the mortgagor, after condition broken, for his own benefit. When this is apparent on the face of the mortgage, it becomes the province of the court to instruct the jury that the mortgage is fraudulent as to subsequent creditors without notice, by reason of said stipulations and the terms of the mortgage itself.'

"Third. For that his honor erred in not charging the jury, as requested by counsel for defendant: 'In this state a chattel mortgage is a conditional conveyance, and upon breach of the condition of the mortgage, by failure of the mortgage debtor to pay the mortgage debt at maturity, the mortgagee becomes the legal owner of the property covered by the mortgage.' (a) And erred further in charging the jury as follows: 'But the law requires, when he goes forward, whether it be the day the condition of the mortgage is broken, or whether it be a considerable time afterwards, that, when he takes those goods, he takes them, how? Under the law, certainly since the act of 1892, he does not take them as absolute owner. He takes possession of them as mortgagee; and, even after they go into his possession, his possession is that of a mortgagee, because the statute of 1892 provides that the mortgagor, up to the very day of the sale, may come in, and by payment of the money due on the mortgage, and the expenses incurred by seizing the property, he can redeem and take the goods from under the hammer of the auctioneer that has not fallen.' (b) And erred further in not charging the jury, as requested by counsel for defendant, 'that the mortgage executed by John Gelzer to J. J. Wescoat, trustee, dated August 17, 1892, due and payable forty days after date, stipulates that, after condition is broken, that the said J. J. Wescoat, trustee, his heirs, executors, administrators, attorneys, or agents, enter and take possession and custody of the property embraced in the said mortgage, and the same to hold and detain to his own use and behoof, as his own goods and chattels, henceforth and forever. The effect of this stipulation was to vest the title to all property embraced in the mortgage absolutely in the mortgagee, without requiring him to account for the proceeds of sale of the property, or any surplus derived therefrom, after payment of the mortgage debt.'

"Fourth. For that his honor erred in not charging the jury, as requested by counsel for defendant: 'If the jury are satisfied from the evidence that John Gelzer has made a transfer of all, or a large portion, of his property, by executing mortgages thereon to J. J. Wes-

coat, trustee, and the Savings Bank of Rock Hill, without notice of said mortgages to his other creditors, and that he retained possession of the property embraced in said mortgages, using and claiming it as his own, it will require very strong evidence to rebut the presumption of fraud arising from such retention of possession after the condition of the mortgages were broken; and the burden of proof to rebut the presumption of fraud rests upon the plaintiffs, the assignees of the original mortgagees.'

"Fifth. For that his honor erred in not charging the jury, as requested by counsel for defendant: 'If the jury are satisfied from the stipulations and terms of the mortgages themselves, and from the other evidence in the case, that each of the three mortgages upon which plaintiffs base their claim to the property in dispute was withheld from being recorded within forty days, as required by law, pursuant to any agreement or understanding had between John Gelzer and the respective mortgagees, so as to enable the said John Gelzer to continue his business, and appear to the world as the absolute owner of the stock of goods in his possession, and that, as a result thereof, that innocent parties were defrauded and deceived into selling him goods that went into his stock, upon the faith that he was the owner of the stock in his possession, then each of said mortgages, as to all creditors of John Gelzer who were thus misled, deceived, and defrauded into selling the said John Gelzer goods and merchandise, are absolutely fraudulent, null, and void.' (a) And erred further in charging the jury, in the face of said request, as follows: 'Now, in regard to recording. The mortgagee is not bound to record his paper. It is a good paper without recording. He is only required to record it when he desires to obtain priority of lien over the property covered by his mortgage. That is the purpose.'

"Sixth. For that his honor erred in not charging the jury, as requested by counsel for defendant: 'If the testimony satisfies the jury that John Gelzer executed to the Savings Bank of Rock Hill, S. C., notes and mortgages to the amount of \$5,100, and that he never did owe the bank more than \$3,100, the presumption of fraud would be very great,—that such mortgages were executed not only to secure an alleged indebtedness of \$3,100, but also for the purpose of defrauding, defeating, and delaying his other creditors, and the burden of disproving this violent presumption of fraud would be upon the plaintiffs in this action.'

"Seventh. For that his honor erred in charging the jury that 'all three of these mortgages, broadly speaking, are drawn in compliance, and executed in compliance, with law, and, upon their face, appear to be regular and correct,' and in not charging the jury that each of the three mortgages contained unusual and extraordinary stipulations and agreements, to wit: In each of the mort-

gages executed by John Gelzer to the Savings Bank of Rock Hill, S. C., the following: 'It being hereby stipulated that I am to buy, sell, and carry on the hardware business with the said stock of goods until the said debt is paid, or this mortgage foreclosed; all goods purchased to take the place of those sold.' And in the mortgage executed by said John Gelzer to J. J. Wescoat, trustee, on the 17th day of August, 1892, the following: 'That, after condition is broken, that the said J. J. Wescoat, trustee, his heirs, executors, administrators, attorneys, or agents, enter and take possession and custody of the property embraced in said mortgage, and the same to hold and detain to his own use and behoof, as his own goods and chattels, henceforth and forever.' (1) And further erred in not construing the aforesaid stipulations and agreements himself.

"Eighth. For that his honor erred in charging the jury as follows: 'So that it comes back to this question: Was there any agreement, direct and expressed, or, whether direct or expressed, was there an understanding and agreement between them, in any shape or form, that Gelder was to derive any special benefit from these mortgages, and that Wescoat or the savings bank participated in that agreement, to the detriment of subsequent creditors or purchasers, or to deceive any creditor,—it don't matter whether he was younger or older? Was that so? If it is, then that is fraudulent, and cannot be sustained.' Whereas, it is respectfully submitted that his honor should have construed the stipulation and agreement between the parties, apparent upon the face of both of the mortgages executed by John Gelzer to the Savings Bank of Rock Hill on the 21st day of January, 1893, and the 2d day of December, 1893, respectively, namely, 'It being hereby stipulated that I am to buy, sell, and carry on the hardware business with the said stock of goods until the said debt is paid, or this mortgage foreclosed; all goods purchased to take the place of those sold,'—and not have left same to the jury to construe. (1) And further erred in charging the jury as follows: 'In this case, if Wescoat or the Savings Bank of Rock Hill, though the debt to them was justly due and owing by Gelzer, and you so find, yet if they used that debt to draw up notes and mortgages which carried a benefit to the defendant Gelzer, and it was so intended, and that was to be at the cost of any innocent creditor or purchaser, subsequent creditor or purchaser, and that the papers were used for that purpose, why, that would be fraudulent, and would destroy the notes and mortgages,'—thereby leaving it to the jury to construe the agreements and stipulations in the mortgages contained, under which the mortgagor continued in possession after condition broken, using the stock of goods as his own, whereas his honor should have construed said agreements and stipulations on the face of the mortgage himself. (2) And erred further in charging the jury that they must pass upon

the question whether the mortgages were executed for the purpose of defrauding the creditors of Gelzer, thus, in effect, leaving the onus of proving the fraud upon the defendant; and in not charging that fraud was presumed from the stipulations and agreements contained in said mortgages, and from the fact of unchanged possession of the stock of merchandise after condition broken in the mortgagor, and that this evidence of fraud was conclusive, unless the plaintiffs claiming the right to possession of the stock of goods under the mortgages had proved, to the satisfaction of the jury, that the mortgages were executed in good faith, and without any intent to defraud the creditors of Gelzer. (3) And erred further in not specifically charging the jury upon whom rested the burden of disproving the presumption of fraud.

"Ninth. For that his honor erred in charging the jury as follows: 'So that the question, then, in its last analysis, resolves itself down to this: Who has the better title, or has the better right to the possession of those goods,—Marshall, Wescoat & Co., as the owners of these mortgages, the condition of which has been broken, if their mortgages be valid, as I have stated to you, or this Tabb & Jenkins Hardware Company? That question you must settle upon the face of the papers under the last mortgage, given on the 2d of December, and recorded in the county in which it was executed,'—thereby leaving it to the jury to construe a written instrument, whereas his honor should have construed the mortgage of December 2, 1893, himself.

"Tenth. Because his honor erred in refusing defendant's motion for a new trial, made upon the minutes, upon the following grounds, to wit: (1) For error in charging the jury that 'all three of these mortgages, broadly speaking, are drawn in compliance and executed in compliance with law, and, upon their faces, appear to be regular and correct,' thereby confining the jury to evidence dehors the mortgages to establish fraudulent collusion between the savings bank and John Gelzer. (2) For error in not himself construing the stipulations in the mortgages. (3) For error in charging the jury that the mortgage to savings bank, dated December 2, 1893, for \$3,100, took precedence over the attachment, 'if that mortgage is valid upon its face, and is not invalid for fraud,' instead of at least qualifying same to the amount alleged to be actually due thereon,—about \$2,600."

Finley & Brice and Wm. B. McCaw, for appellant. Hart & Cherry and C. E. Spencer, for respondents.

POPE, J. The plaintiffs began this action on the 19th day of April, 1894, in the court of common pleas for York county, in this state, against the defendant, who is sheriff of that county, for claim and delivery of certain personal property, consisting of goods, wares, and merchandise, as well as certain show-cases, etc., which they claim to have acquired,

as mortgagees, under three chattel mortgages executed by one John Gelzer, after the condition of each was broken. The defendant denied plaintiffs' right to such relief, and justified his possession of all such personal property by reason of a certain warrant of attachment duly issued to him, as sheriff, at the suit of the Tabb & Jenkins Hardware Company, as creditors of the said John Gelzer. The action came on for trial before his honor, Judge Aldrich, and a jury. At the hearing several witnesses were examined in open court, and the depositions of several others were published. The defendant presented eleven requests to charge. The presiding judge refused all but two of them. After the judge's charge, the jury rendered a verdict in favor of the plaintiffs. Thereupon the defendant moved for a new trial. This was refused. After entry of judgment the defendant appealed to this court. These grounds of appeal, preceded by the judge's charge, will be reported, and also his reasons for refusing a new trial. Before these grounds of appeal are discussed, it will be better to make a brief statement of the facts underlying this controversy: The plaintiffs are merchants doing business in the city of Charleston, in this state, while the Tabb & Jenkins Hardware Company is a corporation doing business in the city of Baltimore, Md. Although Crawford, as sheriff, is the nominal defendant, the contest is really between these two firms, over the assets of the unfortunate merchant, John Gelzer, who lives at Rock Hill, in this state. It seems that John Gelzer, being indebted to J. J. Wescoat, as trustee, in the sum of \$700, executed his note, secured by a mortgage on all his personal property, as a merchant,—as well that in his storehouse as that which he should from time to time add to his stock. Forty days was expressed as the time the debt should mature from the date of its execution,—17th August, 1893. This mortgage was not placed on record until 5th January, 1894, and was never recorded in the county of Charleston, where Gelzer lived when he executed it. The plaintiffs subsequently had this mortgage assigned to them. Gelzer paid all but about \$300 due on this debt and mortgage. On the 21st day of January, 1893, the said Gelzer made his obligation, in writing, due one day after its date, for the sum of \$2,000, and executed a mortgage of all his stock in trade, as a merchant, at Rock Hill, S. C., together with a mortgage on such goods, wares, and merchandise as he might add thereto, to the Savings Bank of Rock Hill, S. C. There was inserted in said mortgage this stipulation: "It being hereby stipulated that I am to buy, sell, and carry on the hardware business, with the said stock, until the said debt is paid, or this mortgage foreclosed; all goods purchased to take the place of those sold." This mortgage was recorded on the 5th January, 1894. And on the 2d day of January, 1893, the said John Gelzer executed a mortgage to secure five

notes: One dated 29th June, 1893, for \$500, and due 1st November, 1893; one dated 29th June, 1893, for \$1,000, due 27th September, 1893; one dated September 6, 1893, for \$300, due December 1, 1893; one dated September 15, 1893, for \$500, due December 15, 1893; and one dated December 2, 1893, for \$800, due and payable on demand. This mortgage was recorded on 5th January, 1894. Both these mortgages were assigned, for value, to the plaintiffs, and the latter contained a stipulation similar in effect to that above quoted. It is thus evident that the first mortgage has never been recorded as required by law; and as the four notes held by the Tabb & Jenkins Hardware Company were made by John Gelzer to that company after the execution of the first two mortgages, and before they were placed on record, these two mortgages need not, for the present, be considered. The last mortgage was not only recorded within the 40 days next ensuing its execution, but the condition thereof was broken before any writ in attachment was issued, under which, alone, the defendant, Crawford, claims the goods. This contest, therefore, to a large extent revolves about this third mortgage. If this mortgage is valid, the plaintiffs are entitled to have all the stock in trade of John Gelzer turned over to them; but, if it is not valid, then the defendant, as sheriff, properly holds the same freed from any interference or control of the plaintiffs. Before going any further, it may as well be stated that if the plaintiffs hold this third mortgage, and are entitled to the possession of all these goods, they will be compelled to hold the same under the act of the general assembly of this state entitled "An act regulating chattel mortgages and the payment and satisfaction thereof." 21 St. at Large, p. 7. The text of that act, avoiding the enacting words, is: "That the mortgagor of any chattel shall have the right to redeem the property mortgaged by him at any time before sale by the mortgagee by paying the mortgage debt and any costs incurred in attempting to enforce its payment, and a tender made by the mortgagor of an amount sufficient to pay said debt and cost, if not accepted, shall render the mortgage null and void."

In considering appellant's exceptions, we will follow the order adopted in his argument, which involves attention at this time to the first, second, and third of such exceptions. The proposition contended for is this: In South Carolina, in an instrument whereby a conditional sale of personal property is provided, and an agreement therein appears whereby the grantor or owner of the personal property has expressly reserved the right to retain said personal property, and no notice is given to the world thereof, so far as subsequent purchasers or creditors are concerned, such sale of property is null and void. And it is further contended that inasmuch as a mortgagee, after condition broken, has the right to take the mortgaged property

in his possession, but does not do so, even allowing the mortgagor to sell and trade such property, the mortgage, in such a case, must and ought to be treated (as a conditional sale would be) as null and void as to subsequent creditors or purchasers. That there is a contrariety of judicial opinions on this subject, so far as mortgages are concerned, outside of our state there can be no doubt. But in our state it has been decided that it will not render a chattel mortgage null and void if the mortgagee allows the mortgagor to retain possession of the mortgaged chattels after condition broken. Mortgages, with us, are nothing more than securities for debt, and this is as true of chattel mortgages as mortgages of real estate. The distinction between the two sets of mortgages is that in chattel mortgages, after condition broken, the mortgagees may take possession of and sell the property, while, as to mortgages on real estate, the mortgagee, as such, has no power. As we understand the charge of the circuit judge, he sought to enforce this doctrine. We will not press this investigation, for this court, quite recently, through the chief justice, as the organ of the court, has considered the effect of a mortgage in this state, as will be found in *Porter v. Stricker* (S. C.) 21 S. E. 635. In his opinion, among other things, he clearly recognizes the propriety of such indulgence from the creditor to the debtor as is evidenced by allowing the debtor to retain the mortgaged property after the condition broken. In this connection he used this language: "It seems to us that the whole testimony points clearly to the conclusion that the sole object of giving the mortgage was to secure an honest debt due to a very indulgent creditor, and another part of which was for money then loaned to the debtor to carry on his business. The subsequent conduct of the party negatives the idea that there was any intention that the mortgage should operate as a transfer of the property, for the conceded fact is that the debtor was permitted to retain the property for more than three months after the maturity of the mortgage debt." But it is contended in this case that the stipulation in the mortgages from John Gelzer to the Savings Bank of Rock Hill, S. C., whereby the said John Gelzer especially agreed that he should retain possession of the property mortgaged, and sell the same, in his business as merchant, until the said debt is paid or this mortgage foreclosed,—all goods purchased to take the place of the goods sold,—is illegal. The third mortgage became due 15th December, 1893, and the said Gelzer was allowed to hold the goods until 6th February, 1894,—1 month and 21 days after condition broken. But from the 5th January, 1894, when the last mortgage was duly recorded, all persons had constructive notice, at least, of this stipulation; and appellant contends that it was the duty of the circuit judge to charge that this stipulation in the two last mortgages was conclusive evidence of a

fraudulent purpose, as between the mortgagor and mortgagee,—that it was a badge of fraud. Was the charge of the judge correct, when he refused to so construe the mortgage? If a man, as a legal result necessarily following facts, has a right to retain mortgaged chattels, after condition broken, until a foreclosure of the mortgage, will it be wrong for him to have that legal result stated in a paper containing those admitted facts? In other words, if a mortgagor of chattels has the right to retain those chattels until after condition broken of his mortgage, and also until foreclosure of said mortgage, even if no agreement of such result is made in the mortgage, will that right be destroyed if he stipulates, in words written in the mortgage, for such possession after condition broken, and until foreclosure? We do not think so. Now, of course, all that is said, up to this moment, on this subject, relates to the simple presence of the stipulation referred to in the mortgage. But in the event it should be made to appear by testimony that this stipulation, and its observance by these parties, were because of a corrupt agreement between the mortgagor and the mortgagee, whereby an advantage to the mortgagor over his other creditors was to be obtained, why, such an agreement would be a fraud, and would upset everything and everybody connected with it. However, it must be remembered that this would place the burden of proof upon the defendant to prove such a fraud. The charge of the circuit judge meets this issue fully, fairly, and thoroughly.

As to the fourth ground of appeal: It nowhere appears in the case that the mortgage held by the plaintiffs as assignees cover all the property of John Gelzer; and of course, therefore, the circuit judge could not charge, as requested, that the three mortgages were executed in fraud. The burden of proof was still, therefore, upon the appellant, who alleged fraud.

As to the fifth ground of appeal: In this state the mortgagee is not bound to record his mortgage. The mortgagee loses his prior lien, as to subsequent liens and conditions, if he fails to so record his mortgage. As we understand the circuit judge, he did charge that if any corrupt agreement existed, as to not recording the two first mortgages within 40 days after their execution, between the mortgagor and mortgagee, they would be annulled as fraudulent.

As to the sixth ground of appeal: The alleged error here referred to seems to us to have been fully cured by the charge of the judge. It is not required of him that he should charge just in the words of the request, or in the order in which they occur. He must cover such requests in his charge. When he has done so the ends of the law, in this regard, are fully met.

As to the seventh ground of appeal: It was the duty of the circuit judge to construe the mortgages. He did so. His language, as

quoted in this ground of appeal, is frank and full. He was not in error in what he said, and the circuit judge did not err in not charging, as requested, that each of the three mortgages contained unusual and extraordinary stipulations, as therein pointed out, as we have hereinbefore fully shown.

As to the eighth ground of appeal: So far as this ground relates to the stipulations contained in the mortgages, we have already decided that it is not well taken. So far as the effect of testimony allunde the terms of the mortgages themselves, these being questions of fact, we have no power to review them, except to say that the instructions of the circuit judge in relation thereto are approved by us.

As to the ninth ground of appeal: We see no error in the language used by the circuit judge. The question was really who had the better title to this personal property. All the other questions were incidents to this leading, controlling question. Of course, the subordinate questions had to be decided, in order to solve the question of title.

As to the tenth ground of appeal: We can only say, after considering the whole case, that the circuit judge did not err here. It was a motion based upon the minutes of the court. Where facts are involved, we have no right to express any opinion; and, when law points are raised, we are satisfied with the conclusions of the circuit judge. It follows, therefore, that all these grounds of appeal must be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

Plaintiff had judgment, and defendants appeal. Affirmed.

N. B. Dial, for appellants. Johnson & Richey, for respondent.

McIVER, C. J. This was a proceeding, originally instituted in the court of probate, by which the plaintiff demanded dower in a tract of land in the possession of the defendants. The judge of probate rendered his decree, allowing dower, and from that decree defendants appealed to the court of common pleas, where the same was heard by his honor, Judge Aldrich, who, in a short order, overruled all the exceptions to the decree of the judge of probate, for the purpose of carrying into effect the decree of that court. The defendants now appeal from the judgment of the circuit court upon the several grounds set out in the record, which it is unnecessary to repeat here, as we propose to consider the several points made by these grounds.

The undisputed facts are that Enoch Hill, the husband of plaintiff, died intestate in May, 1878, seised and possessed of the tract of land in which dower is now claimed, leaving, as his heirs at law, his widow, the plaintiff herein, and six children, one of whom, according to the testimony, was about 20 years of age at the time the testimony in this case was taken, and another had died, leaving minor children. It does not appear that any administration was ever granted upon the personal estate of the intestate, which seems to have been very small; and, indeed, the widow testified that there never was any administration upon the estate. It also appears from the testimony that the intestate owned no other land, at the time of his death, except that which constitutes the subject-matter of the present controversy, but that he had, through one Berry Owings, bid off another tract of land, upon which he had paid something, and that, after his death, the said Berry Owings, in consideration of the amount which had been paid by the intestate during his lifetime, made titles to the widow for 80 acres of said land, estimated to be worth about \$10 per acre. Some time after the death of Enoch Hill, one Stoddard commenced an action to foreclose a mortgage on the tract of land in which the plaintiff now claims dower, to which action the widow and her children were made parties as heirs at law, and as being in possession of the land. That action culminated in a judgment for the sale of the land, which appears to have been rendered in September, 1892, and in that judgment the following clause is found: "The question of dower was not raised or adjudicated in this action." When the land was offered for sale under that judgment, the attorney for Mrs. Hill testified that he "gave notice that Mrs. Hill would claim dower, and the land was sold subject to her claim"; and also that the attorney of Stoddard "gave notice that, in his judgment, Mrs. Hill did not have any dower in said land," to which the

(46 S. C. 91)

HILL v. GRAY et al.

(Supreme Court of South Carolina. Sept. 9, 1895.)

RES JUDICATA—DOWER.

1. The decree in an action against a widow and her children, to foreclose a mortgage executed by their decedent in his lifetime, is not conclusive as to her right of dower in the land, where the decree of foreclosure recited that the "question of dower was not raised or adjudicated in this action," and at the sale notice was given to the purchasers that the widow would claim dower.

2. The acceptance by a widow of a deed to land which her husband in his lifetime had contracted to purchase, but had not paid for, is not sufficient to defeat her claim of dower in specific lands, as an election to take her distributive share in the estate in lieu of dower.

3. Where a widow, with her children, was in possession of land, from the death of her husband, until defendant took possession as purchaser at mortgage foreclosure, without there being any ouster in the meantime, her possession was not adverse, so as to defeat her claim for dower therein.

4. Where a sale on foreclosure was made subject to the widow's right of dower, she was not obliged to take her dower out of the proceeds of sale on foreclosure.

Appeal from common pleas circuit court of Laurens county; James Aldrich, Judge.

Action by Rebecca Hill against W. L. and R. L. Gray to recover dower in certain lands,

witness responded "that, in my judgment, Mrs. Hill did have dower, and would claim same." The land was sold, and bought by defendants, who went into possession in December, 1893; the plaintiff testifying, in this case, that she was induced to surrender possession by a threat of Gray that he would have her put out. The defendants set up several grounds of defense to the claim of dower, and rely upon the same as their grounds of appeal from the judgment of Judge Aldrich, which will now be considered.

The first defense set up is that of *res adjudicata*, which is based upon the ground that plaintiffs failed to set up any claim of dower in the action brought by Stoddard to foreclose the mortgage hereinbefore referred to. But, in the first place, it does not appear that there were any allegations in the complaint in that action which rendered it necessary or appropriate that the claim of dower should be there set up. Indeed, we suppose that the plaintiff herein, together with her children, were made parties to that action simply as heirs at law in possession of the mortgaged premises. But what is conclusive of the matter is that the question of the right to dower was, in effect, reserved by the explicit statement, made in the decree of foreclosure, that "the question of dower was not raised or adjudicated in this action." This, together with the notice given at the sale, was quite sufficient to advise purchasers that the sale was made subject to the widow's claim of dower. We do not think, therefore, that the defense of *res adjudicata* can be sustained.

The next defense set up is that of estoppel, exactly of what kind does not appear. If, as we have seen, the plaintiff was not estopped by the plea of *res adjudicata*, we are unable to discover anything else that would operate as an estoppel.

The third defense set up is, as expressed by counsel for appellants, that the plaintiff "had elected to take other portions of her husband's estate in lieu of dower," by which we understand that the widow, having elected to take her distributive share of her husband's estate, is barred of her dower. The insuperable obstacle to this defense is that it does not appear that the widow ever made any such election. Indeed, in view of the undisputed fact that there never was any administration upon the estate of the intestate, it is somewhat difficult to understand how the widow's distributive share of the estate could have been ascertained, without which she could not properly be said to have made any election; for it is well settled that the widow is to have full information of her interest before she can be held to any election. Suppose, however, that the real point intended to be made by this defense, presented by the third ground of appeal, is that the plaintiff, by accepting the deed from Berry Owings for the 80 acres of land contracted for, but not paid for, by the intestate dur-

ing his lifetime, is barred of her dower. In the first place, that land never constituted any part of the estate of the intestate; but, in the second place, that deed not being before us, we know nothing of its terms, and it may be, for all that appears, that the deed was made by the plaintiff for the benefit of the heirs at law, as it should have been. At all events, it was incumbent upon the defendants, who set up this affirmative defense, to show that the said deed was accepted by the plaintiff as a part of her distributive share of her deceased husband's estate; and no such showing has been made. Indeed, in the absence of any administration upon the estate, there was no person legally authorized to represent the estate, and the transaction with Owings may yet be set aside. This ground of appeal must be overruled.

The fourth ground of appeal raises the defense of the statute of limitations, which is based upon adverse possession. It is quite certain that the defendants, who never went into possession of the land until December, 1893, could not claim by adverse possession themselves for the statutory period; and we think it equally certain that there is no adverse possession in the parties under whom they claim, for the requisite period of time, or, indeed, for any time at all; for, while it does appear that the plaintiff and her children remained in possession of the land from the time of the death of the intestate until defendants took possession, yet there is not the slightest evidence even tending to show that such possession was adverse. If, as appellants claim, the plaintiff and her children were in possession of the land as tenants in common, there certainly could be no adverse possession by one or more of them against the other without some evidence of ouster, or something of that kind; and of this there is not the slightest pretense.

The fifth ground raises the point that, if plaintiff is entitled to dower at all, she must claim it, not out of the land, but out of the proceeds of the sale thereof under the judgment of foreclosure. In the first place, no such point was raised in the court of probate, and it was not, therefore, properly before the circuit court, although it was raised by the fifth ground of appeal from the decree of the judge of probate. What view the circuit judge took of that point does not appear, as he simply confirmed that decree, in a short order, without giving any reason. But, waiving this, we do not think that the point can be sustained, for the reason, as we have seen above, that the sale under the judgment of foreclosure was, in effect, made subject to the claim of dower, and the purchasers were so notified, not only by the terms of the judgment, but by distinct notice at the sale.

The sixth ground of appeal raises the question of *res adjudicata*, which has already been disposed of.

The judgment of this court is that the judgment of the circuit court be affirmed.

(46 S. C. 122)

Ex parte HAMPTON & B. RAILROAD & LUMBER CO.

(Supreme Court of South Carolina. Sept. 16, 1895.)

RESTRAINING CONSTRUCTION OF TRAMWAY.

On the hearing of a petition to restrain the construction of a tramway across certain premises, it appeared that petitioner, a railroad company, had power to construct branch roads not more than five miles in length; that it located its right of way on and procured sufficient land on which to build its road, and that defendants were about to construct a tramway crossing said road; that, prior to the grant to petitioner, defendants acquired the right to build its tramway on the premises in question; that the point where the roads would cross was more than five miles from the main line; that defendants had already constructed their tramway, a part of which petitioner had torn up; that defendants had brought an action against petitioner's president for so doing, which was then pending, and the court below had enjoined petitioner from interfering with defendants' tramway. *Held*, that petitioner was not entitled to an injunction.

Petition in the supreme court, in its original jurisdiction, by the Hampton & Branchville Railroad & Lumber Company, for a writ of injunction to enjoin A. T. Goethe and another from constructing a certain tramway. Denied.

The decree rendered May 8, 1895, by McIVER, C. J., denying the petition, was as follows: "This is an application, addressed to this court, in the exercise of its original jurisdiction, for an injunction restraining Goethe & Ulmer, their servants and agents, from constructing or operating a certain tramroad described in the petition. Upon the original hearing of this petition, this court granted a rule requiring the said Goethe & Ulmer to show cause, on the 6th day of the present month of May, why the injunction, as prayed for in the petition, should not be granted, and in the meantime restraining the said Goethe & Ulmer from constructing or operating said tramroad. In conformity with this order, cause has been shown, and after hearing the return to the rule, together with the affidavits submitted by both parties, and after full argument by counsel for both parties, the court has reached the conclusion that the injunction prayed for should not be granted. It is therefore ordered that the application for injunction be refused, and the petition be dismissed. It is further ordered that the restraining order heretofore granted shall no longer have any force or effect, and from this date be rescinded. The reasons for this conclusion will be stated in an opinion hereafter to be filed."

Fishburne, Murphy & Farron, for petitioner. Howell & Gruber, for respondents.

McIVER, C. J. This is a petition, addressed to this court, in the exercise of its original jurisdiction, praying that A. T. Goethe and M. W. Ulmer, doing business as partners under the name and style of Goethe & Ulmer,

may be enjoined "from building, constructing, or operating a tramway on or across" certain lands of one J. C. Lightsey, "or on or across the right of way procured by the petitioner from J. C. Lightsey." The allegations of this petition are substantially as follows: That, by virtue of section 1609 of the Revised Statutes, petitioner has the power to build branch roads, not exceeding in length five miles, from its main track; that, for the purpose of constructing such a branch road, not exceeding five miles in length, petitioner procured from one J. C. Lightsey sufficient land upon which to construct its branch railroad across a certain tract of land then owned by said Lightsey, and "actually located the right of way and track on said lands"; that one J. C. Geiger was formerly the owner of the said land, and, while he was such owner, he gave to said Lightsey "a grant of the exclusive right of building a tramway or tramways on or across said land, as will more fully appear from a copy of said grant, hereto annexed, and marked 'Exhibit B,' to which reference is prayed"; that the said Goethe & Ulmer have entered upon said land, and are proceeding to construct a tramway across the same, and they threaten and declare that it is their purpose to complete the construction of said tramway, and to continue to use and operate the same, for the purpose of hauling timber and lumber from their sawmill; that the tramway of the said Goethe & Ulmer will cross the branch track or right of way of petitioner, located as aforesaid, and will necessarily result in great hindrance to the use and enjoyment of its railway, and will involve the petitioner in great expense in constructing its branch road across the tramway of said Goethe & Ulmer, looking to the condemnation of its right of way, for the purpose of constructing the tramway of said Goethe & Ulmer; and that petitioner cannot be compensated in money for the damages which petitioner has and will continue to sustain by reason of the construction and operation of their said tramway by the said Goethe & Ulmer, they being, as petitioner believes, insolvent. Upon hearing this petition, verified by the affidavit of W. H. Mauldin, president of the said company, the usual rule to show cause was granted, requiring the said Goethe & Ulmer to show cause why the prayer of the petition should not be granted. To this rule the said Goethe & Ulmer have made a verified return, supported by numerous affidavits, in which the following facts are stated: That, before the petitioner or the said J. C. Lightsey acquired any rights or interests in the said lands, these respondents (Goethe & Ulmer) had received from the said J. C. Geiger the two several grants, "copies of which are hereto annexed"; and that W. H. Mauldin, the agent and president of the petitioner, and J. C. Lightsey, had both actual and constructive notice of the said grants, and of the rights of these respondents thereunder. That the petitioner is not desirous of building a tram-

road or railroad over or across said land, but is actuated in bringing these proceedings by the sole purpose of so harassing these respondents as to force them to haul their lumber and other freight over the petitioner's railroad, or to cease to do business in that section of country. That the point at which the petitioner laid down its pretensive railroad (more particularly mentioned hereinafter) is more than five miles from the main track of the Hampton & Branchville Railroad. That the construction of respondent's tramway was finally completed several weeks before this proceeding was instituted. That no notice, written or otherwise, has ever been served upon these respondents that the land over which their said tramway has been constructed was needed by the petitioner for the construction of its railroad, or any branch thereof; but, as appears from the affidavit annexed to the return, and referred to as part thereof, the said W. H. Mauldin, who is the president of the Hampton & Branchville Railroad & Lumber Company, with the said Lightsey, who is his son-in-law, together with a large force of hands, on or about the 20th of February, 1895, in the nighttime, tore up a portion of the tramway constructed by these respondents, and laid down a few pieces of railroad iron, on blocks, across the track of respondents' tramway, tore down two tenant houses erected by respondents, and used the material in building a house across the track of the respondents' tramway. That, for this high-handed outrage upon the rights of the respondents, they commenced an action, which is now pending, against the said W. H. Mauldin and the said J. C. Lightsey, in which, among other relief, an injunction was asked for, restraining the said Mauldin and the said Lightsey from further interference with the said tramway of these respondents. That the said W. H. Mauldin, in his answer to said action, claimed that the Hampton & Branchville Railroad & Lumber Company was a necessary party to the said action, because it holds a grant from the said J. C. Geiger for the exclusive right to build a tramway or tramways across the lands in question, setting out a copy of said grant; and the said Mauldin further alleged in his answer that he is the president of said company, and, as such, advised and directed his employes to obstruct and prevent the building of respondents' tramway. That the honorable Ernest Gary, after a full hearing, granted an order at chambers enjoining the defendants in that action (the said Mauldin and the said Lightsey) "from hindering and obstructing the said plaintiffs [Goethe & Ulmer] in building, constructing, and operating the tramroad mentioned in the complaint, and from trespassing upon the same, until the hearing and final determination of this action upon its merits."

The papers referred to in the pleadings are as follows: A paper, bearing date the 29th day of July, 1893, executed by J. C. Geiger, whereby he bargains, sells, and releases "unto

the said A. T. Goethe, his heirs and assigns, all the pine timber and pine tree growing, lying, and being on that certain tract of land [describing the same], together with the right of way and free access to the said timber." This paper was executed in the presence of two subscribing witnesses, proved, and recorded in the proper office the 20th of July, 1894. Next, a paper bearing date the 17th of January, 1895,—though the weight of the testimony shows that it was not in fact executed until the 25th of January, 1895,—whereby the said J. C. Geiger sells to the Hampton & Branchville Railroad & Lumber Company "the exclusive right of building a tramway or tramways in, over, and across my [his] swamp and uplands lying in and along Little Salkahatchie river." This paper was executed in the presence of one subscribing witness, who proved the execution of the same, but it was not recorded. Next, a paper bearing date the 18th of January, 1895, whereby the said J. C. Geiger grants, bargains, sells, and releases unto the said A. T. Goethe "a right of way through and across my [his] land" (describing the same). This paper was executed in the presence of one subscribing witness, who proved the same, and the same was recorded on the 26th of January, 1895. And, next, a formal deed from the said J. C. Geiger to the said J. C. Lightsey for the land over which the tramway of the said Goethe & Ulmer runs, bearing date the 25th of January, 1895.

The testimony, derived wholly from affidavits submitted by the parties, is very conflicting upon many of the issues involved; so much so that we cannot say that the petitioner has made such a case as entitles it to the injunction asked for. The burden of proof is upon the petitioner to show that it is a proper case for injunction, and we do not think that the showing made is sufficient to warrant this court in interposing its aid by enjoining the said Goethe & Ulmer from proceeding with their operations, whereby great, and probably irreparable, loss and injury would be incurred by them. Especially is this so when we think that the decided weight of the testimony shows that the tramway, the construction of which is sought to be enjoined, as well as the operating of the same, was fully completed before these proceedings were commenced; and the fact that the petitioner stood by and allowed this work to be done, without taking any legal steps to prevent it, but chose, rather, through its president, to protect its alleged rights by force and arms, does not commend this application to the favor of the court. Besides, we think that the relative rights of these parties can much better be adjusted and determined in the action, hereinabove referred to, brought by Goethe & Ulmer against the said W. H. Mauldin and the said J. C. Lightsey, to which action the said Mauldin, the president of the petitioning company, has demanded that the said company shall be made a party, in which action his honor, Judge Ernest Gary, has already,

after full argument, granted an order restraining the defendants therein from further interfering with the tramway of the said Goethe & Ulmer until the said case is finally heard upon its merits. Without, therefore, undertaking now to decide any of the issues of law or fact involving the merits, this court, believing that it is not a proper case for injunction, has, for the reasons above indicated, heretofore granted an order refusing the application for injunction, and dismissing the petition.

(92 Va. 31)

RICHLANDS FLINT-GLASS CO. v. HILTEBELTEL.¹

(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

MECHANIC'S LIEN—SUFFICIENCY OF COMPLAINT—TIME OF FILING LIEN—DESCRIPTION OF PREMISES—PAROL EVIDENCE.

1. Where a bill to establish a mechanic's lien shows that the last charge in the account was for work during the month of October, and the lien was filed for record November 8th, it sufficiently shows that the lien was filed within 30 days, as required by Code 1887, § 2476.

2. Attached as an exhibit to a bill to establish a mechanic's lien was a mortgage particularly describing the property on which the lien was claimed. *Held* a sufficient description.

3. Where a written contract for laying bricks is silent as to the manner in which the number of bricks is to be determined, parol evidence is admissible to show the custom by which such a matter is determined.

Appeal from circuit court, Tazewell county; Williams, Judge.

Action by J. H. Hiltebeltel against the Richlands Flint-Glass Company to enforce a mechanic's lien. Plaintiff had decree, and defendant appeals. *Affirmed*.

May & May, for appellant. H. C. Alderson and J. H. Fulton, for appellee.

RIELY, J. The appellee, who was the complainant in the court below, brought his suit in equity to enforce his mechanic's lien against the glass factory of the appellant company, and the parcel of land on which it was built.

There was a demurrer to the bill, which was overruled, and this action of the court constitutes the first assignment of error. The first ground of the demurrer is that the bill does not allege that the lien was perfected before the expiration of 30 days from the time the work on the factory terminated. This objection is not well taken, as the bill distinctly avers that the mechanic's lien was filed "as provided for in sections 2475 and 2476 of the Code of Virginia"; and it appears from the copy of the record of the lien, which is filed with the bill as an exhibit, that the work ran through several months, and that the last charge in the account is for the work for the month of October, 1892. The lien was admitted to record in the clerk's office on

November 8, 1892, which was within the period the lien is required by statute to be perfected. Another ground of the demurrer is that the account fails to show the amount and character of the work, and the prices charged therefor. An inspection of the account shows the contrary. The amount and character of the work, the prices charged therefor, the payments made, and the balance due, are all fully set forth, in compliance with the statute. Another ground of demurrer is that "the bill does not specify or describe any land by metes and bounds, nor any quantity of land upon which the plaintiff claims a lien." There is filed with the bill, as an exhibit, and as a part thereof, a copy of the mortgage made by the Richlands Flint-Glass Company for the purpose of issuing bonds to raise the money for the conduct of its business. In this mortgage the parcel of land on which the factory is built is particularly described by metes and bounds, and stated to contain 2.7 acres. The bill seeks to enforce the mechanic's lien against the factory, and this parcel of land on which it was built, and which the company deemed necessary for the convenient use of its factory. The bill clearly designates the property which the complainant seeks to subject to his lien. The other ground assigned for the demurrer need not be particularly noticed, as the question it presents is raised, and more properly, by the answer.

The Richlands Flint-Glass Company bargained with J. H. Hiltebeltel, the appellee, to do the brickwork of the glass factory it proposed to erect; and George McCall, who was then its vice president, drew up a memorandum of the agreement, which was signed by the appellee. The memorandum merely sets forth the various prices which were to be paid per 1,000 for laying the bricks of the different parts of the factory. It does not specify any mode by which the quantity of bricks laid was to be ascertained and settled for. It is wholly silent as to this matter. The difference between the parties as to the method by which the quantity of bricks is to be ascertained constitutes the real controversy in this case. The appellant company claims that, as the contract does not specify any particular mode, its proper construction is that they are to be ascertained by actual count, and that no evidence can be received to show otherwise, as to do so would be to violate the well-settled rule that parol evidence cannot be received to vary or contradict a contract in writing. The appellee contends, on the other hand, that, where a contract for laying bricks does not specify any particular mode of ascertaining the quantity, it is to be ascertained by the custom of the locality, or the usage of trade, which, in this case, would be by measuring the work, and allowing so many bricks to the cubic foot. If the quantity is ascertained by measurement, which includes the mortar joints, and makes no allowance for small openings, and not by actual count, the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

quantity of bricks thus ascertained is necessarily greater. "Extrinsic evidence," it is said in Browne, Parol Ev. § 57, "is admissible, in the construction of a mercantile contract, to show that phrases or terms used in the contract have acquired, by the custom of the locality, or by the usage of trade, a peculiar signification, not attaching to them in their ordinary use; and this whether the phrases or terms are in themselves apparently ambiguous, or not." And again it is stated in the same work (page 216) that "parol evidence is competent to annex to a contract a custom or usage of the business and locality, known to the parties, or so general and well settled as to be presumed to be known to them, and with reference to which they must be deemed to have contracted." As the contract in this case contains no stipulation as to the method by which the quantity of bricks was to be ascertained for settlement, but is silent, or at least ambiguous, in that respect, parol evidence was admissible to show whether there was any agreement between the parties as to this matter, and, if so, what it was, and, if there was no agreement between them, then to show what was the custom of the locality where the contract was made, or the usage of trade, and with reference to which, in the absence of any special agreement, they are to be deemed to have contracted. In *Lowe v. Lehman*, 15 Ohio St. 179, the contract was to furnish any lay bricks at a certain price per 1,000. The controversy there was as to the proper mode of counting, as in the case at bar. The court held that evidence was admissible to show a custom to estimate the quantity of bricks by a measurement of the walls on a uniform rule, based on the size of the bricks, and deducting for openings in the walls, but not for chimneys or jambs. In *Ford v. Tirrell*, 9 Gray, 401, the contract was to build the wall of an octangular cellar at the rate of 11 cents per foot. The only question was as to the mode of measurement. It was held that, the agreement as to the compensation being equivocal and obscure, it was competent to prove a local usage of measuring cellar walls, in order to interpret the meaning of the language, and to ascertain the extent of the contract. *Hinton v. Locke*, 5 Hill, 437, was an action on a contract by which the defendant had promised to pay to the plaintiff, who was a carpenter, 12 shillings per day for every man employed by him in repairing the defendant's house. The parties differed as to how many hours made a day's work; that is, what should be the measurement of the day. It was held that parol evidence was admissible to show that, by a universal usage among carpenters, 10 hours' labor constituted a day's work. So that the plaintiff was entitled to charge $1\frac{1}{4}$ days for every 24 hours within which the men worked 12 hours and a half. In *Walls v. Bailey*, 49 N. Y. 404, the plaintiff had contracted to do the plastering work of the defendant's house,

in Buffalo, at a certain price per square yard. He charged and claimed pay for the full surface of the walls, without deduction for doors, windows, cornices, and base boards, while the defendant contended that under the contract he was only to pay for the plaster actually laid on. Evidence of a custom among plasterers in Buffalo to measure and charge for the entire surface of the walls, without deductions for doors, windows, cornices, and base boards, was held to be proper.

It is shown by the testimony in this case that, at the making of the contract, nothing was said as to the manner by which the quantity of bricks was to be ascertained; and it is further shown by the testimony that, where there is no stipulation as to the mode by which the quantity of bricks is to be ascertained, it is to be done, according to the custom of the locality and the usage of trade, by measuring the work, and allowing 22 bricks to the cubic foot. It was also proved that the appellee had previously laid bricks on other buildings for the same person who represented the appellant company in making the contract in this case, and that the quantity of bricks was ascertained by measurement, and the appellee settled with accordingly. The court, therefore, did not err in overruling the objections of the appellant to the parol testimony in the cause on the ground that it tended to contradict the written contract between the parties, and in holding that the complainant was entitled to have the number of bricks in the glass factory laid by contract work estimated and paid for by measurement, computing the same at 22 bricks to the cubic foot. And, upon a review of the whole case, we think that the court was right in adopting the report of Commissioner Chapman as the basis of its decree, and overruling all the exceptions taken thereto. There is no error in the decree of the circuit court of Tazewell county, and the same must be affirmed.

(92 Va. 68)

CAMPBELL et al. v. McBEE et al.¹

(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

TRUST DEED BY MARRIED WOMAN—RIGHTS OF HUSBAND'S CREDITORS.

Where a married woman and her husband executed a deed of trust on her separate land, and she died, leaving him surviving, *held*, that said deed was superior to judgments against him recorded prior thereto, as he had no right of curtesy which could be subjected to the payment of his debts until said deed was satisfied.

Appeal from circuit court, Wythe county; Williams, Judge.

Action by M. K. McBee and others against A. A. Campbell, trustee, and others. From a decree for plaintiffs, defendants appeal. Reversed.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

A. A. Campbell and Walker & Caldwell, for appellants. R. Crockett and J. A. Saunders, for appellees.

HARRISON, J. Mary K. McBee, a married woman, inherited from her mother 160 acres of land, and under the Acts of 1876-77 and 1877-78 she became seised and possessed of this inheritance as her separate legal estate. During her coverture, creditors of her husband obtained judgments against him, and after these judgments were duly docketed the husband joined in a deed conveying this land to a trustee to secure a loan made to the wife. The wife died. The children of Mary K. McBee, after her death, instituted this suit to enjoin and restrain the trustee from enforcing collection of the debt secured in the deed of trust, and set up the judgments against the husband as liens of prior dignity thereon. An account of liens was ordered, and the master reported said judgments as prior liens, binding the life estate of the husband in the land. The circuit court overruled all exceptions to this report, and held that Milo McBee, the husband of Mary K. McBee, was tenant by the curtesy of the land; that this gave him a life estate therein, which was liable to his judgment creditors, as liens of higher dignity than the debt of the wife secured by deed of trust. From this decree the case was brought to this court.

The land sought to be subjected to these liens is conceded to have been, in her lifetime, the separate legal estate of Mary K. McBee, held as such by virtue of the married woman's act of 1876-78. It is unnecessary to enter upon an elaborate consideration of this act. It is comprehensive in defining the sole ownership and absolute character of the estate created in the wife by it. She can devise it as if unmarried; can alien and incumber it; and, if her husband does not voluntarily unite with her in a deed parting with it, she can pass an absolute title to it by invoking the aid of a court of equity. The act guards the estate thus absolutely vested in the wife, with great particularity, from the debt and liabilities, and from any and every power, of the husband. The husband has no interest, during the wife's lifetime, in the estate of the wife, created by this act, and judgments against him cannot attach to what does not exist. If the wife does not alien her separate real estate, held under this act, in her lifetime, the husband has curtesy in it at her death. But when, during her lifetime, she has conveyed it to a trustee, by deed united in by her husband, to secure a debt, then, so far as the land is necessary to pay the debt thus secured, he has no curtesy in it, and the deed of trust is not affected by judgments rendered against him.

In the case at bar the debt secured to the appellant Jennie Lawson in the trust deed from Mary K. McBee and her husband to A. A. Campbell, substituted trustee, is a lien upon the land conveyed in that deed, prior in

dignity to the judgments audited against the appellee Milo McBee, and must be first satisfied in full from the proceeds of sale, before the judgment creditors can receive anything.

The decree of the circuit court appealed from is, for the foregoing reasons, erroneous, and must be reversed and set aside, and the cause remanded for further proceedings to be had therein in conformity with this opinion.

SHUMATE v. WILLIAMS et al.¹

(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

SALE BY COMMISSIONER—LIABILITY OF PURCHASER.

Where a commissioner to sell land is required, by the order of sale, to execute a bond before receiving any money from the sale, and fails to give such bond, a purchaser at the sale, who pays money to said commissioner, does so at his own risk; and he is not exonerated from liability for the money so paid by reason of the fact that the commissioner was attorney for the judgment creditor.

Appeal from circuit court, Giles county; Williams, Judge.

Bill by John T. Shumate, executor, against John Williams and others. Defendants had decree, and plaintiff appeals. Reversed.

Johnson & Taylor, for appellant. Williams & Porterfield, for appellees.

KEITH, P. This was a bill brought by the testator of the appellant, in the circuit court of Giles county, to subject certain real estate of the appellees to the payment of the judgments binding thereon. There was a decree for a sale of the land in the bill mentioned, and George W. Easley was appointed commissioner. He returned his report of sales, which was duly confirmed by the decree of June 4, 1885, and he was directed to collect the purchase money for the land sold as the bonds therefor fell due, and, out of the money so collected, to pay first the costs of suit, and the residue to the lien creditors of John Williams, according to their priorities as shown in the report of Master Commissioner James B. Peck, filed in the cause. The decree directs that, "before receiving any money under this decree, the said Easley shall execute bond before the clerk of the court, with security to be approved by him, in the penalty of \$3,000.00, conditioned for the faithful discharge of his duties as receiver." The commissioner failed to give the bond, as required, but proceeded to collect the purchase money, and died insolvent, having a balance in his hands due to the executors of John T. Shumate. An amended bill was filed, to which the administrators of Easley were made parties, and the commissioner in chancery was or-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

dered to settle the accounts of George W. Easley as receiver.

A good deal of testimony was taken before the commissioner, which shows that George W. Easley was the attorney for John T. Shumate in his lifetime, that he sued for and obtained the judgments at law for John T. Shumate, and that, as such attorney, he filed a bill in chancery to subject the lands of the judgment debtor to sale. It does not appear that John T. Shumate had any notice that George W. Easley had failed to give the bond required by law and by the decree of the court under which he acted, and we do not think that the mere fact that he was the attorney for the plaintiff, as well as commissioner, is sufficient to exonerate the purchaser from his duty to see that George W. Easley had executed the bond required of him. Until that bond was executed, Williams had no right to pay, and Easley had no right to receive, the purchase money for the land sold under the decree in this cause; and he could, therefore, give no sufficient acquittance to Williams, and any money paid by Williams was paid at his own risk. We consider that this case is controlled by *Hess v. Rader*, 26 Grat. 746, and *Lloyd v. Erwin*, 29 Grat. 598, and that the purchaser is not exonerated from liability for the money paid by him to the commissioner by reason of the fact that the commissioner was the attorney for the judgment creditor, especially as the judgment creditor does not appear to have had notice of the failure of the commissioner to execute the required bond, and cannot, therefore, be supposed to have given credit and indulgence to him in his capacity as attorney merely, but is presumed, in the absence of proof to the contrary, to have relied upon the due execution of the bond as required by law. We are, however, of opinion that the purchasers are entitled, as against the executors of John T. Shumate, to a credit for whatever may be found due to George W. Easley on a statement of accounts between the estates of John T. Shumate and George W. Easley. For the reasons stated, the decree complained of should be reversed.

(92 Va. 59)

**SOUTHERN EXP. CO. v. COMMON-
WEALTH ex rel. WALKER.**¹

(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

CONSTITUTIONAL LAW — PENALTIES AGAINST EXPRESS COMPANIES.

1. Code 1887, § 1220, providing for a penalty against express companies making excessive charges, etc., and giving one-half of the same to the informer, is not in contravention to Const. art. 8, § 7, declaring that "all fines collected for offenses committed against the state" are to be set apart as a permanent literary fund.

2. The legislature, possessing a right to impose a fine or forfeiture, has the power, as ap-

purtenant thereto, to prescribe the proceedings deemed by it most likely to enforce the same.

3. A minimum fine of \$100 against an express company for violating a statute against excessive charges is not contrary to Const. art. 1, § 11, prohibiting excessive fines.

4. The failure of a statute to prescribe a maximum fine against an express company violating the law as to charges is no objection to it.

5. Const. U. S. art. 8, prohibiting excessive fines, refers only to powers exercised by the United States, and not by the states.

Error to circuit court, Wythe county; Williams, Judge.

Action by the commonwealth of Virginia, at the relation of James A. Walker, against the Southern Express Company, for the collection of a fine. To a judgment for plaintiff, defendant brings error. Affirmed.

Blair & Blair, for plaintiff in error. Walker & Caldwell, for defendant in error.

RIELY, J. There is but a single question involved in this case, and that relates to the constitutionality of section 1220 of the Code of Virginia. Its validity is assailed by the plaintiff in error on several grounds.

The first and main objection is based on section 7 of article 8 of the constitution of the state, which sets apart, as a permanent and perpetual literary fund, among other resources, "all fines collected for offenses committed against the state." It is contended that the forfeiture provided for in section 1220 is embraced by the term "fines" so set apart by the constitution, and that the gift of one-half thereof for the use of the informer is a misappropriation or diversion, to that extent, of a fund which has been dedicated to the literary fund, and that the statute is therefore in conflict with the fundamental law, and invalid. This compels an inquiry into the meaning of the words quoted from the constitution. What "fines" are here intended or comprehended? The answer is found in the language of the constitution itself. They are "fines collected for offenses committed against the state"; that is, fines imposed by law as a punishment for crime. Fines constitute, in whole or in part, the punishment for many of the smaller offenses at common law, and also for many offenses created by statute, and these are the "fines" which the constitutional provision was designed to cover. It comprehends only those fines which are affixed as penalties for crime, and are recoverable upon the conviction of the offender, and does not embrace those pecuniary penalties or forfeitures provided by statute, that a popular or qui tam action (which is a civil action) may be brought to recover. Such is the forfeiture prescribed by section 1220, and which was sued for and recovered in this case.

Section 1215 prescribes the rates which an express company may charge, and section 1220 provides a pecuniary forfeiture for their violation. The gravamen of this suit is that the express company, in exacting payment of the defendant in error for a package carried

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

by it, exceeded the rate allowed by law. For the express company to charge for carrying packages of goods and moneys is a perfectly legitimate act. It is in no sense criminal. The act complained of here is entirely innocent, in itself, and is only contrary to law because the charge exacted was greater than the statute allows. It is not characterized by the statute as a crime, or prosecuted and punished as such. This view is enforced by the provisions of section 1220, in that they do not dedicate the entire forfeiture for the use of the state, but direct that one-half thereof shall be for the use of the informer, who is enabled to recover it by a civil suit in the name of the state, without a criminal prosecution and conviction. It is clear that the forfeiture in question is not a penalty for a crime,—“an offense committed against the state,”—but simply a forfeiture for an act which the lawmaking power of the state, in its wisdom, deemed necessary to prevent imposition upon its citizens; and, being so, it is not affected by the constitution, and the legislature had the right to prescribe the forfeit, and then dispose of it at its pleasure, either wholly to the state, or partly to the state and partly to the informer and others. The term “fines,” used in the constitution, literally construed, does not comprehend forfeitures. “A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor.” 1 Bouv. Law Dict. 662. In chapter 31 of the Code the word “fine” includes a pecuniary forfeiture, penalty, and amercement; but that is by virtue of the special enactment (section 745), and it could not affect the proper construction of the term “fines” as used in the constitution.

The constitution of Indiana contains a provision very similar to that under discussion in the constitution of our own state. It provides that the common-school fund of the state shall consist of, and be derived from, “the fines assessed for breaches of the penal law of the state, and from all forfeitures which may accrue.” Article 8, § 2. A statute was enacted imposing a certain duty upon every corporation or person operating a railroad in that state, and affixing a penalty for its violation, to be recovered in a civil action in the name of the state, one-half of which should go to the prosecuting attorney, and the remainder to be paid to the county in which the proceeding was had, and constitute a part of the common-school fund. It was contended in the case of *State v. Indiana & I. S. R. Co.* (Ind. Sup.) 32 N. E. 817, that the statute diverted or misappropriated the penalty contrary to the provision of the constitution above referred to; but the court held that the “fines” specified in the constitution had reference to fines assessed in criminal prosecutions, and that the penalty affixed to the statute for its violation was not a fine in that sense. It therefore sustained the constitutionality of the

statute. This decision strongly corroborates the construction, it has seemed to us, should be given to the similar provision contained in section 7, art. 8, of our own constitution. See, also, *State v. Pennsylvania Co.* (Ind. Sup.) 32 N. E. 822, and *Ott v. Jordan* (Pa. Sup.) 9 Atl. 321.

But, if the constitutional provision so relied on to invalidate section 1220 were susceptible of the construction contended for by the counsel for the plaintiff in error, it would not invalidate it. Such conclusion could only be reached by a very literal and narrow construction. The constitution does not impose fines nor provide for their enforcement. To the legislature belongs the duty of providing for their enforcement and collection, and also of imposing them, except where they are imposed by the common law. It could not have been intended or expected by the framers of the constitution that the laws imposing fines for offenses could be enforced or collected without cost or expense. They must have contemplated that fines, in being enforced and collected, should bear the burden of such means as the legislature might deem best adapted to compel their enforcement and collection, and only intended to appropriate to the literary fund the amount coming to the state after deducting such part as the legislature may have set apart to secure their enforcement and collection. If the legislature possesses the right, as it does, to impose a fine or forfeiture, it has the power, as appurtenant to such right, to prescribe the proceeding or adopt the means deemed by it most likely to result in the enforcement of the fine or forfeiture. If it thought that its policy, as evidenced by the forfeiture provided for in section 1220, was more likely to be enforced by giving one-half of the forfeiture for the use of the informer, it had the right to do so, and only such part as it reserved for the use of the state would be covered by the constitutional provision. This is not an appropriation or diversion of the fine to an object other than that to which the constitution dedicates it. On the contrary, all of the fine, beyond what the legislature has deemed proper to set apart to stimulate the prosecution and secure the enforcement of the fine, goes to the literary fund, as required by the constitution. Moreover, it has been the practice of the legislature, for a hundred years or more, in declaring forfeitures and fixing fines in certain cases, to provide, with the view of stimulating prosecutions in such cases, that an informer should be entitled to a part of the forfeiture or fine. Many such statutes were in the Code of Laws of the state, and in force, at the formation of the present constitution, when section 7, art. 8, was introduced for the first time into the organic law. It is to be presumed that its framers were familiar with these statutes. And, being familiar with them, it could hardly be that they intended to invalidate them, or, by such indirection, to prohibit a long-es-

established policy of the legislature, but that they simply intended to dedicate to the literary fund the part of such forfeitures and fines as was reserved to the state. So, then, in neither view is section 1220 repugnant to the constitution.

It is next contended that the minimum fine of \$100 is excessive, and in violation of section 11, art. 1, of the constitution, which provides that "excessive fines" ought not to be imposed. The imposition and regulation of fines belong to the legislature, and to its discretion and judgment the widest latitude must be conceded. Fines are to be fixed with reference to the object they are designed to accomplish. The degree of criminality of the offense, or the illegality or impolicy of the act, they are intended to punish or prevent, are elements that must enter into their consideration. The peace of society and the welfare of the people occasionally require that the legislature shall create new offenses, and affix penalties for their violation, or alter the penalties for others already existing. What is to be the legislative guide, in the performance of this duty, but its sound judgment and the wisdom of experience? And how can the courts with reason or propriety question the action of the legislature, or control or restrain its discretion, except where the minimum penalty is so plainly disproportioned to the offense or act for whose violation it is affixed as to shock the sense of mankind? Bearing in mind these considerations, which must affect the regulation of fines, and the discretionary power of the legislature, how can the court say that the minimum fine prescribed in section 1220 is excessive? By what standard is it to determine this question? A fine that would prove efficacious in the case of an individual, and beyond which it would appear to be excessive to go, would be likely to prove ineffectual in the case of a corporation, with its aggregated wealth and power, and its disposition to act, oftentimes, in an arbitrary manner, because of the inability of private persons to contend against its illegal and willful acts. The minimum fine prescribed by section 1220 cannot be declared to be excessive by any standard which the courts can apply, and this objection need not be further considered.

It is further contended that the statute is unconstitutional in that it fails to prescribe a maximum limit to the forfeiture, and thus places it within the power of a jury, through caprice or prejudice, to mulct a corporation with a fine of so large an amount as practically to destroy it. If a supposition so extreme, and so unlikely ever to be confirmed, were to be verified, in consequence of the failure to fix a maximum limit to the forfeiture, still we are unable to see how that would render the statute obnoxious to the bill of rights, or section 11, art. 1, of the constitution. How could the bare possibility that an excessive fine might be imposed by a

jury invalidate the statute? If so, a statute otherwise valid might be annulled by a possibility that might never happen. If a jury were to render a verdict so excessive as to contravene the inhibition of the constitution, the wrong or vice would lie in the verdict, and not in the statute. And the objection overlooks the fact that, if a jury were to impose such a fine, it is the province of the court, and would be its duty, to set aside the verdict. The question as to an excessive fine is a judicial one, and does not affect the validity of the statute. When, if ever, any such fine is imposed by a jury, the corrective hand of the court will annul it, in accordance with the letter and spirit of the bill of rights.

The only remaining objection to the statute is that it is repugnant to article 8 of the amendments to the constitution of the United States. It is a sufficient answer to this objection to say that the supreme court of the United States has held, time and again, that the eighth article of the said amendments has reference solely to powers exercised by the government of the United States, and does not apply to the states. *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. 693; *Ellenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. 424; *Pervear v. Massachusetts*, 5 Wall. 475; and *Livingston v. Moore*, 7 Pet. 469. There is no error in the judgment of the circuit court, and it is therefore affirmed.

(92 Va. 34)

NORFOLK & W. R. CO. v. SHOTT.¹

(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

WHO ARE PASSENGERS—CONTINUANCE FOR ABSENCE OF WITNESS—BILL OF EXCEPTIONS—DAMAGES—MISCONDUCT OF COUNSEL—REVIEW.

1. A mail agent traveling on a railroad under a contract between the government and the railroad company is a passenger.

2. A witness who was an employé of the defendant, living within 8 or 10 miles of the place of trial, was not subpoenaed, but defendant undertook to have him present at the trial. *Held*, a refusal to continue the case on the ground of his absence was not reversible error.

3. A bill of exceptions to the admission of evidence over objection should be asked for, and signed by the judge, distinctly pointing out each objectionable ruling; otherwise, the objection will be deemed abandoned.

4. More than one exception may be embraced in one bill, but each exception must be distinctly set forth.

5. Where there is no legal measure of damages, the court will ordinarily leave the question of the amount to the sound discretion of the jury.

6. If the record fail to note the language used by counsel in an address to the jury, an objection to the same will not be considered.

Error to circuit court, Pulaski county; Williams, Judge.

Action by H. I. Shott against the Norfolk & Western Railroad Company. Plaintiff had judgment, and defendant brings error. Affirmed.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Jas. A. Walker and J. E. Moore, for plaintiff in error. Wysox & Morton and Ford & Ford, for defendant in error.

HARRISON, J. This is an action to recover damages for personal injuries sustained by the defendant in error on the 18th of June, 1892, while traveling, as mail agent and postal clerk, on one of the passenger trains of the Norfolk & Western Railroad Company. The injuries complained of were received in a collision between a passenger train going southwest and a train of freight cars moving northeast, which occurred near New River station, in the county of Pulaski, Va. The accident was the result of gross negligence in the conductor on the passenger train, in failing to obey an order to wait at New River station for the freight train with which he collided. This suit was brought in the circuit court of Pulaski, and resulted on the 8th day of August, 1893, in a verdict for the plaintiff for \$7,000. The court overruled a motion for a new trial, and entered judgment upon the verdict.

It is established by the evidence that the plaintiff was an employé of the federal government, and was on the passenger train in the legitimate discharge of his duty as mail agent and postal clerk, under some contract between the government and the defendant company as to carrying the United States mail.

The relation the plaintiff bore to the railroad company, as a common carrier, imposed upon the defendant company the same degree of care for the plaintiff that it was bound to exercise towards every passenger upon its train. The plaintiff was in no sense an employé of the defendant company, and can only be treated as a passenger. The negligence of the company is not denied, and we do not understand the plaintiff's right of recovery to be seriously controverted.

The first error assigned is the refusal of the circuit court to sustain the demurrer to the declaration. No reason is suggested in support of this assignment, and the court, perceiving no ground of objection to the declaration, is of opinion that the demurrer was properly overruled.

The second assignment of error is the refusal of the circuit court to continue the case, on the motion of the defendant company, on the ground of the absence of a material witness.

The court in which a trial takes place is in a position to determine, better than any one else can do, the sufficiency of grounds relied on for a continuance; hence it is that an appellate court does not interfere, unless the judgment of the court below, on such a motion, is plainly erroneous. It has been repeatedly held by this court that a motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, though an appellate court will supervise the action of the

lower court on such a motion, it will not reverse a judgment on that ground, unless plainly erroneous. *Hewitt's Case*, 17 Grat. 627; *Harman v. Howe*, 27 Grat. 676; *Roussell's Case*, 28 Grat. 930; *Walton's Case*, 32 Grat. 855; *Bland & Giles County Judge Case*, 33 Grat. 443; *Keesee v. Bank*, 77 Va. 129; and *Mister's Case*, 79 Va. 5.

In the case at bar the absent witness was an employé of the defendant company, living within 8 or 10 miles of the courthouse where the trial took place. He was not summoned in the mode prescribed by law,—by a subpoena placed in the hands of the sheriff to be served,—but the plaintiff in error undertook the responsibility of summoning the witness, and having him present at the trial. After a careful examination of all the facts and circumstances relating to this assignment of error, we have reached the conclusion that the action of the circuit court in overruling the motion for a continuance was not so clearly improper, or plainly erroneous, as to justify this court in setting aside the judgment on that ground.

The third assignment of error is as follows: "Because of the erroneous rulings of the court below as set out in bill of exceptions No. 3."

Bill of exceptions No. 3 covers 124 pages of evidence, an examination of which shows that, in the progress of the trial, numerous points were saved, both by the plaintiff and defendant, as to the propriety of certain questions, and the admissibility of the evidence contained in certain answers. The bill of exceptions does not specify which rulings of the court upon these numerous points are relied on as erroneous.

The failure to take a bill of exceptions alleging errors committed by the court in the admission or rejection of evidence is treated in the appellate court as a waiver or abandonment of those objections.

When exception is taken to the admission or exclusion of evidence, the bill must be so framed as to point out the particular error complained of, clearly and distinctly; otherwise, the exception will be unavailing. Judge Marshall, in delivering the opinion of the court in *Scott v. Lloyd*, 9 Pet. 418, says: "Although the plaintiff's counsel objected to the question, and said that he excepted to the opinion of the court, no exception is actually prayed by the party, and signed by the judge. This court cannot consider the exception as actually taken, and must suppose it was abandoned."

This decision has been quoted with approval by this court in *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671, and *Trumbo's Adm'r v. Car Co.*, 89 Va. 780, 17 S. E. 124, and perhaps in other cases.

In the case of *Holleran v. Meisel*, lately decided by this court, and reported in 21 S. E. p. 658, Judge Riely, in delivering the opinion of the court, says, "It is the office of a bill of exceptions to set forth a specific and

definite allegation of error, and so much of the evidence as is necessary to a clear apprehension of the propriety or impropriety of the ruling made by the court, and if it fails to do this the exception will prove unavailing." It may now be regarded as a settled rule of practice in this state that in order to have the benefit in an appellate court of exceptions taken, in the progress of a trial, to the ruling of the court upon a motion to reject or admit evidence, it is necessary that a bill of exceptions should be asked for, and signed by the judge, clearly and distinctly pointing out each erroneous ruling complained of; otherwise, the objection taken will be regarded as abandoned.

It is true, there may be more than one exception embraced in one bill, thus making it a bill of exceptions, as was held in *Brown v. Hall*, 85 Va. 146, 7 S. E. 182; but, where this is done, each separate exception embraced in such bill must set forth clearly and distinctly the ground of objection relied on, so that there will be no confusion with others there-in contained.

In the case at bar the bill of exceptions under consideration is a single bill of exception, setting forth all the evidence introduced on the trial, taken upon the refusal of the court to set aside the verdict and grant a new trial. It does not conform to the rule of practice already laid down, and therefore the numerous objections made to the admission and rejection of evidence at the time it was taken must be regarded by this court as abandoned. It is proper, however, to say that we have considered all such objections, and are of opinion that the points saved in regard thereto would have been unavailing if said bill of exceptions had been properly taken.

It is further assigned as error that the verdict of the jury, for \$7,000, is excessive. The law as to how far courts will interfere with the verdicts of juries is very well settled. The question to be considered is not whether the court, if acting in the place of the jury, would have given more or less than the amount of the verdict, but whether the damage awarded by the jury is so large or so small as to indicate that the jury has acted under the impulse of some undue motive, or some gross error or misconception of the subject. Where there is no legal measure of damage, the court will ordinarily leave the question of amount to the sound discretion of the jury.

Judge Daniel, speaking for this court in the case of *Farish v. Riegle*, 11 Grat. 697, where the action was for injuries sustained by the upsetting of a stagecoach, and the jury gave \$9,000 damages, says: "There is no rule of law fixing the measure of damages in such a case, and it cannot be reached by any process of computation. In cases of this kind the judgment of the jury must govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced

by partiality or prejudice, or have been misled by some mistaken view of the merits of the case"; citing *Tinney v. Ashley*, 16 Pick. 547.

Applying these well-settled principles to this case, we cannot undertake to say that the damages allowed by the jury are unreasonable.

Another assignment of error is that counsel for the plaintiff, in his closing argument, used improper and illegal arguments to the jury, calculated to improperly influence their verdict.

The language objected to is not in the record. The certificate shows that no objection was made, to the court, during the argument complained of; that objection was not made on this account until after the verdict of the jury, and until after the motion was made for a new trial and overruled; that then the objection was made for the first time as ground in support of a second motion to set aside the verdict and grant a new trial.

It is clear that this objection was not made in time to be availing. It comes too late after verdict, if the court can see that under all the circumstances a proper verdict has been rendered.

In the case of *Price v. Com.*, 77 Va. 393, where the remarks complained of were prohibited by the statute, this court held as follows: "Where, in such case, accused does not testify, it is improper for the prosecuting attorney to comment on that fact. But, if exception is not taken thereto till after verdict, it is too late, unless, under all the circumstances, the court can see that a proper verdict has been rendered, and the accused not injured by the comment." The several assignments of error already considered constitute the grounds upon which the plaintiff in error based its motion for a new trial. It follows from what has been said that this motion was properly overruled.

Upon the whole case, and for the reasons given, we are of opinion that the judgment must be affirmed.

(92 Va. 30)

HANKS v. LYONS et al.¹

(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

PRACTICE—SERVICE OF NOTICE—RETURN DAY.

Code 1887, § 3211, provides for recovery of money due by contract, by motion after 15 days' notice, the notice to be returned to the clerk's office 10 days before commencement of the term. Court commenced March 19th. The notice was served March 7th, was given to the sixth day of the term, and returned to the clerk's office on the day of service. *Held*, that said motion was served in due time, and, under Code 1887, § 3378, should have been put on the docket.

Error to circuit court, Pulaski county; Williams, Judge.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Action by C. L. Hanks against John W. Lyons and others. From a judgment for defendants, plaintiff brings error. Reversed.

Walker & Caldwell, for plaintiff in error.
I. H. Larew, for defendants in error.

RIELY, J. Section 3211 of the Code of Virginia is as follows: "Any person entitled to recover money by action on any contract, may, on motion before any court which would have jurisdiction in an action, otherwise than under section thirty-two hundred and fifteen, obtain judgment for such money after fifteen days' notice, which notice shall be returned to the clerk's office of such court ten days before the commencement of the term. A motion under this section, which is docketed under section thirty-three hundred and seventy-eight, shall not be discontinued by reason of no order of continuance being entered in it from one day to another, or from term to term. This section shall not be construed as intended to affect the remedy by motion given by the preceding section." The plaintiff in error proceeded, under this section, to obtain judgment upon a contract, in the court below, against the defendants in error. The term of the court commenced on March 19, 1894, and the notice was given, not to the first, but to the sixth, day of the term. It was served on the defendants on March 7, 1894, and returned to the clerk's office of the court on the same day. It thus clearly appears that the notice was served on the defendants more than 15 days before the day on which the motion for the judgment was to be made, and was returned to the clerk's office of the court more than 10 days before the term of the court commenced. The notice was duly placed by the clerk on the docket, as required by section 3378, among the motions and actions matured for the docket at that term of the court. On the day of the term of the court to which the notice was given, the defendants moved the court to quash the notice and strike the case from the docket, which motion was sustained by the court. To this judgment, a writ of error was awarded by this court. The ground upon which the defendants based their motion was that the notice was not served 15 days before the term of the court commenced; it being contended that the notice must not only have been in a condition to be docketed at that term, but also so matured that judgment might be given on the first day of the term.

It is to be observed that the statute authorizes the court to render judgment on motion after 15 days' notice, which notice shall be returned to the clerk's office of the court 10 days before the commencement of the term. The statute does not specify that the notice must be served 15 days before the commencement of the term, nor that it must be given to the first day of the term. If this was the intention of the legislature, it would

have been easy to say so. If it intended that the notice should be matured for judgment, as well as for the docket, before the term, it would have been easy so to declare. But no such intention is expressed in the statute, nor does it contain anything from which such intention can be inferred. The plaintiff, in the notice, complied literally with the provisions of the statute, and was entitled, under his notice, to move the court, on the sixth day of the term, for judgment against the defendants. The court plainly erred in quashing the notice and striking the case from the docket. The case of *Hale v. Chamberlain*, 13 Grat. 658, which was relied on by counsel for defendants in error, does not sustain his contention. In that case, the court held that the notice could not be matured during the term, but that it "must be in a condition to be docketed before the term, to authorize the court to give judgment at that term." *Id.* 663. It is plain from the reasoning of Judge Allen, who delivered the opinion of the court, that it did not mean that the notice must be so matured before the term as that judgment could be given on the first day of the term, but simply that it must be matured for the docket before the term, by being served and returned within the time prescribed. Section 3378 of the Code, which is the same as when the case of *Hale v. Chamberlain*, *supra*, was decided, directs that before every term of a circuit court, and before every term of a corporation court designated for the trial of civil cases in which juries are required, the clerk shall make out a docket of the following cases pending, to wit: First, cases of the commonwealth; second, motions and actions, in the order in which the notices of the motions were filed, or in which the proceedings at rules terminated, docketing together, as new cases, those not on the docket at the previous term. The clerk, as is seen, is required to make out the docket before the term; and a notice like the one in question, in order that it may be heard at that term, must be in condition to be docketed before the term. In the case of *Hale v. Chamberlain*, *supra*, the notice was not only not returned before the term, but was not even served until after the term began. It could not, therefore, be put on the docket at that term, and the court necessarily held that it could not be heard at that term; but, in the case at bar, the notice had been served and returned and filed by the clerk on March 7, 1894, which was more than 10 days before the commencement of the term. It was, therefore, in a condition to be docketed before the term, and, when docketed, it was a case pending in the court for a hearing on the day to which the notice was given. The two cases are wholly unlike, and the principle of that decision cannot govern this case.

For the foregoing reasons, the judgment of the circuit court must be reversed, and the said notice of the plaintiff in error reinstated on the docket for trial.

(92 Va. 102)

SPENCE et al. v. NORFOLK & W. R. CO.¹
(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

DELAY IN TRANSPORTATION OF GOODS—ACTION
FOR DAMAGES—WHO MAY MAINTAIN
—FORM OF ACTION.

1. Plaintiffs shipped goods by a railroad, guarantying freight. The bill of lading was accompanied by a draft, to be accepted by consignees before delivery of the goods. The goods having been damaged by delay, the consignees refused to receive the same, and the railroad company notified plaintiffs, requesting them to direct the disposition of the goods, which plaintiffs refused to do, on the ground that the goods belonged to the consignees, and were shipped at their risk. *Held*, that plaintiffs could maintain a suit against the railroad company for damages caused by the delay.

2. Where the direction to the carrier is not to deliver the goods until payment shall be made by the consignee, the property in the goods continues in the consignor, who can sue for damage to the same, caused by delay, either by an action on the case, or in assumpsit.

Error to circuit court, Wythe county; Williams, Judge.

Action by Spence & Neff against the Norfolk & Western Railroad Company. To a judgment for defendant, plaintiffs bring error. Reversed.

W. S. Poage, for plaintiffs in error. Bolling & Stanley, for defendant in error.

BUCHANAN, J. The plaintiffs in error brought an action on the case, against the defendant in error, for damages for failing, as a common carrier, to deliver at their destination, within a reasonable time, two car loads of vegetables and fruit.

The verdict of the jury and the judgment of the trial court were in favor of the defendant, and to that judgment this writ of error was allowed.

The principal error complained of was the refusal of the court to give instruction No. 5 asked for by the plaintiffs, and the giving of an instruction of its own in lieu thereof. The instruction asked for, and which was refused, was as follows:

"The court further instructs the jury that, when the risk of the safe transportation of the goods is upon the consignor, he will be considered as the owner, for the purpose of maintaining an action against the carrier for their loss or injury.

"Therefore, if the jury shall believe from the evidence in this case that the risk of the transportation of the goods and produce set out in the plaintiffs' declaration was upon them [plaintiffs], they are entitled to maintain this action for said loss or injury."

The instruction the court gave in lieu of it is in these words: "If the jury believe from the evidence that the plaintiffs contracted to sell to De Witt & Co. and Bayer & Son certain produce; and if the jury believe that, according to the true intent and meaning of

the said contracts between the said plaintiffs and the said De Witt & Co. and Bayer & Son, the plaintiffs sold the said produce to the said De Witt & Co. and Bayer & Son at an agreed price, free on board the defendant's cars at Rural Retreat, and that the plaintiffs did deliver said produce on the defendant's cars at Rural Retreat, and consigned the same to said De Witt & Co. and the said Bayer & Son at Columbus, Ohio, and Charleston, S. C., to be delivered to the said consignees at their destinations by the defendant, and that plaintiffs charged the said De Witt & Co. and Bayer & Son, on the books of the plaintiffs, with the price of said goods so shipped to them,—then the plaintiffs cannot maintain this action, and the jury should find for the defendant."

On the trial of the cause, the defendant does not seem to have controverted its liability for failure to perform its duty in carrying the goods shipped, but relied entirely upon the defense that the plaintiffs had no interest in the goods shipped after they were delivered to the defendant, and therefore had no right of action against it for such failure of duty, or, if they had any right of action at all, it was an action of assumpsit on the contract, and not an action on the case in tort.

The question has been very much discussed in this country whether the shipper or consignor can maintain any action against a common carrier for damages done to goods after they have been received by such carrier for the purpose of carriage, and before they have been delivered to and received by the consignees, when the shipper or consignor had no right of property, general or special, in the goods, and no right or interest in their safe carriage, except that arising from the bill of lading.

One line of cases holds that, since the shipper or consignor has parted with all interest in the property, he cannot be injured by the failure of the common carrier to perform its duty, or to keep its contract, and the consignee or owner alone can maintain the action.

Another line of cases holds that, inasmuch as the contract for shipment was made by the shipper or consignor, he has the right to maintain such action, because the carrier agreed with him to carry the goods safely, and within a reasonable time, and the action is for the breach of that agreement.

This subject was discussed at length, and with great learning and ability, by Chief Justice Shaw, in the case of *Blanchard v. Page*, 8 Gray, 281. The facts of that case showed that the plaintiffs in the action against the carrier had sold goods to another party, who had paid for them, and they afterwards delivered the goods to the common carrier, to be forwarded for them. When they delivered them to the carrier, they took from it a bill of lading purporting to be a contract with the shippers to carry and deliver the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

goods to the purchaser. The goods were lost, and an action was brought by the shippers against the carrier for their value, upon the contract in the bill of lading. It was admitted that the shippers had no interest or property in the goods at the time of the shipment, and it was for that reason contended that they could not maintain the action; but the court held, notwithstanding the fact that they had no interest in the goods shipped, that an action could be maintained upon the contract. And this position was sustained by an argument, both upon general principles and upon authority, which, as Mr. Hutchinson says in his work on Carriers, seems unanswerable. In a later case decided by the same court, it was held that, where there was no bill of lading, nor other writing evidencing the contract, an action could be maintained by the consignor, who had no interest in the property shipped, nor an express contract with the carrier. *Finn v. Railroad Corp.*, 112 Mass. 524.

Mr. Hutchinson, in his work on Carriers, after discussing this question at length, reaches the conclusion that the consignor, who has made a special contract with the carrier, may always maintain an action upon it for the loss of or damage to the goods, regardless of the question of interest or property in them. Nor would it appear to be material whether the freight upon them has been paid by him or another. If not paid, he is the party to whom the carrier may look for its payment, in case the consignee should refuse to accept the goods, or to pay the carrier's charge upon them. And if paid, no matter by whom, the payment would be a sufficient consideration for the contract with the consignor. Section 728.

Ang. Carr. § 299, says that the rule upon this subject is properly stated by Park, J., in *Freeman v. Birch*, 1 Nev. & M. 420, in which it was held "that the person employing the carrier must bring the action, but that the circumstance of the legal right being in one person may be evidence of employment by that person. Hence it follows that, in order to decide who is the proper party to be made plaintiff in an action of this sort, the first inquiry must be whether any special agreement for the carriage of the goods in question exists. If there is none, it then becomes necessary to ascertain in whom the right of property is vested. In the former case, the remedy for any breach of contract belongs to the party with whom such agreement is made. Therefore, where the consignor agrees with the carrier for the conveyance of the goods, and is to pay him, the action is well brought."

The plaintiffs in this case, according to their evidence, not only made a special contract with the defendant, by which they guaranteed the payment of the freight, but the consignees were not entitled to the possession of the goods until they accepted the drafts attached to the bills of lading. The sales in this case were made by telegram. The Co-

lumbus purchasers or consignees, De Witt & Co., wired the plaintiffs for prices, who replied that they would sell them the produce, shipped, at a certain price, "f. o. b. the cars [free on board the cars] at Rural Retreat, shipment subject to draft with bill of lading attached." De Witt & Co. then wired the plaintiffs not to send draft, and they would remit. The plaintiffs answered, refusing to ship unless they would agree to their terms. De Witt & Co. then wired them to ship according to their first proposition. The same kind of a contract, it seems, was made with Bayer & Son, the Charleston purchasers or consignees. It is very clear from their contracts that the plaintiffs did not intend to part with all interest in the goods when they delivered them to the defendant for shipment. The evidence shows that when the consignees refused to receive the goods, on the ground that they were damaged, the plaintiffs, upon being notified of the fact, refused to give directions as to the disposition of the goods, on the ground that they had sold them to the consignees, and the goods were shipped at their risk. This action of the plaintiffs could not change the original contract between them and the consignees. The most that can be said of it is that their conduct at that time is inconsistent with their claim now. It is also equally true that the conduct of the defendant at that time was inconsistent with its present claim. Then it treated the plaintiffs as the owners of the goods, and insisted upon paying, and did pay, then, the balance of the amount received upon the sales of the goods shipped to Charleston, after paying the freight. Now it insists that the plaintiffs had no interest in the goods shipped after they were delivered to it for shipment. While the conduct of both parties has been inconsistent with their present claims, such conduct cannot affect their legal rights in this case, as neither acted upon the other's conduct to his prejudice.

The evidence shows, or, at least, tends to show, that the consignees had no right to the possession of the goods shipped until they paid the drafts which were attached to the bills of lading. In such a case, Mr. Benjamin says, in section 399 of his work on Sales (2d Am. Ed.), "that where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of exchange; and, if he refuses acceptance, he acquires no right to the bill of lading, or the goods of which it is the symbol."

Mr. Angell says: "Where the direction is not to deliver the goods in case of the existence of certain circumstances, nor until payment should be made by the consignee in cash, the property in the goods continues in the consignor." Section 511.

Hutchinson on Carriers, in discussing this subject, says: "But, after all, the question whether the property in the goods has passed

to the consignee by a delivery to the carrier will depend upon the intention of the transaction, and this may always be shown. And goods may be shipped to the order and on account of the consignee as purchaser, and yet his right to the possession of them may be incomplete, as where the direction to the carrier is not to deliver the goods until the payment of the price, or a compliance with some other condition, by the consignee. In such cases, of course, the title to the goods remains in the consignor until the conditions upon which delivery is to be made have been complied with." Section 734.

There are cases which hold, where goods are sold and shipped C. O. D., the title passes; but in those cases it is admitted that the seller has a special property in the goods sold. In the case of *Pilgreen v. State*, 71 Ala. 368, which was a case where a liquor dealer received an order requesting him to send whisky by express, C. O. D., to the party ordering it, it was said: "The general property, however, passed to the buyer by the delivery to the express company at Calera [the place from which the whisky was shipped]. The risk of loss then passed to him, though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property, and to the actual possession. * * * The seller has a lien upon the property for the price, and the right of possession until it is paid."

Whether the contracts in this case vested the title to the goods sold in the consignees, when delivered to the defendant company for shipment, subject to the lien for the purchase price, and the right to the possession until the drafts were accepted, or whether the title did not vest in them until the drafts were accepted, is not material, for, in either case, the plaintiffs had such interest and rights in the property as would entitle them to maintain an action; for it is well settled that where both the consignor and the consignee have an interest in the goods, one having a general and the other a special property, either may sue; but a recovery by one constitutes a bar to an action by the other. *Freeman v. Birch*, 1 Nev. & M. 420; *Mayall v. Railroad Co.*, 19 N. H. 122; and 2 Am. & Eng. Enc. Law, pp. 902, 903. The plaintiffs having such interest in the goods shipped (if any interest be necessary where they have made a special contract with the carrier for their shipment, and guaranteed the payment of freight) as gives them the right to maintain an action against the defendant, the question arises, can they maintain an action of tort, or must they bring assumpsit?

That they can maintain an action on the case, as well as an action of assumpsit, we think, is well settled.

In the case of *Boorman v. Brown*, 3 Adol. & E. (N. S.) 511, 43 E. C. L. 843, 850, Chief Justice Tindal, in delivering the opinion of the court, said: "That there is a large class of

cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance is indifferently either assumpsit or case upon tort, is not disputed. Such actions are against attorneys, surgeons, and other professional men for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailees of different description; and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff." The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform the duty, or the nonfeasance, is a ground of action upon a tort.

Ang. Carr. § 422, says, in discussing this question: "But, in respect to the proper form of action at common law against all common carriers, there was for a long time a question, and one much agitated among pleaders; and it was natural that the question should arise out of the innovation upon the common-law duties of carriers. As long as their occupation was considered as a public duty, the breach was tort, for which they were liable to an action on the case, founded upon the custom of the realm, or, in other words, upon the common law. In time, however, they succeeded in establishing the existence of a contract, and then they at once became liable to an action of assumpsit on their undertaking. And a very long-established, continued, and uniform usage has sanctioned the principle and adopted the advantages of both forms of action; so that the case may be considered either way,—as arising *ex contractu* or *ex delicto*,—according as the neglect of duty or breach of promise is intended to be relied on as the cause of injury. The practice of declaring against common carriers on the custom of the realm was as ancient as the common law itself, and was uniformly adopted until the case of *Dale v. Hall* (decided in 1750) [1 Wils. 281], when the practice of declaring in assumpsit succeeded; but, for four hundred years before that time, the declaration was in tort on the custom."

It is said by Hutchinson on Carriers "that, since the recognition [in the case of *Dale v. Hall*] of the right of the bailor of the goods to sue upon his contract with the carrier, the two forms of action—the one in assumpsit for breach of contract, and the other in tort for the breach of duty—have been adopted indifferently, or as best suited the purposes of the pleader." Sections 738, 739, 740; 2 Am. & Eng. Enc. Law, p. 903; 3 Rob. Prac. (New) 437-441.

This court, in the case of *Express Co. v. McVeigh*, reported in 20 Grat. 264, 284, held that where there is a public employment, from which arises a common-law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing of something contrary to an agreement

made, in the course of such employment, by the party upon whom such general duty is imposed. In that case, as in this, there was a special agreement, and this court held that the plaintiff had the right to bring, as he did, an action of tort. In *Ferrill v. Brewis' Adm'r*, 25 Grat. 765, 768, Judge Staples said: "There is a class of cases [among them that of bailment] in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or nonperformance is indifferently in assumpsit or in case upon tort."

The plaintiffs made the contract with defendant for the shipment of the goods, and guarantied the payment of the freight. They are, therefore, parties to the contract, and had an interest in the safe delivery of the goods; and it is not for the defendant, who made the contract with them, to say, upon a breach of that contract, that the plaintiffs are not entitled to recover damages which are the direct and natural consequence of such breach of contract. *Blanchard v. Page*, 8 Gray, 281, 301.

Even if the defendant had not required the plaintiffs to guaranty the payment of the freight, we do not think its right to recover the same, if it had performed its duty, and the proceeds of the goods shipped were insufficient to pay its freight, could be made to depend upon what may prove to be the legal effect of the dealings between the consignors and consignees upon the title to the property which was the subject of transportation. It had the right to look for its compensation to the plaintiffs, who required it to perform the service by delivering the goods to it for transportation. And the plaintiffs, unless they were the mere agents of the consignees, have the right to enforce the contract made with the defendant, and to sue for its breach; and their right to do so cannot be made to depend upon the question whether or not the title to the goods shipped passed by their dealings with the consignees. There can be but one recovery against the defendant for its breach of contract, or its failure to perform its duty, whether the action be brought by the plaintiffs, with whom the contract was made, or by the consignees, if they were the owners of the goods. *Finn v. Railroad Corp.*, 112 Mass. 524, 533, 534.

The consignees in this case, if they had the right to do so, have brought no action, and there is not only no suggestion that they have ever made any objection to the plaintiffs' maintaining this action, but they, or members of their firms, are introduced as witnesses by the plaintiffs in proving their case.

We think that an action on the case in tort may be brought against the carrier, by the party who makes the special contract with it, for its breach of the contract, unless there be in the contract some undertaking

by the carrier which it would not be its duty to perform under the common law. In such case damages for a breach of such additional undertaking could, perhaps, only be recovered in an action *ex contractu*.

The plaintiffs, we think, had the right to maintain this action against the defendant, if they proved either that they had made a special contract with it for the transportation of the goods, or that they had any interest or property in the goods, either general or special, and that the defendant had committed a breach of its contract, or failed in the performance of its duty; and that the jury should have been so instructed.

It follows from what has been said that the circuit court erred in the instruction complained of; and for such error its judgment must be reversed, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

(45 S. C. 166)

HALL v. HALL et al.

(Supreme Court of South Carolina. Sept. 17, 1895.)

LIABILITY ON GUARDIAN'S BOND—RELINQUISHMENT OF DOWER.

1. Rev. St. § 2081, provides that a judge of probate in whose office an administrator's bond is lodged, upon a petition by any of the sureties, shall summon the administrator and make such order for the relief of the petitioner as may not impair the right of the parties interested in the estate. Under section 2170, said section applies to guardians' bonds. *Held*, that when the court grants an order discharging such surety, and a new bond is executed, but no new letters of guardianship are issued, the surety is liable for all the property of the ward in the hands of the guardian at the time of the discharge, but not for the property of the ward that may subsequently come into the hands of the guardian.

2. Where, on the trial, the only objection made to a deposition was that it was not the best evidence of the facts sought to be proved, an objection that the person before whom the deposition was taken was not authorized to take testimony was waived.

3. In a proceeding under Rev. St. §§ 2031, 2170, providing for the release of a surety on a guardian's bond, it was not necessary that an accounting be had, and the letters of guardianship revoked, before the surety could be discharged from further liability.

4. Where a widow relinquished her right of dower, and accepted in lieu thereof other land of her deceased husband, it would be inequitable to charge her with the assets she received, and apply the same on a claim against her husband as surety.

Appeal from common pleas circuit court of Greenville county; Witherspoon, Judge.

Action by Sallie P. Hall against Stacy E. Hall, as guardian, and others, for an accounting. From the judgment therein rendered, plaintiff and certain defendants appeal. Affirmed.

This cause came on to be heard on exceptions to the master's report before his honor, Judge Witherspoon, who rendered the following decree:

"The above-entitled action was instituted in 1892 by the plaintiff to secure the amount due by the defendant Stacy E. Hall, as plaintiff's guardian. The defendant John T. Chapman is a surety, and the other defendants are heirs at law of F. M. Davenport, a deceased surety, upon the guardian bond of Stacy E. Hall. All of the issues were referred to the master, and the case was heard upon exceptions by the plaintiff and by the defendant heirs at law of F. M. Davenport to the report of the master, filed February 23, 1894. The defendant John T. Chapman did not answer. The defendant heirs at law of F. M. Davenport admitted in their answer that Stacy E. Hall, as guardian, did receive rents belonging to plaintiff, her ward, but allege that the rents so received were applied by the guardian to the maintenance of her said ward, who is the daughter of said guardian. They admit that all of said heirs at law, except the defendants F. M. Davenport and J. A. Davenport, received a portion of the assets of the estate of the deceased surety, F. M. Davenport. These defendants allege that, upon his application, F. M. Davenport, in 1882, was relieved by the probate court of his liability as surety upon the guardian bond of Stacy E. Hall, and that the said Stacy E. Hall executed to the probate court a new bond as guardian, with J. C. Hall and H. E. Cooley as sureties. They allege that the said J. C. Hall and H. E. Cooley are proper parties to this action. These defendants further allege that, if plaintiff has any cause of action against these defendants, it was more than six years before the commencement of this action, and they plead the statute of limitations in bar of said action.

"It appears that W. H. Pool, the former husband of the defendant Stacy E. Hall, and the father of the plaintiff, died April 10, 1874, leaving a widow and five children, including the plaintiff. On the 21st of October, 1874, the defendant Stacy E. Hall was duly appointed, by the probate court for Laurens county, guardian of her daughter, the plaintiff, then Sallie Pool, about five years of age. As such guardian, the defendant Stacy E. Hall executed her bond, payable to the probate judge for Laurens county, in the penal sum of \$3,000, for the faithful discharge of her duties as such guardian, with the defendants J. C. Chapman and one F. M. Davenport, now deceased, as sureties on said bond. During the year 1882, F. M. Davenport filed his petition in said probate court, praying to be relieved from liability as surety upon the guardian bond of the said Stacy E. Hall. After stating that she was informed that F. M. Davenport desired to be relieved of his liability as surety upon her guardian bond, in a paper dated July 31, 1882, and addressed to said probate court, the said Stacy E. Hall consented to have her letters of guardianship revoked by the court without formal or legal notice to her. This

paper appears among the records in said probate court. There also appears among said records a bond dated November 4, 1882, executed by the defendant Stacy E. Hall, with J. C. Hall and H. E. Cooley as surety, payable to A. W. Burnside, probate judge for Laurens county, in the penal sum of \$3,000, and conditioned for the faithful discharge by Stacy E. Hall of her duty as guardian of this plaintiff. The sureties on this bond justify before said probate judge. No order, or the record of an order, discharging F. M. Davenport from liability as surety upon the guardian bond of Stacy E. Hall can be found in said probate office, after diligent search. It appearing that the defendants F. M. Davenport and J. A. Davenport had not received anything from the estate of their father, F. M. Davenport, by mutual consent an order was passed by the master dismissing the complaint as to these two defendants. The master finds as matter of fact that, at the date of the execution by Stacy E. Hall of a new bond by plaintiff, guardian, on November 4, 1882, a balance was ascertained by the probate court to be due by, and in the hands of, the guardian, and that an order was passed by said court relieving F. M. Davenport from his liability as surety upon the guardian bond of Stacy E. Hall, although there is no record of said order or of said accounting by said guardian. The master finds the amount due by Stacy E. Hall to the plaintiff on November 4, 1882, with interest to February 15, 1894, the date of the report, to be \$1,235.11; that F. M. Davenport died in June, 1888; that 150-acres of his land was set off by the order of the court to his widow, Winnie B. Davenport, the defendant, and that the balance of his real estate had been sold, and, after paying debts, the proceeds had been divided among his other heirs at law, except his two children, the defendants F. M. and J. A. Davenport.

"The master concludes as matter of law that the proceedings in the probate court, instituted by F. M. Davenport in 1882, relieved the said F. M. Davenport from liability as surety on the bond of Stacy E. Hall, as guardian, or any funds coming into her hands after that date; that the proceedings in said court show the intention of the parties to settle the indebtedness of the guardian up to the date of the execution of the second bond; that said proceedings were tantamount to payment. If the proceedings instituted before the probate court by F. M. Davenport did not amount to payment, the master concludes that they amount to such a repudiation of the trust as would give currency to the plea of the statute of limitations, so far as the heirs at law of F. M. Davenport are concerned; and, as to the defendant heirs at law of F. M. Davenport, the master sustains the plea of the statute. The master concludes that the plaintiff is entitled to judgment against the defendant Stacy E. Hall, as guardian, and against the defendant John T.

Chapman, as surety, for the sum of \$1,235.11, being the amount found to be due, by the master, by said guardian, on November 4, 1882, the date of the second bond, with interest to February 15, 1894, the date of the master's report.

"It has been held that the act of 1789, granting relief to sureties upon administration bonds, is, in substance, similar to the act of 1839, now in force. The relief is the same as that afforded to petitioning sureties upon a guardian bond. The power to relieve is limited by the injunction that the rights of parties interested in the estate must not be impaired. The relief can be afforded by either revoking the letters of administration or guardianship, or by requiring a new bond, which stands as a primary security to the old bond, or between the sureties upon the two bonds. *Bobo v. Valden*, 20 S. C. 278. So far as the distributee or ward is concerned, the sureties upon both bonds are to be regarded as parties to a common undertaking. *Enicks v. Powell*, 2 Strob. Eq. 196. In *Trimmier v. Trail*, 2 Bailey, 480, it is held that the discharge of a surety operates as an exemption from future, but not from past, liability. In *Field v. Pelot*, McMul. Eq. 400, Chancellor Johnson says: 'No case can be found (I speak with confidence) in which, after new surety given, the preceding sureties have been charged, unless some breach of duty was committed by the principal during the time, and there the liability has always been restricted to that.' While, as between the sureties, the second bond is to be held as a primary security, so far as the distributee or the ward is concerned, they can proceed against the sureties on either bond. I conclude that the master did not err, as alleged in plaintiff's exceptions, in holding that the heirs at law of F. M. Davenport, the deceased surety, could only be held to account to the plaintiff for the funds in the hands of her guardian, Stacy E. Hall, on November 4, 1882, the date of the execution of the second bond, with interest on said sum. It does not appear that any breach of duty had been committed by the guardian up to that period. It appears that A. W. Burnside was the probate judge of Laurens county from 1876 to 1891, and that he now is a resident of Graysville, in the state of Georgia. The testimony of this witness was taken *de bene esse* under the act of December 21, 1883. It is urged, under plaintiff's exceptions, that the master erred in admitting this testimony, as there was no evidence that it was taken before an officer authorized by said statute. The plaintiff had notice that the testimony would be taken before W. W. Gilbert, a notary public. The certificate required by the act of 1883 accompanied the testimony forwarded to the court. It is signed, 'W. W. Gilbert, N. P. & J. P.' The witness was cross-examined by the said W. W. Gilbert as a notary public. The act of 1883 does not prescribe any mode by which the official character of the officer

before whom the testimony is to be taken shall be authenticated. I conclude that the master did not err, as alleged, in admitting the testimony of A. W. Burnside, John M. Clardy, the present probate judge of Laurens county, T. H. Cooke, and John T. Chapman. There is no contradiction of the records, and the testimony of these witnesses was offered to show that the records of the probate court, as exhibited, is incomplete. But if there was error in admitting the testimony of these witnesses, it is not material, as the petition to be relieved of liability filed in the probate court by F. M. Davenport, and the execution of the second bond by Stacy E. Hall, as guardian, on November 4, 1882, carry with them the presumption that an order was granted by said court discharging F. M. Davenport from future liability as surety upon the guardianship bond of Stacy E. Hall, as prayed for by the said F. M. Davenport. I do not think the evidence is sufficient to show that Stacy E. Hall accounted as guardian when the second bond was taken by the probate court. Such accounting would have been proper, but it was not necessary to discharge the surety from future liability. The evidence admitted is sufficient to sustain the master's finding that the probate court passed an order discharging F. M. Davenport from liability as surety upon the guardianship bond of Stacy E. Hall. I also conclude that the evidence is sufficient to sustain the master in allowing credit to the guardian for board, clothing, and tuition of the ward, who is her daughter. I do not think the master erred, as alleged, in not allowing the ward credit for services rendered to the guardian. The evidence on this point is conflicting, but the master has had the witnesses before him, and his conclusion is sustained by the evidence.

"The plaintiff's exception alleging that the master erred in the statement of the guardian's account, as well as in stating the amount due by the guardian, does not specify wherein the master has erred, and is too general and indefinite to be considered. I cannot concur in the master's conclusion, as matter of law, in sustaining the plea of the statute of limitations as a bar to plaintiff's recovery of judgment against the defendants as heirs at law of F. M. Davenport, and to this extent the plaintiff's exceptions must be sustained. The amount due the ward is due by the guardian as trustee. The undertaking of F. M. Davenport, as surety, was that the guardian would faithfully discharge the trust. It is not contended that the statutory period had expired after the guardian attained her majority, and before the commencement of this action, and I fail to see how the heirs at law of F. M. Davenport can avail themselves of the plea of the statute of limitations. The plaintiff's last exception, alleging that the master erred in his finding as matter of fact, and in his conclusion of law, as to the amount ascertained to be due

plaintiff, is also too indefinite to be considered.

"It is alleged in the exceptions by the defendants as heirs at law of Davenport, deceased, that the master erred in adding the accrued interest on November 4, 1882, the date of the new bond, and charging interest upon principal and interest from said date to January 1, 1890, when the plaintiff took possession of her premises. It seems to me that the master has compounded the interest between said dates, and this exception by defendants must be sustained. Under this exception, I conclude that the amount due by the guardian at the date of the master's report—February 15, 1894—is \$1,083.76, instead of \$1,235.11, as reported by the master. The other exceptions of the defendant heirs at law of F. M. Davenport are overruled, except as herein modified or sustained.

"It is ordered and adjudged that the master's report herein filed February 23, 1894, be sustained, and be made the judgment of this court, and that the exceptions to said report be overruled, except as sustained by this decree. It is further adjudged that the complaint herein be dismissed, with costs, as to the defendants F. M. Davenport and J. A. Davenport, upon the grounds stated in the master's report.

"It appears by the master's report that a portion of the real estate of F. M. Davenport has been assigned, by order of the court, to the widow, the defendant Winnie B. Davenport, as her dower and homestead. This land assigned as dower and homestead cannot be made liable to plaintiff's judgment; and as this is all of the assets of the estate of F. M. Davenport received by the widow, as appears by the master's report, the plaintiff is not entitled to enter up judgment against the said defendant Winnie B. Davenport. The plaintiff will only be entitled to judgment against such of the defendants, heirs at law of F. M. Davenport, the deceased surety, as appear to have received a portion of the assets of the estate of F. M. Davenport. According to the master's report, the only heirs (Davenport's) that received assets for which they are liable to account to plaintiff are the defendants Alice Vance, Emma Epps, Susan E. Davenport, Harriet Davenport (now Thompson), Abbie Iler, Lula Cox, Keziah Davenport, and Dora Davenport, each of whom received \$511.57 out of the proceeds of sale of the real estate of F. M. Davenport sold under the order of court. I find as a matter of fact, and conclude as matter of law, that the plaintiff is entitled to judgment against each of the defendants Stacy E. Hall, John T. Chapman, and the defendants Alice Vance, Emma Epps, Susan E. Davenport, Harriet Davenport (now Thompson), Abbie Iler, Lula Cox, Keziah Davenport, and Dora Davenport for the sum of \$1,080.76, with interest thereon from the 5th day of February, 1894.

"It is ordered and adjudged that the plaintiff, Sallie P. Hall, have judgment, with leave to have execution thereon, against the defend-

ants Stacy E. Hall, John T. Chapman, and each of the defendants Alice Vance, Emma Epps, Susan E. Davenport, Harriet Davenport (now Thompson), Abbie Iler, Lula Cox, Keziah Davenport, and Dora Davenport, heirs at law of F. M. Davenport, deceased, for the sum of \$1,083.76, with interest thereon from February 15, 1894, together with costs. It is further ordered and adjudged that the said judgment and execution can only be enforced against the defendants Alice Vance, Emma Epps, Susan E. Davenport, Harriet Davenport (now Thompson), Abbie Iler, Lula Cox, Keziah Davenport, and Dora Davenport to the extent of the \$511.57 of the assets of the estate of F. M. Davenport reported by the master to have been received by each of said heirs at law.

"Any of the parties to this action are at liberty to apply for further orders at the foot of the decree."

The plaintiff, Sallie P. Hall, excepted to the decree of his honor, Judge I. D. Witherspoon, on the following grounds: "(1) Because his honor erred in holding that the heirs at law of F. M. Davenport, the deceased surety, could only be held to account to the plaintiff for the funds in the hands of the guardian, Stacy E. Hall, on November 4, 1882, the date of the execution of the second bond, with interest on said sum, whereas he should have held that said heirs were responsible, to the extent of assets received by them from the estate of their ancestor, for the entire period of guardianship of said guardian, and for all sums of money received by her during said guardianship, and not subsequently accounted for. (2) That his honor erred in holding that the master did not err in admitting the testimony of A. W. Burnside, taken de bene esse before W. W. Gilbert at Graysville, Ga., there being nothing in the record to show that the said W. W. Gilbert was an officer authorized by law to take such testimony. (3) That his honor erred in holding that the master did not err in admitting the testimony of T. H. Cooke, John T. Chapman, and John M. Clardy, as no proper ground for admission of secondary evidence had been shown, and said testimony being hearsay and irrelevant, and not properly admissible. (4) That his honor erred in sustaining the finding of the master that an order was passed by the probate judge of Laurens county, in 1882, discharging the surety, F. M. Davenport, from all further liability as surety on said bond, and also in holding that said surety was discharged from further liability without an accounting being had, and without a revocation of the letters of guardianship by proceedings in the probate court in 1882. (5) That his honor erred in holding that the defendant Winnie B. Davenport is not liable for the assets of the estate of F. M. Davenport received by her, and that the plaintiff is not entitled to judgment against said Winnie B. Davenport. (6) That his honor erred in sustaining the exceptions of the defendant heirs at law of F. M. Davenport to the report of the master, alleging that

he erred in adding the accrued interest due November 4, 1882 (date of new bond), and charging interest on said amount to January 1, 1890. (7) That his honor erred in holding that the property set apart to Mrs. Winnie B. Davenport, consisting of 150 acres of the home place of F. M. Davenport, deceased, was set off to her as a homestead, and that it was not, for this reason, liable to execution for plaintiff's debt, and that, therefore, judgment could not run against her on account of her possession and ownership of said property."

The following exceptions were served on behalf of certain defendants: "(1) Because his honor erred in finding as a matter of fact that at the time of the execution of the second bond by Stacy E. Hall, as guardian, no accounting was made by her of her ward's estate, whereas he should have found that at such time an accounting was had, and a balance struck, and the amount thus ascertained to be due found to be in her hands. (2) Because his honor erred in not concluding as matter of law that the presumption was that the said Stacy E. Hall, as guardian, had in her hands at the time of the execution of the second bond, or at the time of her second appointment, if it be held she was so reappointed, the amount she was then due the ward, it having been found as a matter of fact that no breach of duty had been committed by said guardian up to the time of the execution of the second bond. (3) Because his honor erred in finding as matter of fact, and concluding as matter of law, that the plaintiff was entitled to judgment against the defendants Alice Vance, Emma Epps, Susan E. Davenport, Harriet Davenport (now Thompson), Abbie Iler, Lula Cox, Keziah Davenport, and Dora Davenport for the sum of \$1,080.76, whereas he should have held that the complaint should be dismissed as to such defendants, and that plaintiff was entitled to no judgment against them."

By a mistake of the master which was overlooked by counsel in this case, the master reported that 8 of the heirs of F. M. Davenport (naming them) had received \$4,092.70, whereas this amount was divided among 11 heirs. The 3 thus omitted were Anne Campbell, Mary A. Cason, and Nancy E. Chapman. The circuit judge confirmed the master's report in this particular, the mistake not being brought to his attention. The amount received by each of said heirs from the father's estate was \$372.06, and it is agreed between counsel in this cause that the decree of the circuit judge shall be corrected so as to give judgment against the three thus omitted, and to limit the recovery against each of the heirs to the amount received by each, to wit, \$372.06. It is also agreed that the exceptions, notice of appeal, etc., shall be deemed corrected so as to include these three also.

Earle & Quattlebaum, for appellants. Jos. A. McCullough and Haynsworth & Parker, for respondent.

GARY, J. The defendant Stacy E. Hall was appointed guardian of the person and estate of her infant daughter, Sallie P. Hall, by the probate court of Laurens county in October, 1874, and immediately thereafter took charge of her ward's estate, consisting of a farm in Laurens county, and received the rents therefrom until 1890, when plaintiff married and took possession. The plaintiff became of age in 1891, and soon thereafter made demand on her guardian for a settlement of her estate, which being refused, she instituted this action for an accounting against said guardian, and John T. Chapman, one of the sureties on her bond, and the heirs at law of F. M. Davenport, the other surety, who died before this action was commenced. The case was heard by his honor, Judge Witherspoon, on exception to the report of the master, whereupon he rendered a decree, which, together with the exceptions both on the part of the plaintiff and defendants, will be incorporated in the report of the case. We will first consider the exceptions on the part of the plaintiff.

Exception 1. In considering this exception, it may be well to refer to the statutory law of our state on this subject, which is as follows: "The judge of probate, on appointing a guardian to any estate, shall require him to enter into bond to himself and his successors in a penalty of double the amount of the estate, and shall have the same power, as to relieving the sureties of a guardian, which is given to him by section 2031 in the case of relieving the sureties of an administrator." Rev. St. § 2170. "It shall be the duty of the judge of probate in whose office an administration bond is lodged upon a petition filed by any of the sureties to the same who conceive themselves in danger of being injured by such suretyship, to summon the administrator before him, and make such order or decree for the relief of the petitioner as may not impair or affect the right of the parties interested in the estate." Id. § 2031. Much of the confusion as to the law upon this question, we think, arises from the attempts to reconcile the dicta of conflicting opinions, instead of interpreting the statute in such a manner as to accomplish the purpose for which it was enacted. Without undertaking to review the many decisions of our courts of last resort on this subject, we are content to state the principles deducible from them that are applicable to this case: (1) When the surety on a guardian's bond files a petition to be discharged from liability, and the court grants an order for such discharge, and a new bond is executed, but no new letters of guardianship are issued, the surety is liable for all the property of the ward in the hands of the guardian at the time of the discharge. (2) Such surety, however, is not liable for the property of the ward that may come into the hands of the guardian after the surety has been discharged. Chief Justice O'Neill, delivering the opinion of the court in Trimmer

v. Trall, 2 Bailey, 430, expresses the views which we entertain upon the question in the following language: "If the ordinary, on citing the administrator to appear, at the instance of his sureties, should merely take a new bond, with new sureties, from him, this would not discharge the former sureties from a past liability, although they would not be liable to a future one. It is also, I think, unquestionable that the new sureties would be liable for any funds which the administrator then had in his hands. *Joyner v. Cooper* (decided at Charleston in February last) 2 Bailey, 199; *McDowell v. Caldwell*, 2 McCord, 55; and *Treasurers v. Taylor* (decided at this term) 2 Bailey, 524. In such a case the security would be cumulative, and the creditors or distributees would have the right to recover the fund from the first as well as the second sureties. In the language of Judge Colcock in the case of *Shelton v. Cureton*: 'Admitting that the discharge could operate as to future liabilities, it cannot affect those which did exist. There is no power which could release the securities from such.' 3 McCord, 417. If, however, at the time a new bond is given, no liabilities have attached, as where the administrator has legally inventoried and sold the estate, but has not received any of the funds, then the liability for the failing to account would be cast on the new sureties alone." See, also, *Bobo v. Vaiden*, 20 S. C. 279; *Gilliam v. McJunkin*, 2 S. C. 442; *McKay v. Donald*, 8 Rich. Law, 331; *Ordinary v. Wallace*, 1 Rich. Law, 507; *Hill v. Calvert*, 1 Rich. Eq. 56; *McMeekin v. Huson*, 3 Stro. Eq. 327; *Glenn v. Wallace*, 4 Stro. Eq. 149; *Owens v. Walker*, 2 Stro. Eq. 239; *Field v. Pelot*, *McMul. Eq.* 369; *Shelton v. Cureton*, 3 McCord, 412; *Enicks v. Powell*, 2 Stro. Eq. 186; *Waterman v. Bigham*, 2 Hill (S. C.) 512; *Alexander v. Bullard*, *Rice, Eq.* 23. The first exception is overruled.

Exception 2. This exception relates to the testimony of A. W. Burnside taken de bene esse, which was objected to on the ground that there was nothing in the record to show that the person before whom it was taken was an officer authorized by law to take such testimony. The defendants' attorneys served a motion on plaintiff's attorneys that they would take the testimony of Burnside "before W. W. Gilbert, a notary public for the state of Georgia," etc. The examination was duly had in accordance with the notice, and various questions propounded on cross-examination on behalf of the plaintiff. The deposition was forwarded by mail to the clerk of court for Greenville county with the formalities required by law. The envelope was sealed, and across its flap was written, "W. W. Gilbert (L. S.) N. P. & J. P., notary public authorized to take testimony." No objection was made to the opening of the deposition, but the introduction of the testimony was objected to, on the ground, as stated in the master's report, "that it was not the best evi-

dence of the facts sought to be disclosed." The failure of the plaintiff to object to the testimony on the ground stated in the exception was a waiver of such objection. The second exception is overruled.

Exception 3. This exception was predicated on the fact that the testimony of A. W. Burnside was inadmissible. The exception raising the question as to the admissibility of Burnside's testimony having been overruled, the third exception is also overruled.

Exception 4. This court is satisfied that his honor, the circuit judge, was correct in sustaining the finding of the master that an order was passed by the probate judge of Laurens county in 1882 discharging the surety, F. M. Davenport, from all further liability on said bond. His honor was also correct in deciding that an accounting was not necessary before the surety could be discharged from further liability. *Gilliam v. McJunkin*, 2 S. C. 442. Under the principle hereinbefore announced, it was not necessary that the letters of guardianship should be revoked in order to discharge the surety from future liability. The fourth exception is overruled.

Exceptions 5 and 7. These two exceptions will be considered together. The land was not set apart to Mrs. Winnie B. Davenport as a homestead, but in lieu of her claim of dower. In relinquishing her right of dower, she gave a valuable consideration for the land set apart to her. Having given valuable consideration for the land set apart to her, it would be inequitable to allow the plaintiff to enter up judgment against her, and sell this land to pay the indebtedness of F. M. Davenport, deceased. These exceptions cannot be sustained.

Exception 6. The plaintiff's attorneys abandoned this exception, and it will, therefore, not be considered.

We come now to a consideration of the defendants' exceptions. The principles hereinbefore announced show that the questions raised by the first and second exceptions are immaterial, and need not be considered. We see no error on the part of the circuit judge as alleged in the third exception. Indeed, the defendants' attorneys in their argument before this court did not discuss either the first, second, or third exception of the defendants. It is the judgment of this court that the judgment of the circuit court be affirmed.

(44 S. C. 503)

BROWN et al. v. McCALL et al.

(Supreme Court of South Carolina. Sept. 7, 1895.)

DEED—CONSTRUCTION—ESTATES IN REMAINDER.

1. A deed to L., "his heirs and assigns forever," to be held by him pursuant to "the uses, trusts, and limitations" mentioned in an order made in a suit by D., widow of B., against his children, for partition and settlement of his estate,—the order being that the commissioner execute a conveyance to L. of the property al-

lotted to D., and of all other interests she might have in the estate of B. in trust for D. during her life, and after her death to the use of her children by B.,—vests in the trustee an estate in fee simple.

2. Under a deed in trust for the use of D., widow of B., during her life, and after her death to the use of her children by B., "the issue of a deceased child taking by representation the parent's share," all such children, being in esse when the deed was executed, took vested transmissible estates in remainder, liable to be divested only by their dying, during the lifetime of the life tenant, leaving issue. So that where, during the life of the life tenant, one of B.'s children died, leaving no issue, one to whom he had in his lifetime sold his interest would be entitled to it, or, he not having disposed of it, his heirs would be entitled to it; but where, before the death of the life tenant, one of B.'s children died, leaving children, they would be entitled to his interest, notwithstanding he had sold it.

Appeal from common pleas circuit court of Sumter county; D. A. Townsend, Judge.

Suit by George W. Brown and others against Emily S. McCall and others for partition. From the decree, certain defendants appeal. Modified.

The decree of the court below was as follows:

"This is an action for the partition of a tract of land, and a question of title is raised, as to some of the defendants. The main contest arises upon the construction of a deed or deeds of conveyance of said tract of land made under order of court, by the commissioner in equity, to William Lewis, as trustee, and involves the question whether James D. Blanding, Octavia Moses, and the devisees of John S. Richardson, the elder, who purchased certain interests in said land, and James E. Baumgartner, who married one of the parties in interest, have now any interest in said land. In order to understand the case, it is necessary to go back of said deeds, to the death of James R. Berry. James R. Berry died leaving a widow, Dorcas Berry, and eight children, to wit, Julia A., Emily S., William M., James J., Richard S., Theodore R., Matilda A., and Vedora. The widow married Dr. Washington H. Brown, and together they filed their bill in equity to settle up the estate of the said James R. Berry. In the suit thus commenced an order was made directing the commissioner in equity to convey by deed the share and interest of Dorcas Brown in the estate of James R. Berry to William Lewis, in trust to and for the use of the said Dorcas Brown during life, and after her death to the use of the said Washington H. Brown for life, and, after the death of the survivor, one-half to the children of Dorcas by James R. Berry, the issue of a deceased child taking by representation the parent's share, and the other half to her issue by Washington H. Brown, the issue of a deceased child taking by representation its parent's share. Upon the construction of the deed or deeds thus ordered and made arises almost the entire contention in this case. The life tenants are dead. Of

the Berry children, only two (Julia A. Bracy and Emily S. McCall) are living. The other six predeceased the life tenants, four of them leaving children living at the death of the survivor of the life tenants, as follows: James J. Berry left John Berry and William Berry. Richard S. Berry left Bennett Berry, Harris Berry, Richard Berry, Lavie Berry, Martha Ella Berry, and Dorcas Elizabeth Berry. Vedora Berry left Wesley Weeks, Josephine Hodge, Olain D. Harvin, and Pauline Broadway. William M. Berry had one son, but both father and son predeceased life tenants. Matilda predeceased life tenants, leaving her husband, James E. Baumgartner, and a daughter, who predeceased the life tenants, and left her father, the said James E. Baumgartner, who is now living. There is no evidence as to the date of her death. Of the Brown children, George W. and B. F. Brown survive the life tenants, and are parties to this action. One Jesse Brown died and left three children, to wit, Edward Brown, Felix Brown, and George Brown, who are parties to this action. James D. Blanding was made a party to this action for the reason that, having purchased the interest of William M. Berry in his lifetime, he claimed a fee-simple title in said land, to the extent of one share. Octavia Moses was made a party to this action for the reason that, having purchased the interest of James J. Berry in his lifetime, she claimed a fee-simple title in said land, to the extent of one share. John S. Richardson, the elder, was made a party to this action for the reason that, having purchased the interest of Richard S. Berry in his lifetime, he claimed a fee-simple title in said land, to the extent of one share; and, having died, his devisees (John S. Richardson, the younger, Katharine M. Duncan, and D. M. Richardson) have been made parties, by order of the court. James E. Baumgartner was made a party to this action for the reason that he claimed to have inherited one share in said land from the parties in interest. There is no contention about the interest that the Brown children took. There is no doubt that they took contingent interests, and, the life tenants having died, G. W. Brown, B. F. Brown, and the children of Jesse Brown took among them, under the deed, one-half of the trust interest.

"The only question of importance is the character of the interests taken by the Berry children under said conveyance. It is contended on the one hand that the said interests were contingent upon a survival of the life tenants, and that James D. Blanding, Octavia Moses, and John S. Richardson's devisees have now no interest in said land, because the parties from whom they purchased, to wit, William M. Berry, James J. Berry, and Richard S. Berry, predeceased the life tenants; and further that, as no words of inheritance were used in said deeds, only a life estate was thereby conveyed to the Ber-

ry children, and that the grantees of such as are now dead have no interest in said land. On the other hand it is contended that said interests were vested, and that said grantees have a fee-simple title, to the extent of their several purchases.

"If the deeds made under order of the court conveyed only a life estate to Dorcas and Dr. Brown, and then a life estate, merely, to the children of Dorcas by both marriages, the solution of this whole question would be very much simplified. To determine this, we must look at the order, and not at the deeds. The order directed that all the interest of Dorcas in James R. Berry's estate be conveyed. What was that interest? Was it a dower interest, and therefore only for her life, or was it a fee-simple interest? If it had been the former, the court would not have ordered a conveyance which carried it beyond the term of her natural life. The inference is, then, that it was a fee-simple interest, and if this is correct the order supplies all deficiencies in the deed. So much as to the quantity of interest conveyed by said deeds. Now as to the character of the interest taken by the Berry children. The character of the interest taken by the Berry children is a matter of some difficulty, but I am forced to the conclusion that they took contingent interests, inasmuch as it was uncertain, till the death of the life tenants, whether the Berry children, or their issue, would take. If this is correct, then the interest of two of them, to wit, Matilda and William M., both of whom predeceased the life tenants, and left no issue living at the death of the life tenants, reverted back to the estate of Dorcas Brown, and descended, under the statute of distributions, to the heirs at law of Dorcas Brown; and the children of James J. Berry and Richard S. Berry are now entitled, under the deed, to the shares of their parents, instead of their grantees.

"This disposes of the claims of James D. Blanding, Octavia Moses, the devisees of John S. Richardson, the elder, and James E. Baumgartner, none of whom are entitled to anything. It remains only to determine what each of the other plaintiffs and defendants are entitled to. Julia A. Bracy is entitled to $\frac{1}{2}$ of $\frac{1}{2}$ (making $\frac{1}{4}$) of the trust estate. She is entitled also to $\frac{1}{6}$ of the $\frac{1}{2}$ of $\frac{1}{2}$ of the trust estate to which William would have been entitled had he lived, and also to $\frac{1}{6}$ of the $\frac{1}{2}$ of $\frac{1}{2}$ of the trust estate to which Matilda would have been entitled had she lived. I say $\frac{1}{6}$, because the $\frac{2}{3}$ (William's and Matilda's added together) descend, under the statute of distribution, to two living children (Julia A. Bracy and Emily S. McCall), and to the children of the four who died (Theodore R., Richard S., James J., and Vedora Harvin), and to two of the Brown children living (George W. and B. F. Brown), and to the children of Jesse, deceased. Therefore there are nine divisions of the $\frac{2}{3}$

which descends by the statute of distributions. Hence Julia A. Bracy is entitled to $\frac{1}{2}$ of $\frac{1}{2}$ plus $\frac{1}{6}$ of $\frac{2}{3}$ of $\frac{1}{2}$ of the entire trust estate, or $\frac{11}{144}$ of the entire trust estate. Emily S. McCall is entitled to the same as Julia A. Bracy. The children of Theodore R. Berry are entitled each to $\frac{1}{2}$ of $\frac{11}{144}$ of the entire trust estate. The children of James J. Berry are entitled each to $\frac{1}{2}$ of $\frac{11}{144}$ of the entire trust estate. The children of Richard S. Berry are entitled each to $\frac{1}{6}$ of $\frac{11}{144}$ of the entire trust estate. The children of Vedora Harvin are entitled each to $\frac{1}{4}$ of $\frac{11}{144}$ of the entire trust estate; George W. Brown, to $\frac{26}{144}$; B. F. Brown, to $\frac{26}{144}$; and the children of Jesse Brown each to $\frac{1}{2}$ of $\frac{26}{144}$ (equal to $\frac{26}{432}$, or $\frac{13}{216}$, of the entire trust estate). If there was any evidence to show which died first,—Wm. M. Berry, or the daughter of Matilda,—the mode of calculation would differ, but the result would be the same. The other parties are entitled to nothing. And it is so ordered and decreed. It is further ordered that a writ of partition issue according to law and the practice of this court, and that any party to this action have leave to apply at chambers, to the judge of the Third circuit, for any further orders that may be necessary to carry out this decree. The evidence is not sufficient to show that Julia A. Bracy is liable to any of the parties in interest for rents, after paying taxes on the place."

The grounds submitted by plaintiffs for sustaining the decree were as follows:

"First. As to whether the estates in remainder were in fee simple, or for life, merely, in the remainder-men. Though no words of inheritance were used, yet, as his honor states, it was clearly the intention to settle the whole estate of Mrs. Brown. A deed of settlement was executed by the commissioner to the trustee, declaring the trusts and limitations according to the directions of the court. The property settled was entirely personalty, and the limitations of the deed, as to personalty, were sufficient to pass the entire estate to the remainder-men, without words of inheritance. Money funds of the trust estate were used by the trustee in purchasing the land which was conveyed to the trustee to be held on the trusts and limitations previously prescribed, which could not be done unless the remainder-men should be entitled to the same entire, absolute, fee-simple estate in the land which they were entitled to in the money which was changed into land. The mere change of money of the trust estate into land could not change the character or extent of the estates in remainder prescribed for the trust property while it was personalty. In the construction of those limitations, the land continued to be the money which was used to purchase it. Second. As to who, on the death of the life tenants, were entitled as remainder-men: (1) In the construction, especially of deeds of settlement, the intention has weight. It

would seem manifest that the intention was that the persons to be provided for were the children living at surviving life tenant's death and the issue of predeceased children. Who should be entitled would be unknown until that death, and the limitation was therefore a contingent one. (2) The remainder was limited to a class, 'children,' and only such persons as answered to that description at the death of surviving life tenants could take; the death of any of the class before that event, leaving issue who should be then alive, being provided for by the substitution of such issue in place of, and as representing, the deceased child. (3) As to purchasers at sheriff's sales of alleged shares of children who predeceased surviving life tenant, leaving issue then alive, being entitled, instead of such issue. That construction would nullify the terms and provisions of the deed. The rights of such issue were as clearly declared as those of any children who should survive life tenant. (4) Such issue was 'substituted' for the deceased child, and were to take as a child."

J. D. Blanding, in pro. per. T. B. Fraser, Jr., for appellant J. E. Baumgartner. Lee & Moise and R. O. Purdy, for other appellants. Haynsworth & Haynsworth & Cooper, for respondents.

McIVER, C. J. James R. Berry died many years since, intestate, leaving an estate both real and personal, among which was the tract of land, containing 450 acres, which is the subject-matter of the present action. He left, as his heirs at law and distributees, his widow, Dorcas, and eight children, viz. Julia A., Emily S., William M., James J., Richard S., Theodore R., Matilda, and Vedora. Dorcas, the widow, subsequently intermarried with one Washington H. Brown. On the 29th of December, 1846, a bill was filed in the court of equity by the said Washington H. Brown and wife, Dorcas, against the children of the said James R. Berry, for a partition and settlement of his estate. Under this proceeding it appears that a partition of the personal property was made, and the tract of land above mentioned was ordered to be sold. It also appears that the share of Dorcas Brown in the estate of her first husband was settled upon her, and the commissioner in equity was ordered to execute "a conveyance to William Lewis of the property allotted to Mrs. Brown in the said partition, and of all other interest she may have in the estate of her intestate [the said James R. Berry] in trust for the use of Mrs. Brown during her natural life, and after her death to the use of Dr. Brown [the said Washington H. Brown] for life, and, after the death of the survivor, one-half to the use of her children by her late husband, James R. Berry, the issue of a deceased child taking by representation the parent's share, and the other half to her issue by her present husband, Dr. Brown, the issue of

a deceased child taking by representation the parent's share." In pursuance of this order the commissioner in equity, on the 14th day of August, 1849, executed a deed to the said William Lewis, "his executors, administrators, and assigns," for all the property "allotted to Mrs. Brown on the said partition," which we understand to have been personal property only, "and of all other interest which she may have in the estate of her intestate [James R. Berry deceased]," upon the trusts prescribed in said order. The land which was ordered to be sold, to wit, the 450 acres, was purchased by the trustee, William Lewis, with the funds of the trust estate in his hands, by the permission of the court, and on the 28th day of August, 1849, was conveyed by the commissioner in equity to the said William Lewis, "his heirs and assigns forever," to be held by him upon the same "uses, trusts, and limitations as are mentioned" in the deed of settlement of the estate of the said Dorcas Brown, executed on the 14th day of August, 1849, as above mentioned. At the time of the execution of these deeds of the 14th and 28th of August, 1849, respectively, all of the children of James R. Berry above mentioned were alive; but, at the time of the death of the surviving life tenant, Dorcas Brown, who died on the 9th day of November, 1890, only two of these children to wit, the plaintiff Julia A. Bracy and the defendant Emily S. McCall, survived. Of the other children, William M. Berry predeceased the surviving life tenant leaving no issue, though it is stated in the circuit decree that he had a son who likewise predeceased such life tenant. Four of these children, viz. Theodore R. Berry, J. J. Berry, R. S. Berry, and Vedora Harvin, predeceased the surviving life tenant; but each of them left children, who are now living, and are parties to this case. Another of the children, Matilda Baumgartner, predeceased the surviving life tenant, leaving her husband, J. E. Baumgartner, who is a party to this action, and one child, who likewise predeceased the surviving life tenant, and of whom the said J. E. Baumgartner claims to be the sole heir. It also appears that the interests of W. M. Berry, R. S. Berry, and J. I. Berry, respectively, were sold in their lifetime by the sheriff, under execution against them, and bought by J. D. Blanding, John S. Richardson, and Mrs. Octavia H. Moses, respectively, and that, John S. Richardson having died since the commencement of this action, his devisees have been made parties to this case by an order of the court. It is also stated in the case that none of the several parties, except John S. Richardson and Octavia H. Moses, demand an accounting from the plaintiff Julia A. Bracy for rents and profits; she, it appears, having been in possession of the land since the death of the surviving life tenant. It also appears that, of the children of Dorcas Brown by her second marriage, only two survive, viz. George W. Brown and B. F.

Brown, who are plaintiffs; the third child of that marriage having predeceased the surviving life tenant, but leaving children, who are parties to this case. The circuit judge by his decree (which should be incorporated in the report of this case) held that the remaindermen under these deeds took an estate in fee, and not for life merely, and that the interests of the children of James R. Berry, as well as the interests of the children of Washington H. Brown, were contingent upon their surviving the last surviving life tenant, and were not transmissible to their representatives. Hence he held that only those of the children of both marriages who survive the surviving life tenant could take in remainder, while the issue of a deceased child who survived the surviving life tenant would take in remainder the share of their deceased parent, but that the shares of such of the children who predeceased the surviving life tenant, leaving no issue living at the time of the death of the surviving life tenant, "reverted back to the estate of Dorcas Brown, and descended under the statute of distributions, to the heirs at law of Dorcas Brown." Accordingly, he rendered judgment that the land should be partitioned upon the principles above stated. He also adjudged that the evidence was not sufficient to show that Julia A. Bracy is liable to any of the parties in interest for rents, after paying taxes on the lands. From this judgment several of the parties have appealed, as follows: J. D. Blanding, upon the ground of error "in not holding that Wm. M. Berry took, under the deeds referred to in the complaint, a vested, transmissible interest in the land sought to be partitioned, and that this defendant was entitled to such interest, under the deed of the sheriff to him." The devisees of John S. Richardson and Mrs. Octavia H. Moses, upon the grounds: (1) That his honor erred in not holding "that vested estate passed under the deed to William Lewis, trustee, to the then living children of James R. Berry." (2) Because of error in holding the evidence insufficient to show that Julia A. Bracy is liable for rents and profits. Josephine Hodge and others, children of Vedora Harvin, upon the ground of error in holding "that a fee was conveyed by the deed set out in the complaint." J. E. Baumgartner, upon the following grounds: (1) Because of error in holding that a fee was conveyed by the deed set out in the complaint. (2) Because of error in not holding that Matilda Baumgartner and Veronica Baumgartner took transmissible estates. (3) Because of error in holding the evidence insufficient to show that Julia A. Bracy was liable for rents and profits. The plaintiffs also give notice that they would submit certain additional grounds, set forth in the record (which should be incorporated in the report of this case), for sustaining the circuit decree.

The first question, therefore, which is presented by these appeals, is whether the es-

tates in remainder were in fee simple, or for life merely. We agree with the circuit judge that these estates were estates in fee simple, and not for life merely. The court of equity undertook to settle the interest of Dorcas Brown in the estate of her deceased husband, James R. Berry, which was undoubtedly an estate in fee, upon certain trusts and limitations, and we cannot doubt that the intention was to dispose of the entire estate, and not a part of it only, and it seems to us that such an intention was sufficiently expressed in the deeds above referred to. The first deed covered personal property only, and the language used in that deed was certainly sufficient to vest in the grantees an absolute interest or estate, equivalent to a fee-simple estate in realty. Then when the second deed, which covered the land in question, was made, the intention of the court, was manifested by the recitals made in that deed, was declared to be to convey a similar estate, to the same persons, as had been conveyed by the previous deed; and the conveyance was therefore made to the trustee, "his heirs and assigns forever," which were certainly apt and proper words to vest in the trustee an estate in fee simple, in order to enable him to carry into effect the previously declared intention to dispose of the entire and absolute estate. It seems to us that this view is sustained by the cases of *Bratton v. Massey*, 15 S. C. 277, and *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714.

The next inquiry presents the more important and difficult question as to who were entitled to take in remainder upon the death of the surviving life tenant, and what was the nature of such estates in remainder. Let us first examine the language used, which we are called upon to construe, in the light of the surrounding circumstances, in order to ascertain, if possible, what was the real intention of the parties, for there is no doubt that, even in deeds,—especially deeds of settlement, like this,—intention is entitled to great weight. Here was the court of equity, which, under the proceedings for partition, had obtained control of the interest of a married woman in the estate to be partitioned, and purposed to make suitable settlement of the same. Accordingly, the proper officer of the court was directed to convey said property to a trustee, to be held by him "in trust for the use of Mrs. Brown during her natural life, and after her death to the use of Dr. Brown [her second husband] for life, and, after the death of the survivor, one-half to the use of her children by her late husband, James R. Berry, the issue of a deceased child taking by representation the parent's share, and the other half to her issue by her present husband, Dr. Brown, the issue of a deceased child taking by representation the parent's share"; and the property was so conveyed. Now, bearing in mind the fact that at the time these deeds were executed all of the Berry children were alive, would it not

seem that if the deed had stopped at the words, "for the use of her children by her late husband, James R. Berry," the intention was that such children should take a vested remainder, the enjoyment of which was postponed until the death of the surviving life tenant. But, as the deed did not stop at the words last quoted, it is necessary to inquire what is the effect of the super-added words, "the issue of a deceased child taking by representation the parent's share." While these additional words may have the effect of showing that the intention was that if any child of James R. Berry should die before the surviving life tenant, leaving issue, such issue should take the share of such deceased child, and thereby defeat the remainder which would otherwise have been vested in such child, how could these additional words affect the case of a child dying, without issue, before the death of the surviving life tenant? It will be observed that the language is not "to the use of her children by her late husband (*living at the time of the death of the surviving life-tenant*), the issue of a deceased child taking by representation the parent's share," but the language actually used omits the words which we have placed in parenthesis and italicized,—the very words which would appropriately express the intention (if it had been entertained) that the interest of any of the then living children of Berry was to be dependent upon the fact that such child should be living at the death of the surviving life tenant. It is apparent, therefore, if we look alone to the language of the deed, that the claims of the defendants J. D. Blanding and J. E. Baumgartner, rest upon a different footing from those of the defendants Octavia H. Moses and the devisees of John S. Richardson, for the former claim (the one as purchaser, and the other as heir at law) the shares of children of J. R. Berry, who predeceased the surviving life tenant, leaving no issue living at the time of the death of such life tenant, while the latter claim, as purchasers, the shares of children who predeceased the surviving life tenant, leaving issue living at that time, and who are now parties to this case. But, before proceeding to consider or decide the relative merits of such claims, we propose to review the authorities which bear upon the general subject, though, as stated by one of the counsel, there are but few cases that throw much light upon the particular points which are involved in the present case.

In *Cole v. Creyon*, 1 Hill, Eq. 311, the testator devised and bequeathed his whole estate to his wife for life, and at her death "to be equally divided between Henry and Elizabeth Cole's children and Alexander Creyon, viz. the offspring of said Elizabeth Cole's body, and no other; to be retained in the hands of my executors and executrix until the age of 21 years, or days of marriage, which shall first happen; then to be made over to them lawfully, each legatee receiving

their just quota of the same, which I will and bequeath to them and their heirs forever." The only points decided in the case were (1) that the application for partition was premature, as the time for distribution fixed by the will had not arrived; (2) that Alexander Creyon was entitled to one-half the estate, and the Cole children to the other half. Harper, J., in delivering the opinion of the court, does go on to express the opinion, with some hesitation, that when the time for distribution arrived only those of the Cole children who were then alive would be entitled to participate in the distribution of their half, under the rule that, where there is a bequest to children at the death of the tenant for life, only those who then are in esse can take, as their interests do not vest until the time appointed for distribution. But he adds: "There would be reason for making a different construction, and probably a different one ought to be made, when the child dying [before the time fixed for distribution] has left children; and this also to effectuate the intention, for it cannot be supposed that the testator intended the object of his bounty not to be capable of transmitting to his children so as to provide for them." It is somewhat difficult to understand how the question whether the share of a child who was in esse at the time the will took effect, or, if the question arose under a deed, as in the case under consideration, at the time of the execution of the deed, vested, could be made to depend upon the happening of a subsequent event,—the birth of issue which would survive the life tenant. If the share of the deceased child vested at all, it seems to us it must have been when the will took effect, or when the deed was executed; and, if such share then vested, it would be transmissible, whether such child died in the lifetime of the life tenant, leaving issue, or not. In other words, we do not see how the same words could be construed as creating a vested interest in a child who died without issue, and only a contingent interest in a child who died without issue, when there are no other words creating such a contingency.

In *Conner v. Johnson*, 2 Hill, Eq. 41, the devise was to the widow for life, and "after the death of my wife to be equally divided between David Rees and Daniel and Jacob Utesey, sons of Jacob Utesey, and David and Isaac and An. Utesey, children of George Utesey, and Jacob Carn and the children of Elizabeth Carn [afterwards Elizabeth Rhode, and now Elizabeth Conner], children and grandchildren of Frederick Carn; and whereas, I have made four different parts of families my heirs, my will and desire is that, if any of them should die with [meaning without] issue, then and in that case his or her share shall be equally divided between my adopted heirs of the same family." Two of the persons named as remainder-men, viz. Daniel Utesey and Jacob Carn, died after the testator, and before the life tenant, leaving

no issue, and one of the children of Elizabeth Carn, who was then married to Christian Rhode, died after the testator, and before the life tenant, leaving no issue. The first question was whether the estate was to be divided among the remainder-men per capita, or whether each of the four families was to take, among them, one-fourth of the estate in remainder. The second question was as to the disposition of the shares of such of the remainder-men as died after the testator, but before the life tenant, leaving no issue. Held, that at the testator's death the seven designated persons took seven-eighths of the estate, as joint tenants, and the remaining eighth went to such of the children of Elizabeth Carn as were living at the death of the tenant for life, and that the shares of such of the designated persons as predeceased the life tenant, leaving no issue, went to the family to which such deceased person belonged; e. g. the children of Elizabeth Carn living at the death of the life tenant took one eighth under the devise to them, and another eighth in right of their uncle Jacob Carn, who died before the life tenant, leaving no issue, under the last clause of the above quotation from the will. This conclusion was based upon the rule that where there is a devise to several ascertained individuals, and to a class of individuals to be ascertained on some future event, a class will take a share equal to that of each of the ascertained individuals, and no more; and, if any of the persons included in the unascertained class died before the period for distribution arrived, their interest did not so vest as to be transmissible to their representatives. And Harper, J., says that it was upon this principle that the case of *Cole v. Creyon*, supra, was decided. It will be observed that there is this striking difference between the case now under consideration and both of the cases above cited, for in both of them the devise was to the children of Elizabeth Cole (or Carn), a person then living and capable of having other children, and hence the individuals of the class comprehended in the words "children of Elizabeth Cole or Creyon" could not possibly be ascertained; but in our case the remainder was to "the children of Dorcas Brown by her late husband, J. R. Berry," and therefore the persons entitled in remainder did not constitute a class of unascertained persons, but were as clearly designated as if they had been mentioned by name, for it would be impossible that Dorcas Brown could have any other children by her deceased husband than those who were in existence at the time the deeds were executed. So, also, the reason of the rule which Chancellor Harper applied in *Conner v. Johnson* and in *Cole v. Creyon* is absent here, for he says: "It depends on this: that the different interests must vest at different times. The shares of the ascertained individuals must vest at the death of the testator [or, where the question arises

under a deed, at the execution of such deed]; that of the unascertained individuals cannot vest until the event happens by which they are to be determined, and upon any other construction it would be impossible to determine what interest did vest at the testator's death." The fact that in speaking of the case of *Cole v. Creyon* he takes care to say that the devise was to the children of Elizabeth Cole, "*who was still living*" (italics ours), indicates that he had in his mind the distinction which we have pointed out. Indeed, we do not see why a devise to children of a deceased person, or to children of a woman by her deceased husband, does not as plainly ascertain and designate the persons intended to take as if such children had been mentioned by name. But a devise to the children of a person "*who was still living*" would not as clearly designate and ascertain the persons intended to take as if they were mentioned by name, for the obvious reason that such person might have other children.

In *Bankhead v. Carlisle*, 1 Hill, Eq. 357, the testator, after having given specific legacies to his 10 children, by name, of whom Gideon Glenn was one, gave certain property to his wife for life, or during widowhood, "which said property I wish and devise, at the marriage or death of my wife, to be equally divided amongst my children as above named." Gideon, the son, survived the testator, but died before the widow, and the question was whether he took a vested or contingent interest, under the above clause of the will. Johnston, Ch., in the circuit decree, which was simply affirmed by the court of appeals, says: "Gideon, by surviving the testator, was in a condition to take under the will whatever passed by the will. The will gave him a portion of the property, with a direction that it be allotted to him on his mother's death. He could have taken it the day of his father's death and was withheld only by the preferable right of enjoyment which the will conferred on his mother. Nothing but that prevented him. Here, then, was a present capacity to take whenever the possession should become vacant. This is the test of a vested interest, and an interest vested is not lost by the dying of the person in whom it exists [vests] before the period of its being actually enjoyed. That only transmits, in the case of realty, to his distributees or legatees, and, in the case of personality, to his representatives." The distinguished chancellor then proceeds to comment upon the cases cited to sustain a contrary view, and says they were cases in which the remainders were to *such of the children as should be alive at the termination of the particular estates* (italics ours), or, we may add, cases like the present, where the provision was that the issue of a deceased child should take, by representation, the share, and says that in such cases the issue of a deceased child could not take through their deceased parent, for the obvious reason that

in the class of cases referred to by the chancellor the deceased parent, not being alive at the termination of the particular estate, did not fill the description of a devisee, and hence could not take any estate, and hence could not transmit any to his issue, and in the class of cases which we have added the deceased child could not take any estate, if he left issue, because, by the express terms of the will or deed, such issue was substituted for him as devisee, but if he died leaving no issue there was no one substituted in his place as devisee, and nothing to divert the estate previously vested in him.

Rutledge v. Rutledge, Dud. Eq. 201, was a case very much like the case under consideration. In that case John Harleston, in consideration of an intended marriage between his daughter Jane and Edward Rutledge, conveyed certain property to trustees, to be held by them in trust for the joint use of the said Edward and his intended wife, Jane, and the survivor of them, for life, "and, after the decease of both the said Edward and Jane, then to and for the use of such issue as she, the said Jane, may have by the said Edward Rutledge, to be divided amongst them share and share alike, if more than one; but if it should so happen that there should be no issue of the said marriage, or if such issue should die during the lives of the said Edward and Jane, or of the life of the survivor of them, then to the use of such survivor, his or her heirs and assigns, forever." The immediate issue of the marriage were seven children, three of whom predeceased both their father and mother, intestate, unmarried, and without issue. The father then died, leaving his wife, Jane, and four children surviving. Of these four children, two died in the lifetime of their mother, intestate, unmarried, and without issue. The other two also died during the lifetime of their mother,—one of them (Edward) leaving a widow and six children; the other (Nicholas H.) leaving a widow, but no issue. The widow, Jane, then died, leaving no other issue of her body surviving but the six children of her son Edward. The principal question in the case was whether the children of Edward, who were the only issue of the original marriage living at the time of the death of the surviving life tenant, took the whole estate, or whether the representatives of Nicholas H. were entitled to share in the estate in remainder, and this depended upon the question whether the immediate issue (the children) of the original marriage took, as they were respectively born, vested and transmissible estates; and it was held that they did, and hence that the representatives of Nicholas H. were entitled to come in. That case, it will be observed, goes much further than we are asked to go in the present case, for there none of the issue of the marriage of Edward and Jane Rutledge were in esse at the time of the execution of the deed under which the question arose, while

in our case all of the children of Dorcas Brown by her late husband, J. R. Berry, were in esse at the time of the execution of the deed, and, as said, substantially, by Johnston, Ch., in *Bankhead v. Carlisle*, supra, were in a condition to take under the will whatever passed by the will. The deed gave them a portion of the property, with the direction that it be allotted to them on the death of the surviving life tenant. They could have taken on the day of the execution of the deed, and their possession was only postponed to the preferable right of enjoyment which the deed conferred upon the life tenants. Nothing but that prevented them. There was, therefore, a present capacity to take whenever the possession should become vacant, and this is the test of a vested interest, which is not divested by the death of the person in whom such interest vest before the period fixed for the actual enjoyment thereof, unless, we may add, the will or deed contains some other words to that effect, as, for example, in our case, where the deed provides that the issue of a deceased child shall take, by representation or substitution, the parent's share.

In *Bentley v. Long*, 1 Strob. Eq. 43, the testator gave his whole estate to his wife during her life or widowhood, "and at her death or marriage to be equally divided amongst our children"; and one of the questions in the case was whether the children took a contingent interest, dependent upon their surviving the widow, or a vested, transmissible interest, to take effect, in possession, on her death. Held, that the interests of the children living at the death of the testator were vested and transmissible, upon the authority of *Bankhead v. Carlisle*, supra, although the children were named in the will in that case, and were not named in *Bentley v. Long*. This, no doubt, was for the reason that the children of testator living at his death were as clearly ascertained as if they had been designated by name.

In *Wessinger v. Hunt*, 9 Rich. Eq. 459, the testator gave his estate to his wife for life, "and at her death it is my will and desire that the estate which may be then in being for her support be equally divided amongst my children and grandchildren" (excluding some of them by name). One of the children died after the testator, but before the life tenant, leaving no issue; and, among other things, it was held that such deceased child took a vested, transmissible interest,—*Wardlaw, Ch.*, in his circuit decree, which was affirmed by the court of appeals, saying: "It is clear, on authority, that the children and grandchildren of testator, living at his death, took vested interests in the remainder, transmissible to their representatives, subject to diminution by the increase of the objects of bounty; or, in other words, vested estates, opening to let in all of the classes who might come into existence before the period of distribution."

In *Wilson v. McJunkin*, 11 Rich. Eq. 527, the testator gave certain property to trustees for the sole and separate use of his daughter Nancy "for and during the term of her natural life, and at her death to be equally divided amongst her children, in fee simple." One of the children of Nancy, who was in esse at the time of testator's death, intermarried with one Thomas Wilson, and gave birth to a child, who died in the lifetime of the mother, very soon after birth. The mother then died, leaving no issue, but leaving her husband, Thomas Wilson. The life tenant then died. And the main question in the case was whether the husband, Thomas Wilson, was entitled to share in the estate in remainder; and this depended upon the question whether his wife took a vested estate transmissible to her heirs and distributees, and, hence, that the husband was entitled to share in the estate in remainder.

In *Haynsworth v. Haynsworth*, 12 Rich. Eq. 114, the donor, by deed, gave to a trustee certain property "in trust, to and for the sole use of my said granddaughter [Mary], wife of the said Henry Haynsworth, during her natural life, and after her death to and for the use of the said Henry Haynsworth, for and during his natural life, and after his death to and for the use of the children born, or hereafter to be born, of my said granddaughter, and their heirs, share and share alike; but should my said granddaughter and the said Henry Haynsworth both die without leaving children living at the time of their decease, born of the said Mary," then over to certain other grandchildren. Mary Haynsworth died, leaving her husband, Henry, and one child surviving her; and the child then died, leaving his father, Henry, surviving him. It was held that such child took a vested and transmissible estate, which became indefeasible upon the death of his mother, Mary, leaving him surviving. In his circuit decree, which, upon this point, was concurred in by the court of appeals, Carroll, Ch., cites with approval *Rutledge v. Rutledge*, supra, and also *Smither v. Willock*, 9 Ves. 234, which last-named case will be more particularly considered when we come to consider another point in this case. *Johnstone*, Ch., in delivering the opinion of the court of appeals, uses these words, which, it seems to us, are appropriate to the present case: "A vested interest has the quality of transmissibility, and is not defeated by the death of the tenant. It is not to be taken away, except upon the occurrence of some event which, by the terms of the grant, or a just construction of the instrument, was intended to terminate that interest."

In *Dickson v. Dickson*, 23 S. C. 216, the testatrix gave certain property to her two daughters, Louisa and Amelia, "for their own use and benefit during the term of their natural lives; and upon the death of either, leaving issue, such issue shall take their parent's share at marriage, or upon arriving at age,

absolutely and forever. But, in default of such issue, then the property so given to go to my three sons, share and share alike, or, in case of the death of any of them at that time, to and among their then surviving children; such children, collectively, taking their parents' share." The two daughters above named, and the three sons, James, John, and Joseph, survived the testatrix, but all of them died during the lifetime of the life tenant, Amelia; two of them (James and John) leaving issue, and the third (Joseph) leaving no issue. The life tenant, Amelia, then died, without issue; and the question was, who were entitled to the property left by such life tenant? Was it divisible into two equal shares, one of which would go to the children of James, and the other to the children of John, or was it divisible into three equal shares, two of which would go to the children of James and John, as above, and the other to the representatives of Joseph? It was held that though the interests of the three sons were not vested, but contingent, by reason of the fact that they were dependent upon the uncertain event of Amelia's dying without issue, yet they were nevertheless transmissible, and that the representatives of Joseph were entitled to one-third of the estate in remainder. So that even if it could be held that the children of Dorcas Brown, by her late husband, J. R. Berry, took contingent, and not vested, interests, it would not necessarily follow that such interests were not transmissible. But the case is cited mainly for the purpose of confirming what we have hereinbefore said as to the gift to these children not being a gift to a class of unascertained individuals; for, as said by Judge Fraser in his circuit decree in *Dickson v. Dickson*, upon the authority of 1 Jarm. Wills (Ed. 1880) 534: "A gift to persons as a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time. The gift here to the three sons—a definite number of persons—is just the same as if they had been called by name in the will." And as is said by Simpson, C. J., in delivering the opinion of this court, after referring with approval to what Judge Fraser had said: "Here the gift was not to a body of persons uncertain in number, and to be ascertained at a future time. On the contrary, it was to three sons of the testatrix, alive at the time of the execution of the will, and the direction was that the property should go to these three sons, share and share alike, upon the death of the life tenant leaving no issue. Certainly, it could not be contended that if the testatrix had named the sons, each to be entitled to a share upon the contingency specified, that in such case the doctrine as to the gifts to a class would apply, excluding such as were not in existence at the happening of the contingency, and giving the whole estate to such only as were then in being; and yet the language used seems to us to exclude the idea

of a class as fully as if the sons had been named individually."

The case of *Doe v. Provoost*, 4 Johns. 61, may be also cited. There the testator devised certain real estate to his daughter Christiana for life, "and immediately after her death I give the same unto and among all and every such child and children as the said Christiana shall have lawfully begotten at the time of her death, in fee simple, equally to be divided between them, share and share alike." Christiana had four children at the time of the making of the will, and at the time of the death of the testator; and one of them, Catherine, died before her mother, leaving the lessors of the plaintiff, her heirs at law. The court held that the said Catherine took a vested remainder, which descended to her heirs, and hence the plaintiff was entitled to recover. Spencer, J., dissented, holding that Catherine's remainder was contingent upon her surviving the life tenant. The ingenious suggestion made by counsel for respondents in this case—that the decision was right because the limitation was to every such child and children as Christiana may have lawfully begotten (not such as she should leave living at her death), and was in fee simple—seems to have escaped the attention as well of the very eminent counsel who argued that case as of the very able court which decided it, for their decision is not based upon any such ground.

In *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64, real estate was conveyed by deed to a trustee, "in trust for Eliza C. Deas * * * and after her death to her issue, to take per stirpes, his [held to be a clerical error for "their"] heirs and assigns, to his and their use, benefit, and behoof forever." Held, that Eliza took an estate for life, with a vested, and therefore a transmissible, remainder to her immediate issue, which was held to mean "children," or, they being dead at the time the life estate fell in, their children by representation; and consequently the share of a child who predeceased the life tenant, leaving no issue, passed to the heirs or devisees of such child. That case is therefore very much like the case under consideration, and seems to be conclusive, if the interpretation of the word "issue" there adopted be correct, as we must assume it was. Indeed, this case is stronger than that, for here the remainder is expressly to the children of Dorcas Berry by her late husband, James R. Berry, "the issue of a deceased child taking by representation the parent's share," which, according to the authorities, must be held to mean "the child or children" of a deceased child taking by representation the parent's share; for, as is said in 11 Am. & Eng. Enc. Law, 875, and supported by numerous cases cited in the notes: "When the word 'issue' is used in reference to the parent of that issue, as where the issue are to take the share of the deceased parent, it must mean his chil-

dren; that is, the word 'parent' confines the word 'issue' to the children of the [first] taker."

We next mention the case of *McMeekin v. Brummet*, 2 Hill, Eq. 638, which was inadvertently omitted at its appropriate place. In that case, William Brummet gave two slaves to a trustee, in trust for the use of his daughter Comfort Perry and the heirs of her body, "but should the said Comfort die without children to heir the said negroes, then the said negroes are to return to the sons of Spencer and Daniel Brummet, and their heirs forever." At the time this gift was made, Spencer Brummet had one son, who was the defendant in the case, and Daniel Brummet had one son, William, who predeceased both the donor and the said Comfort, leaving no issue. Upon the death of Comfort without issue, a question arose as to who were entitled to the negroes and their increase; the defendant claiming the whole, and the plaintiff, as administrator of William, the deceased son of Daniel Brummet, claiming one-half. Harper, Ch., delivered the decree of the circuit court, which was adopted by the court of appeals, holding that the limitation "must be construed to the sons of Spencer and Daniel Brummet then living, as if it had been, in terms, to F. K. Brummet, son of Spencer Brummet, and William Brummet, son of Daniel Brummet." And he therefore adjudged that plaintiff, as the representative of the deceased son, William, was entitled to one-half of the estate in remainder. That distinguished chancellor, in delivering the circuit decree, uses this language, which, it seems to us, is directly applicable to, and is in fact conclusive of, the case in hand,—at least, so far as the shares of such of the children of Dorcas Brown by her first husband, who predeceased the surviving life tenant, leaving no issue, are concerned. He said: "So, if these slaves had been given to Comfort Perry for life, remainder to the sons of Spencer and Daniel Brummet; I take it to be equally clear that there would have been a vested remainder in the sons of Daniel and Spencer Brummet, who were living at the time of the gift,"—which, of course, as was held in that case, would be transmissible to the representatives of any deceased son.

From this review of the authorities, as well as from a careful examination of the language used in the deeds which we are called upon to construe, it seems to us that the children of Dorcas Brown, by her late husband, J. R. Berry, all of whom were in esse at the time of the execution of the deeds, took vested, transmissible estates in remainder, liable to be divested only by their death during the lifetime of the surviving life tenant, leaving issue, in which event such issue, by the express terms of the deed, were substituted in their place, but that the estates of those of the said children who predeceased the surviving life tenant, leaving

no issue, remain vested, and transmissible to their representatives, inasmuch as the only event upon which their vested interests should become divested never occurred. This view is sustained by the case of *Smither v. Willock*, supra, cited with approval in *Haynsworth v. Haynsworth*, supra. There the testator gave certain property to his wife for life, "and from and after her death the capital to be divided between the testator's brothers and sisters named in the will, in equal shares; but, in case of the death of any of them in the lifetime of the wife, the shares of him or her so dying to be divided between all and every his or her or their children. One of the brothers died in the lifetime of the widow, leaving no issue. Held, that the share of such deceased brother was vested, subject to be divested only in the event of his death in the lifetime of the testator's widow, leaving children; and consequently, that event not having happened, his representative was entitled." To the same effect, see *Harrison v. Foreman*, 5 Ves. 207, as well as the language of *Johnson, Ch.*, hereinbefore quoted from his opinion in the case of *Haynsworth v. Haynsworth*. We think, therefore, that the circuit judge erred in excluding the defendants J. D. Blanding and J. E. Baumgartner from any share in the remainder. One of these persons claims by purchase, and the other by inheritance, the shares of children of Dorcas Brown, by her first husband, who predeceased the surviving life tenant, leaving no issue; and as we have held that these shares were vested and transmissible interests, these defendants, now the owners thereof, are entitled to claim the same. We agree, however, with the circuit judge, that the devisees of John Richardson and Mrs. Octavia H. Moses must be excluded. These defendants claim, by purchase, the shares of two of the Berry children who died during the lifetime of the surviving life tenant, leaving issue, or children, as that word must be construed, as we have seen above; and, by the express terms of the deed, such issue or children are substituted in the place of their parents. While, therefore, nothing has occurred to divest the vested interest of such of the children as have died during the lifetime of the surviving life tenant, leaving no issue, the very event upon which the vested interest of such of the children as have died, leaving issue, was to be divested, having occurred, such interests became divested, and those who claim such interest by purchase must give way to those who have been substituted in their stead.

As to the only remaining question,—as to the liability of the plaintiff Julia A. Bracy to account for rents and profits,—it is only necessary to say that the only parties who set up any claim to such an accounting by the pleadings, or in the circuit court, have been adjudged to be not entitled to any portion of the property, and, of course, they would not be entitled to any account for

rents and profits. For it is stated in the case that "an accounting for rents and profits was claimed against Julia A. Bracy only by John S. Richardson and Octavia H. Moses." It is true that the defendant J. E. Baumgartner, by one of his grounds of appeal, does impute error to the circuit judge in refusing an account for rents and profits. But, to say the least of it, there may be a question as to whether that was sufficient. Waiving this, however, the question seems to have been treated by the circuit judge as one of fact, and where that is the case we are not disposed to interfere with the conclusion of the court below, especially in a case like this, where the testimony is so meager, and, at least, leaves room for a doubt whether Mrs. Bracy, one of the tenants in common, used more than her share of the land, or rather, whether such use was worth more than the taxes which she paid on the whole of the land. The judgment of this court is that the judgment of the circuit court be so modified as to conform to the views herein announced, and that the case be remanded to that court for such further proceedings as may be necessary.

(95 Ga. 292)

PORT ROYAL & W. C. RY. CO. v. DAVIS.

(Supreme Court of Georgia. Jan. 14, 1895.)

INJURIES TO EMPLOYE — NEGLIGENCE — INSTRUCTIONS—ARGUMENT OF COUNSEL.

1. Where an employé of a railroad company sues for personal injuries, a request to charge the jury to the effect that the omission of the plaintiff to perform a particular duty, or that the plaintiff, in attempting to discharge the duty, committed an error of judgment, resulting in his injury, would defeat a recovery,—the request leaving out of consideration entirely the question as to whether, with respect to either proposition, the plaintiff was negligent,—was properly refused.

2. While, in the abstract, it is the duty of railroad companies to carefully select and superintend its operatives, machinery, appliances, and appointments of every character used in its business, yet, where the failure to properly select or superintend its operatives is not made a ground of complaint in the declaration, and the negligence imputed to the company was confined to the improper selection of machinery and appliances, it was error, at the request of the plaintiff's counsel, to give in charge the abstract principle of law first above stated, without limiting its application to the subject complained of in the declaration.

3. Where rules are prescribed or regulations adopted for the government of employés in and about the discharge of their duties, it is the duty of the employer to give notice of their existence, and so to promulgate them as to afford to the employé a reasonable opportunity of ascertaining their terms. Knowledge, either express or such as the law will imply, without reference to the means by which it is imparted, binds the employé to compliance. Therefore, a request to charge to the effect that, if the rules be written or printed, each employé should either be furnished with a copy, or advised as to where he can read or hear them read, and which leaves out of consideration all other means of acquiring knowledge, should have been denied, and the court, in giving such instruction, erred.

4. In the trial of an action for injuries alleged to have been occasioned to an employé of a railroad company in coupling cars, it was error to charge that if the employé was instructed by the conductor to couple the cars without a knife or stick, and when about to enter upon the discharge of that duty the conductor was in a position to see that he had no knife or stick, and allowed him to proceed without them, and the employé was then and there injured, he was not negligent in not having such knife or stick, and was entitled to recover, if injured without fault on his part, and by the negligence and carelessness of the agents of the company.

5. Courts should not permit counsel, in the argument of one cause, to refer to positions and arguments of opposing counsel in another, with a view (or which might have the effect) to prejudice, disparage, or discredit the sincerity of his position assumed in the case being tried; but such matters are, to a great extent, within the discretion of the presiding judge, and, unless in the exercise thereof prejudicial error has been committed, this court will not interfere.

(Syllabus by the Court.)

Error from city court of Augusta; W. F. Eve, Judge.

Action by A. L. Davis against the Port Royal & Western Carolina Railway Company for personal injury. Plaintiff had judgment, and defendant brings error. Reversed.

The following is the official report:

Davis sued the railroad company for damages resulting from an injury received while engaged as a train hand in the service of the company, and while coupling cars, whereby his right hand was caught and crushed between the bumpers. He obtained a verdict, and defendant's motion for a new trial was overruled. The declaration alleges that on February 13, 1891, he was instructed to couple certain cars, and in carrying out the order his hand was caught, by reason of the link used in coupling being too short, and the too rapid backing of the engine; that he was entirely free from fault, and the accident resulted from the failure of other servants of the company to provide links of sufficient length to permit of safe coupling, and to exercise proper care in the handling of the engine; that he had been in defendant's service but a few days, and had no knowledge or intimation that the place at which the coupling was ordered to be done was any more hazardous or dangerous by reason of being on a curve; that he had no knowledge that one of the bumpers was higher than the other, or that the link was so short as to make coupling dangerous and impossible, until after the accident occurred; that he was furnished with no instrument to aid him in perfecting the coupling, nor with any rule book or direction prescribing the manner in which coupling should be done, but he was ordered by the conductor simply to do the coupling, without any direction, warning, or instruction as to how it should best be done, the conductor knowing at the time that plaintiff had no instrument to aid him in the coupling, etc. The opinion states fully the grounds for new trial ruled on in the second, third, and fourth divisions. The grounds referred to in the first and fifth divi-

sions are: (1) Error in refusing to charge, as requested: "If it was the duty of the plaintiff to observe the link and the bumpers, and he failed to do so, he cannot recover for any injury received by reason of such failure; or, if he observed them, and formed the opinion that they were safe, he was acting for the company, and, if he made a mistake in this opinion, he cannot recover for the consequences of such mistake." (5) In concluding argument, plaintiff's counsel said he would ask the jury, in the same words of eloquence once used by eminent counsel now representing the defendant, wherein counsel had said, "For every sigh, for every groan, for every pain he had suffered, he should have compensation equivalent to his agony." Counsel for defendant objected to plaintiff's attorney reading law to the jury. Counsel disclaimed reading law to the jury, but said he was simply quoting other's eloquence, just as he would read or quote from the Bible, or Shakespeare, or any worthy author. The court permitted the counsel to conclude the quotation, which he did by saying that "these were to be put on one side of the scale, and, on the other, money, money, until both in even balance hung, and the jury felt that he had been fully and adequately remunerated." Counsel for defendant then and there objected to the same as being irrelevant, improper, illegal, and tending to prejudice the jury.

Ganahl & Ganahl, for plaintiff in error. C. H. Cohen and J. R. Lamar, for defendant in error.

ATKINSON, J. 1. In a suit by an injured employé against a railroad company for injuries resulting from alleged negligence of the company, where it is sought to be shown, by way of defense, that the plaintiff is not entitled to recover because of his own negligence in the premises, it is not error for the presiding judge to refuse to charge the jury, in substance, that if a particular duty was imposed upon the plaintiff, and he failed to perform that duty, or that if the plaintiff, in attempting to discharge the duty, committed an error of judgment, which resulted in his injury, he could not recover. We do not think this is a correct rule. The omission to perform a duty which defeats a recovery, or the error of judgment which produces a like result, must be such an omission as must, in some sense at least, be attributable to negligence upon the part of the servant suing; and where the charge of the court leaves entirely out of consideration whether or not the plaintiff, with respect to these duties, was in any sense negligent, it withdraws from the jury the very question which the law submits for their consideration, and undertakes in advance to adjudicate this question of fact. The omission to perform a duty imposed might amount to negligence. It is difficult to suppose a case where a man could omit to perform an imposed duty, and at the same time be entirely free from fault;

but it is not only possible, but entirely probable, that a man, in the performance of a duty imposed upon him, may exercise the greatest care, and still, because of an error in judgment in the performance of the duty, he might, without fault upon his part, be injured. But the charge requested states to the jury that if the plaintiff either omitted to perform a particular duty, or that if, in attempting to discharge the duty, he committed an error of judgment, resulting in his injury, without any reference to how careful and diligent he was in making the attempt, still he could not recover. The vice of the instruction requested was leaving out of it altogether the question as to whether the plaintiff, in the omission of the duty, or in the forming of his judgment, which turned out to be erroneous, was in any way guilty of negligence.

2. The declaration in the case contained no count alleging, as a substantive cause of the injury complained of, that the agents and servants of the defendant, who were coemployees with the plaintiff, were not properly supervised and superintended. The whole gist of plaintiff's action was that because of certain defective appliances, with which he was required to perform his duty, he was injured. The court, however, was requested to charge, and did charge, at the instance of plaintiff's counsel, that it was the duty of the road to carefully select and superintend its operatives, its machinery, appliances, and appointments of every sort used in its business. While, as an abstract proposition of law, this is a correct rule, there being no complaint in the declaration that a failure of the railroad company carefully to superintend its operatives was in any sense a contributing cause to the injury, it was error for the court to give in charge this rule of law, without limiting it in its application to the particular subject complained of in the declaration. To charge the jury that, if the plaintiff was himself without fault, he might recover, provided the agents of the company were at fault in this matter, and then to charge the jury that it was the duty of the company carefully to superintend its operatives, would imply that the plaintiff's right to recover might be predicated upon the failure of the company to perform this latter duty. The evidence might have demonstrated that the plaintiff was himself free from fault. It might have demonstrated that the appliances alleged by him as being defective, and to which the declaration attributes his injury, were in every respect perfect. Yet to say to the jury that the railroad company was bound to carefully select and superintend its operatives might have the effect to mislead them in the application of that general proposition to this particular case, because they might have found that, in this respect, the company was negligent, but a finding upon that would not authorize a recovery upon the declaration; and thus the

jury might, under an erroneous conception of their duty in the premises, misguided by this instruction of the court, have been induced to return a verdict founded upon an improper supervision of the defendant's officers and operatives, rather than because of defects in the machinery or appliances. It is well enough for the court carefully to understand the plaintiff's contentions, as stated in the declaration, and confine the evidence and instructions to the issues which are presented by the declaration and the pleas. If this is done, the jury would have no inducement to wander into the field of speculation, nor would there be in the instructions anything suggestive of a power upon their part to do so.

3. The court properly charged the jury generally, with respect to the promulgation of rules of the railroad company, that: "The rules of corporations are the law which governs them and their employés and officers, but no employé is bound by any rule which has not been promulgated to him, or to which his attention has not been called. Actual knowledge of a rule would avoid a necessity of any formality in its promulgation. So, before any employé of a railroad company could be governed or be bound by the rules of the corporation, you must be satisfied the rules were within his knowledge, were brought home to him, or there was furnished to him an opportunity to learn the rules, or he had actual knowledge of the rules." This was a fair statement of the true rule upon this subject, as heretofore announced by this court. But when, at the request of the plaintiff's counsel, the court, in addition to this, charged: "If the rules are written or printed, each employé should either be furnished with a copy, or informed where to apply, at least, where he might call and hear them read, or read them himself,"—inasmuch as the evidence in the case shows that the rules of the company, which were insisted upon as binding upon this plaintiff, were printed rules, the effect of this charge was to instruct the jury that, although ordinarily other means might be employed in imparting to persons to be affected thereby notice of the rules of the company, yet, where the rules are written or printed, it was the duty of the company either to furnish the plaintiff with a copy of these printed rules, or tell him where he could hear them read; otherwise, he would not be bound. This is more than the law requires. If by oral tradition he have knowledge, derived even from his coemployees, of the existence and terms of such rules, he is bound to conform his conduct thereto, whether he have either a copy of the rules themselves, or have had an opportunity to read them or hear them read. The latter is one means of promulgating the rules, and probably the most effective; but it is not the only means by which, being received, notice thereof will bind the employé.

4. Exception is taken to the following charge of the court: "If you believe the plaintiff was instructed by the conductor to couple the cars without a knife or stick, and that, when he was about to enter upon the discharge of this duty, the conductor was in a position to see that he had no knife nor stick in his hand to perform the coupling with, and he allowed him to proceed without it, and the plaintiff was then and there injured, then I charge you that the plaintiff was not negligent in not having such knife or stick, and he is entitled to recover if he is injured without fault on his part, and by the negligence and carelessness of the agents of the company." A rule of the company had been introduced in evidence which required the use of a knife or stick in making couplings. This charge, in the first place, assumes that there was evidence submitted to the jury which might tend to show that the conductor instructed the plaintiff to couple the cars without a knife or stick, whereas, while it may be found under the evidence that the conductor instructed the plaintiff, he not having a knife or stick, to couple cars, there is no evidence from which the jury could find an affirmative instruction from the conductor to the plaintiff to couple the cars without using a knife or stick. This charge, for this reason, was erroneous. The second error in the charge is that if the conductor saw the plaintiff about to make the coupling without the use of a knife or stick, and neglected to compel him to desist, without giving him affirmative instructions at all upon the subject, the conductor's negligence would so neutralize the effect of any negligence of the plaintiff upon his own part as wholly to acquit him of negligence. It would be a strange rule of law which would justify the negligence of an employé in the performance of his duties by simply showing that another employé engaged about the same business was likewise negligent. The apparent duty of guardianship by the superior officer over the conduct of his coemployé, and making him responsible for the injuries of the coemployé, without reference to the negligence of the latter, which is set up and established by this instruction of the court, has no warrant in the law. A positive instruction by one in authority to his inferior to perform a particular service in a particular way is one thing, and the omission to give an instruction when none such was necessary is entirely a different thing. For the court to say that the alleged negligence of this conductor would acquit this plaintiff of negligence was to withdraw from the consideration of the jury altogether the question as to whether or not the plaintiff was not himself negligent in obeying such instructions, assuming even that they were given.

5. It seems that in the progress of this case, and during the argument, the counsel for the plaintiff referred to an argument made by counsel for the defendant years ago,

in the trial of a damage suit of this character, in which the counsel for the defendant in this case occupied in that the position of counsel for the plaintiff. The speech referred to has become embalmed in part in the printed reports of this court, and is recognized as one of surpassing eloquence. With a pathos characteristic of the great advocate who delivered it, he appealed to all the emotions of the jury to compensate his client for the injury that he had sustained; to estimate in cold cash the physical pain and torture and the mental anguish that he must endure. And this extract plaintiff's counsel was proceeding to read to the jury. Counsel for the defendant objected, upon the ground that this was improper. We think, too, this was an improper practice, but not, of itself, such as, in the absence of other substantial error, would justify the granting of a new trial. Counsel, in their relations with each other and before the courts, are many times, in the course of a long professional career, required to take positions which do not seem to the casual observer to be at all times entirely consistent the one with the other. The man who represents the plaintiff to-day may in a similar case, or one involving similar features, to-morrow represent the defendant, and it would be manifestly unfair and unjust if the court permitted the argument in one case to be quoted by counsel in the other, with a view either to prejudice or to disparage or to discredit the position assumed in the case being tried. It is hardly probable that such a practice could serve any useful purpose, and its effect doubtless would be to cause unnecessary attrition among the members of the bar, and produce bad feeling where none but the kindest sentiment should prevail. There should be no room in the legal profession for the indulgence of personal jealousies or resentments, and the lawyer is the last man in the world who should permit himself, by word or deed, to sting the sensibilities or wound the feelings of a brother lawyer. The control of these matters, however, is largely within the discretion of the trial court, and we shall assume that at the proper time, upon proper necessity, courts administer proper correctives. Judgment reversed.

(95 Ga. 340)

GATES v. STATE.

(Supreme Court of Georgia. Jan. 23, 1895.)

MURDER—INDICTMENT—"MALICE AFORETHOUGHT."

While it is necessary to allege in an indictment for murder that the homicide was committed with malice aforethought, yet the omission to use that exact expression may be supplied by the employment instead thereof of any language which may be its legal equivalent. The use of the words "malice aforesaid" in lieu of the words "malice aforethought" is not such a defect of substance affecting the real merits of the case as will, after verdict, support a motion in arrest of judgment.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Richard Gates was convicted of murder, and brings error. Affirmed.

The following is the official report:

The indictment charges that Gates, "with force and arms, did unlawfully, and with malice aforesaid, kill and murder one Lee Sledge, by then and there shooting said Lee Sledge with a certain loaded pistol." Defendant was found guilty, and his motion in arrest of judgment was overruled. The motion was upon the grounds: (1) The crime of murder is insufficiently charged or described. (2) The necessary element of malice, a legal ingredient, is not properly, legally, or sufficiently alleged in said indictment, and thus murder is not alleged in the terms or language of the Code. (3) Murder is not fully set out in the indictment, for the malice required to constitute murder, to wit, "malice aforethought," is not alleged in said indictment, or that there was a deliberate intention unlawfully to kill or shoot Lee Sledge, the alleged deceased. (4) The death of Lee Sledge, who is alleged to have been shot, is not alleged in said indictment.

F. M. Longley and T. H. Whitaker, for plaintiff in error. T. A. Atkinson, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

ATKINSON, J. Upon an indictment for murder it is necessary to allege and prove that the homicide upon which the prosecution is based was committed with malice which was operating upon the mind of the slayer at the time the fatal blow was given. This may be proven by direct testimony, or it may be shown by circumstances, but the fact must, nevertheless, be established. Upon a motion in arrest of judgment after a conviction for the offense of murder, if the allegations of the indictment be sufficient to authorize its admission, this court is bound to presume that the evidence submitted was in accordance with and sufficient to establish the allegations in the indictment. The motion in arrest of judgment in this case is based upon four grounds; the only two—the third and fourth (the first and second being included in the third)—necessary for consideration being that the offense of "murder is not fully set out in the indictment, for that the malice required to constitute murder, that is to say, malice aforethought, is not alleged in the indictment, and that there was a deliberate intention unlawfully to kill or shoot the deceased," and the fourth is that the death of the person alleged to have been slain is not laid in the indictment. While ordinarily it is proper, and perfectly accurate pleading would seem to require, that each constituent element of an offense should be, in the indictment, stated in the language of the Code, yet, upon motion in arrest of judgment, this is not essential, if the language employed is a fair legal equivalent of

the terms employed by the Code. The term "malice aforethought" in the Code means that the homicide must be committed upon premeditated design; and that term necessarily includes malice both express and implied, either of which is sufficient, if proven, to sustain a conviction. Where the indictment alleges that the homicide was committed with malice, and instead of the word "aforethought" employs the word "aforesaid," the effect of the use of this latter expression might be to limit the state in its introduction of testimony to the showing of that malice which had theretofore by the slayer been expressed. It might limit the range of judicial inquiry to the existence of that particular kind of malice alleged in the indictment,—that is to say, malice aforesaid. But if it be true, as alleged in this indictment, that the defendant slew the deceased unlawfully and with malice aforesaid, the jury would be authorized, indeed required, to convict him, because to say that he slew him with malice is an allegation that at the time the deceased was slain malice was the preponderating motive in the mind of the slayer. After a conviction, the presumption being that the evidence was in accord with the exact allegations as made in the indictment, it will be presumed that this defendant slew the deceased with malice aforesaid,—that is to say, with malice which had previously been declared by the accused. We do not think the fourth ground of the motion in arrest of judgment is sustained by the record, as will be apparent from a perusal of the indictment. The allegation is that the defendant, with malice aforesaid, did kill and murder the deceased. We think it may be fairly implied from the use of this language, it being alleged that the deceased was both killed and murdered, that he is in fact dead. The court committed no error in overruling the motion in arrest of judgment. Judgment affirmed.

(95 Ga. 343)

CARUTHERS v. STATE.

(Supreme Court of Georgia. Jan. 28, 1895.)

VOLUNTARY MANSLAUGHTER—EVIDENCE.

The evidence, taken most strongly against the accused, showing that he and the deceased, upon words of reproach and a sudden quarrel, in which both participated, came to blows, and that a combat with deadly weapons ensued, in which no undue advantage was sought or taken on either side, the killing amounted to no more than voluntary manslaughter, and a verdict for murder was unwarranted. (Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Frank Caruthers was convicted of murder, and brings error. Reversed.

The following is the official report:

Frank Caruthers was convicted, without recommendation, of the murder of Thomas L. Caruthers by stabbing. His motion for new

trial was overruled, and he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because, in selecting the jury, after two of the jurymen—E. C. Smith and R. P. Taylor—had promptly declared, in answer to the usual statutory questions, that they had bias or prejudice resting on their minds for or against the prisoner, and had been pronounced incompetent by the solicitor, the presiding judge further interrogated them in regard to their prejudice, in the hearing of other jurors, who were afterwards examined as to their competency. Said jurors answering the court that they had such prejudice on their minds that it would not readily yield to evidence, they were then excused by the court. Error in refusing to charge the following written requests: "A man may be justifiable in killing another while the slayer has malice in his heart; and if the deceased was attacking prisoner with a weapon likely to produce death, and the prisoner cut and killed him in self-defense, it would be justifiable homicide, even if defendant had malice against deceased at the time. His malice in such a case would not count against him." "If prisoner did not consider his life or limb in danger, and did not kill in self-defense, but in a passion aroused by the attack made upon him by deceased (if you believe such attack was made as claimed by his counsel), and did not act with malice, then it is voluntary manslaughter, and not murder." "In deciding whether prisoner acted with or without malice, you may consider who commenced the difficulty under the testimony, who struck the first blow, how many blows were given or attempted by each party, the kind of weapons, and whether the weapons were prepared for the occasion, or were casually on hand; and any and all other circumstances connected with the case as shown by the evidence." Error in charging: "If you find from the testimony that the defendant was making an assault upon the deceased, and advancing on him with a knife, and deceased struck him, though it may have been with a deadly weapon, to repel the assault of the defendant, and the defendant killed him, even though the fatal blow was given after the deceased struck him, then I charge you that it would be murder." "While, upon the other hand, if you find from the testimony that the deceased struck the defendant without cause or provocation, with a weapon likely to produce death, then in that event it would be justifiable homicide, provided you find the deceased died from the stab or blow given by the defendant." Because the court, immediately after the charge complained of in the last paragraph, and before charging on the subject of impeachment as below, charged the following: "If you find from the testimony that the defendant was attempting to make an assault upon the deceased, that the deceased struck him with a weapon, or was attempting to strike him with a weapon, not likely to pro-

duce death, and the defendant struck and killed him with a knife, it would be voluntary manslaughter." Error in charging: "A witness may be impeached by proof of contradictory statements previously made as to matters relevant to his testimony and to the case as to facts he has testified about. If a witness has been successfully impeached, you are not authorized to believe him, but it is for you to say whether or not you will believe the impeaching witness or the witness sought to be impeached; the credibility of all witnesses being for you and your consideration."

W. L. & Warren Grice, for plaintiff in error. Tom Eason, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, J. The accused was convicted of murder, and sentenced to be executed. He moved for a new trial on numerous grounds. We have not very closely scrutinized the special grounds of the motion, because, after a careful and anxious study of the evidence, we have reached the conclusion that there should be a new trial upon the substantial merits of the case. The evidence will appear in the reporter's statement. It does not, in our opinion, make a case of murder. In no view of it, could the killing amount to more than voluntary manslaughter. Taking the evidence most strongly against the accused, the case was one of mutual combat, and falls within the class to which our leading case on this subject—*Gann v. State*, 30 Ga. 67—belongs. We therefore regard it as our solemn duty to give the accused another trial. Judgment reversed.

(92 Va. 20)

SEXTON et al. v. C. AULTMAN & CO.¹
(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

LIMITATIONS—PLEADING—INSTRUCTIONS.

1. Where defendant gives notice of set-off, and files an account of set-off, plaintiff may avail himself of limitations without specially pleading it.

2. Where plaintiff has a right to the defense of limitations without pleading it, an instruction that the same, if believed, would be a defense, is not erroneous as operating as a surprise to defendant.

Error to circuit court, Wythe county; Williams, Judge.

Actions by C. Aultman & Co. against C. S. Sexton & Co. Cases were consolidated. Judgments for plaintiff, and defendants bring error. Affirmed.

Blair & Blair, for plaintiffs in error. Walker & Caldwell, for defendant in error.

BUCHANAN, J. The defendant in error brought two actions in debt against the plaintiffs in error upon certain notes made by the latter. The cases were heard together, by

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

consent, as one case. The defendants pleaded nil debit, filed their account of set-offs, and a special plea in writing, under our statute of equitable set-offs. Section 3299, Code 1887. The plaintiff replied generally to these pleas, and filed a list of counter set-offs. Upon the trial of the case, the plaintiff was allowed to rely upon the statute of limitations to defeat the defendants' claim of set-offs, without replying the statute specially either to the account of set-offs or to the plea of equitable set-off, and this action of the court is assigned as error.

Ordinarily, the statute of limitations must be pleaded specially, or it cannot be relied on; but there are some exceptions to the rule. In the case of equitable set-off, under our statute, it cannot be pleaded specially. The only reply that can be made to such plea is a general replication. Section 3300 of the Code expressly provides that every issue of fact upon such plea "shall be upon a general replication that the plea is not true, and the plaintiff may give in evidence on such issue any matter which could be given in evidence under a special replication if such replication were allowed." If the set-off relied on is not an equitable set-off, under our statute, the defendant may either plead the set-off, or give notice of it by filing an account of set-off. If he plead it, then the plaintiff, if he relies upon the statute of limitations, must reply to it specially. 4 Minor, Inst. (1st Ed.) 659, 660, 667; Trimyer v. Pollard, 5 Grat. 460.

But if the defendant does not plead his set-off, but gives notice of it, and files an account of set-off, the plaintiff has had no opportunity to reply the statute of limitations, but may avail himself of the statute upon the trial. Mr. Minor says: "And it should be observed that where the defense is presented, not by plea, but by notice, as the plaintiff has no day in court to reply the statute of limitations, he may avail himself of it at the trial without pleading it; but it is otherwise if the set-off be pleaded. 4 Minor, Inst. 660; Trimyer v. Pollard, 5 Grat. 460; Smith v. Pattie, 81 Va., at pages 664, 665.

In this case the defendants gave notice of their set-offs, and filed an account of them, instead of pleading them, and, under the settled practice in this state, the plaintiff had the right to rely upon the statute of limitations upon the trial without pleading it. The court did not, therefore, err in holding that the plaintiff had the right to rely upon the statute of limitations without pleading it.

It is also assigned as error that the following instruction given by the court was erroneous:

"The court instructs the jury that if they believe from the evidence that the defendants, G. S. Sexton & Co., are entitled to commission on the Floyd sale; and if they further believe from the evidence that the same, according to the true intent and meaning of

the parties, by their contract and dealings in regard to the same, became due more than five years before the filing of said accounts of set-offs and plea in this suit,—then they must find for the plaintiff, C. Aultman & Co., on said Floyd commission, and reject the same."

It is contended that the instruction is erroneous on two grounds: First, because it operated as a surprise upon the defendants at the conclusion of the case, and, when the case was about to be argued, for the court to give an instruction which served the purpose of replying the statute of limitations to defendants' pleas of set-off, when no such replication had been filed. For the reasons given above, there was not only no necessity for replying the statute of limitations, but no opportunity for it. The plaintiffs had the right to an instruction upon that point, as the evidence tended to show that the defendants' claim of set-off for commissions on the Floyd sale was barred by the statute of limitations; and a correct instruction upon a point which the evidence tends to prove can never work a surprise in law. The objection to the instruction upon that ground must, therefore, be overruled.

The other ground of objection is that the instruction invaded or trespassed upon the province of the jury. This objection is also without foundation, as the whole question was left to the jury, as to when the commissions on the Floyd sale became due and payable, if at all, under all the evidence in the case.

The verdict of the jury was fully sustained by the evidence, and the judgment of the circuit court must be affirmed.

(92 Va. 98)

VIRGINIA MIN. CO. v. WILKINSON et al.¹
(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill to enjoin a suit at law against complainant will be dismissed where all the defenses to the suit set up in the bill are available at law.

Appeal from circuit court, Carroll county; Williams, Judge.

Bill by the Virginia Mining Company against James Wilkinson and others. From a decree for defendants, plaintiff appeals. Reversed.

Bolling & Stanley and D. W. Bolen, for appellant. Walker & Caldwell, for appellees.

RIELY, J. We are met at the threshold, in the consideration of this case, by a demurrer to the bill for want of jurisdiction in equity. The bill sets forth that the complainant bought of the defendants a parcel of land therein mentioned, and agreed to pay the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

purchase money when the defendants had executed such a deed of conveyance as was acceptable to its counsel, and the title to the land had been approved by him. It alleges, also, that its counsel prepared a proper deed, with general warranty, and sent it to James Wilkinson, one of the vendors, to be executed by all of the parties; but that, instead of having it executed as it had been prepared, the covenant of general warranty was altered to one of special warranty. It further states that, upon the deed being returned to the said counsel, he refused to accept it, because of the material change that had been made in it, and sent it back to James Wilkinson, for him to have it corrected and re-executed as the counsel had originally prepared it; but that Wilkinson, instead of doing so, deposited it in the clerk's office, and had it recorded, without the knowledge or consent of the complainant. The bill further alleges that the complainant still refuses to accept the deed, or recognize it as conveying to it any interest in the land; that the contract for the purchase of the land was not in writing, but altogether verbal; and that the complainant was not, and had never been put, in possession of the land. It further avers that the vendors had brought an action of assumpsit against the complainant to recover the purchase price of the land, and that it could not make its defense in the suit at law, and obtain the relief it was entitled to. It therefore prayed for an injunction to restrain the defendants from prosecuting their said suit; that the deed might be adjudged to be void; and that the complainant be declared not to be bound by the contract to buy the land, and be relieved from all liability under the deed. It is thus seen that the grounds set forth for the interference of a court of equity are, when analyzed, that, the defendants having failed to tender a proper deed under the contract, and the complainant having refused to accept the deed which was tendered, it was not liable to pay the purchase money; and, further, that, the contract being wholly verbal, it was consequently void under the statute of frauds, and no recovery could be had upon it; and that the complainant had never been put in possession of the land so to take the case out of the statute. All of these grounds constitute legal defenses, and could be availed of in the suit at law. 4 Minor, Inst. pt. 1, marg. p. 645. The bill sets forth no ground why the complainant could not have made its defense there. It is a settled principle that equity will not grant relief where there is a plain and adequate remedy at law. 1 Bart. Ch. Prac. 13; Story, Eq. Jur. § 33; Pom. Eq. Jur. § 217; Haden v. Garden, 7 Leigh, 157; Morrison v. Speer, 10 Grat. 228; Beckley v. Palmer, 11 Grat. 625, 634; Manufacturing Co. v. Henry's Adm'r, 25 Grat. 582; and Coleman's Adm'r v. Anderson, 29 Grat. 425. "It may be stated as a general rule, subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law as in a

court of equity, and that remedy is direct, certain, and adequate, a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold." Story, Eq. Pl. § 473. If, in the case at bar, the deed tendered by the vendors was not in accordance with the contract, and the complainant never accepted it, and its recordation was without its knowledge or consent, as alleged in the bill, the defense at law was complete, and there was no difficulty in making it. No reason is shown for withdrawing the matter in controversy from the cognizance of the appropriate tribunal, and carrying it into a court of chancery. The demurrer to the bill should have been sustained, the injunction dissolved, and the bill dismissed.

We are, for the foregoing reasons, of opinion that the decree of the circuit court should be amended so as to direct that the judgment at law heretofore confessed by the appellant to the appellees be set aside, and that the case be reinstated upon the docket as it was when the injunction was granted, and that, as so amended, the decree of the circuit court should be affirmed, with costs to the appellees, as the parties substantially prevailing.

(92 Va. 50)

COX'S EX'RS v. CROCKETT et al.¹
(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

RES JUDICATA—ACTION BY ASSIGNEE.

In a suit by a judgment creditor to subject defendant's land, an accounting of liens against the land was ordered. One of the liens was a judgment obtained against defendant on his purchase-price notes by the vendor's assignee who held the notes under an absolute assignment. This lien was adjudged a nullity because the consideration for the notes had totally failed, and from this judgment no appeal was taken. The assignee subsequently recovered from the assignor the amount of the notes. *Held*, that the defendant's vendor was bound by the judgment declaring the judgment obtained by the assignee on defendant's notes a nullity and was therefore estopped from enforcing the same as a lien on defendant's land.

Appeal from circuit court, Wythe county; Bolen, Judge.

Bill by William Cox's executors against Crockett & Co. to subject land in defendants' possession to payment of a judgment against defendants' grantor. From a decree for defendants, plaintiffs appeal. **Affirmed.**

J. W. Caldwell, Blair & Blair, and Chapman & Gillespie, for appellants. Walker & Caldwell, for appellees.

CARDWELL, J. In May, 1861, Elias Groseclose sold to William and A. G. Cox a tract of land situate in Wythe county, and on the 6th of August, 1866, Groseclose conveyed the land to the Coxes, retaining a lien for balance of purchase money. In 1859, one William Gibboney obtained judgment against Elias Groseclose for \$1,073, with interest

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

from July 9, 1859, and costs, which was duly docketed in the clerk's office of Wythe county. In 1870, William Gibboney filed his bill in the circuit court of Wythe county to enforce his judgment lien on the land bought by the Coxes from Groseclose, and which we will hereafter speak of as the "Groseclose Land," and to this suit he makes Groseclose and the Coxes parties defendant. In 1872, while Gibboney's suit was still pending, the Coxes sold the Groseclose land to T. G. McConnell for \$9,300, and conveyed the same to McConnell by deed of general warranty, and retaining a lien for the purchase money, McConnell executing his three notes for the purchase money, in equal sums for \$3,100, with interest thereon from October 1, 1871, till paid, and payable respectively on the 1st day of October, 1872, 1873, and 1874. The Coxes thereupon assigned one of these notes to William Gibboney in payment of his judgment lien against Groseclose, and assigned the last two notes, due October, 1873, and October, 1874, to John W. Taylor's executors, and a suit was instituted in the name of William and A. G. Cox for the benefit of Taylor's executors on the note maturing October 1, 1873, against McConnell, and judgment obtained thereon. Elias Groseclose, the Coxes' vendor, then assigned the balance of the purchase money due him from the Coxes to one Adam Groseclose, and in January, 1874, Adam Groseclose filed his bill seeking to enforce the vendor's lien reserved on the face of the deed from Elias Groseclose to the Coxes for the balance due from them to Elias Groseclose. In September, 1874, the court decreed that any balance due from the Coxes to Groseclose constituted a vendor's lien on the Groseclose land, and directed an account to ascertain the balance of the purchase money due from the Coxes to Adam Groseclose, as assignee of Elias Groseclose, and the balance was reported by the commissioner to be \$2,095.50, with interest, and the report was confirmed, and the Groseclose land decreed to be sold to pay balance of purchase money due from the Coxes. The land was sold under the decree for \$4,985. At the January rules, 1875, Taylor's executors filed a bill to enforce the lien of the second and third purchase-money notes executed by McConnell to the Coxes for the Groseclose land, on one of which judgment had been obtained, making the Coxes, Groseclose, and McConnell parties defendant. In March, 1875, there was a decree for sale in this case of the Groseclose land to satisfy the notes held by Taylor's executors, on one of which, as we have seen, judgment had been obtained. At July rules, 1875, D. P. Graham, surviving partner of D. Graham & Son, filed a bill to enforce the lien of a judgment in his favor against the Coxes for some \$2,000 or more, obtained in October, 1867, and which was a lien on the Groseclose land, and second in priority only to the Gibboney judgment against Groseclose, and to the Groseclose vendor's lien retained in the

deed from the Coxes to McConnell. To this bill the Coxes and McConnell are made defendants. At the September term, 1875, the suits of Graham v. Cox and Taylor's Ex'rs v. McConnell were heard together, and a decree for an account was entered, the causes referred to a commissioner, and in February, 1876, the commissioner returned his report, showing that the lien on the Groseclose land, which had priority over the purchase money due from McConnell to the Coxes, amounted to about \$15,000. At the March term, 1876, the four causes, Gibboney v. Cox, Taylor v. McConnell, Adam Groseclose v. Cox, Graham v. McConnell, were heard together, and the commissioner's report, before referred to, confirmed, and the sale of the land previously made was set aside and a decree for resale made. At the resale D. Graham became the purchaser of the Groseclose land at \$4,000, and at the September term, 1877, the sale to Graham was confirmed. At the November term of the court, 1879, Commissioner Bolling, pursuant to a decree previously entered, reported that after paying the liens for purchase money due from the Coxes to Groseclose and costs and commissions out of the \$4,000 purchase money due from Graham, there was left only \$418.55 to be paid on the judgments against Cox, which were prior to the McConnell purchase, and which would leave over \$7,000 of prior liens against Cox unpaid; and at the December term, 1879, this report of Commissioner Bolling was confirmed, followed by decree at a later term, directing a deed to be made to Graham, the purchaser. In 1882 all the above-mentioned causes were stricken from the docket, and no appeal has ever been taken in any of them.

It thus appears from the records of these suits, made exhibits in the cause now being considered, that the land sold by the Coxes to McConnell was covered with prior liens largely beyond the amount of the purchase money McConnell was to pay, and that McConnell was wholly and entirely deprived of the Groseclose land by reason of these prior liens. In 1876 there was pending in the circuit court of Washington county a chancery suit instituted by the Lynchburg Banking & Insurance Company, a judgment creditor of said T. G. McConnell, to subject the real estate of McConnell, situated in Washington county, to the payment of the plaintiff's judgment, and in January, 1878, an account of liens was ordered in that suit, and the judgment of the executors of Taylor, assignees of the Coxes, against McConnell, for \$3,100, with interest and costs, was filed before the commissioner by Taylor's executors, and was reported as lien No. 11. This report was excepted to by junior lien creditors of McConnell, because the judgment of Taylor's executors, assignees of the Coxes, was reported as a lien against McConnell, and on the ground that the land sold by the Coxes—that is, the Groseclose land—to McConnell was wholly lost to him by reason of prior liens against

the Coxes. On October 4, 1879, a commissioner reported that the judgment of Taylor's executors, assignees of the Coxes, was "obtained upon purchase-money notes executed by McConnell to the Coxes for the Groseclose land; that after purchase, and before the notes were paid, a suit was brought in Wythe county to enforce the lien for purchase money due from the Coxes' intestate for said land, and as the result of said suit the land was taken from McConnell entirely"; the suit referred to being the suit of Adam Groseclose, assignee of Elias Groseclose, against the Coxes, hereinbefore mentioned. To this report, disallowing their judgment, Taylor's executors excepted, and on the 20th of January, 1880, the court sustained the report of the commissioner disallowing the judgment by reason of the fact that the subject which was the consideration of the judgment had been lost to McConnell, and overruled the exception of Taylor's executors. No appeal was ever taken from this decree of the circuit court of Washington county, but Taylor's executors subsequently filed their bill in the circuit court of McDowell county, W. Va., against J. O. Cox and William Cox, defendants, and succeeded in collecting the amount due them from the Coxes, and in this bill of complaint then filed it appears for the first time that Taylor's executors claimed to hold the notes assigned to them by William and A. G. Cox against T. G. McConnell only as collateral security. It turns out that when the judgment was obtained by William and A. G. Cox for the benefit of Taylor's executors against T. G. McConnell for the sum of \$3,100, with interest, in May, 1874, as we have before stated, the judgment became a lien upon a tract of land known as the "Painter Tract," situated in the county of Wythe, and which land was afterwards conveyed by McConnell and wife to one John G. Kreger, in trust to secure an alleged indebtedness to one David G. Thomas, and subsequently conveyed by deed from Kreger, trustee, to David G. Thomas, then by deed from Thomas and wife, on April 2, 1883, to the firm of Crockett & Co., appellees here. In 1888 William Cox filed his bill in the circuit court of Wythe county, setting forth that by reason of the fact that John W. Taylor's executors had been satisfied as to their claim, out of the estate of J. O. Cox in West Virginia, he (William Cox) was entitled to the benefit of the judgment obtained on the purchase-money note of T. G. McConnell for the sum of \$3,100, a part of the purchase money for the Groseclose land, and sought to subject the Painter tract of land then in possession and ownership of Crockett & Co. to the payment of the judgment; whereupon Crockett & Co. demurred to and answered the bill filed by William Cox, setting up by way of defense all of the facts relative to the loss of the Groseclose land by McConnell, the purchase of the Painter land by Crockett & Co., and the proceedings had in the circuit court of Wash-

ington county in the suit of the Lynchburg Banking & Insurance Company v. T. G. McConnell, and claiming that the matters set up in the bill of the complainant, William Cox, were *res adjudicata*, and that, therefore, the complainant could not enforce the judgment he claimed against the defendants, Crockett & Co., or subject the Painter land to the payment thereof. After the filing of this bill by William Cox, he departed this life, and the cause was revived in the name of his personal representatives, and at the final hearing of the cause "upon the bill, the exhibits filed therewith, the answer of Crockett & Co., with general replication thereto, the demurrer, joinder therein, the record in the cases of Groseclose v. W. and A. G. Cox, Graham v. Cox and McConnell, Taylor's Ex'rs v. McConnell, Gibboney v. Cox et als, Lynchburg Banking & Insurance Co. v. McConnell, and the orders before entered," the circuit court of Wythe county overruled the demurrer, and decreed that complainants' bill be dismissed on the merits, with costs to the defendants. From this decree an appeal was allowed to this court.

The question presented is whether appellants are estopped from asserting the judgment obtained for the benefit of J. W. Taylor's executors against T. G. McConnell against the Painter tract of land now owned by appellees? We are of opinion that the rule of *res adjudicata* applies to this case. In the case of *Clarksons v. Doddridge*, 14 Grat. 42, Judge Moncure, in delivering the opinion of the court, says that when the right to receive the money due on a claim is in the assignee he has the right to bring an action at law in the name of his assignor, and he will be regarded, even by a court of law, as the substantial plaintiff in the action. The court will protect his rights, and will not permit the nominal plaintiff to receive the money, nor to relieve the debt, nor to dismiss the action. By analogy, therefore, Taylor's executors stood in the shoes of William and A. G. Cox as to the judgment on the note against T. G. McConnell, and were clothed with full power and authority to assert this judgment against T. G. McConnell in the suit of the Lynchburg Banking & Insurance Co. v. T. G. McConnell, pending in the circuit court of Washington county; and the decree of the court in that cause, declaring that the said judgment was a nullity, by reason of the fact that the consideration for which it was originally obtained had failed, was as binding upon William and A. G. Cox as it was upon the executors of John W. Taylor. At that time T. G. McConnell had no reason to suppose that the Coxes had any interest in the judgment. Indeed, they had none; and, if appellants here have any interest, it was acquired after the decree of the circuit court of Washington county declaring it a nullity. If this were not so, the original assignment of the note upon which the judgment was obtained carried with it to Tay-

lor's executors a mere right of action, and, if appellants could acquire, after the decree of Washington county circuit court, an interest in the judgment upon which they might sue, and subject the property of McConnell or his vendee to the payment thereof, they might also sell their right to another, and, if he should try this action on its merits, and fail to recover, upon the same principle the right might be assigned to still another, and so on, and there would be no end to litigation. The doctrine of estoppel is founded upon principles of law which are intended to repress litigation, and to prevent a multiplicity of suits. *Adams v. Barnes*, 17 Mass. 368; *Freem. Judgm.* § 327. Appellants acquired title to the judgment asserted in this cause—if any title they have—after the decree of Washington county circuit court, and they are to be treated as privies to that decree. *Id.* § 162. It may be claimed by appellants that when the Coxes assigned the note to Taylor's executors, upon which the judgment asserted in this cause was obtained, there was a contemporaneous and collateral agreement, which rendered the assignment conditional or partial; but this will not avail, even if it be so, as the assignment appears to have been absolute in its terms. Where the assignment, whether written or verbal, of anything in action, is absolute in its terms, so that by virtue thereof the entire apparent interest vests in the assignee, any contemporaneous, collateral agreement by virtue of which he is to receive a part only of the proceeds, and is to account to the assignor or other person for the residue or even is to thus account for the whole proceeds, or by virtue of which the absolute transfer is made conditional upon the fact of recovery, or by which his title is in any other similar manner partial or conditional, does not render him any the less the real party in interest. The debtor is completely protected by the assignment, and cannot be exposed to a second action by any of the parties, either the assignor or others. *Pom. Rem. & Rem. Rights*, § 132, and notes. For the foregoing reasons, we are of opinion that the decree of the circuit court of Wythe county, complained of, is clearly right, and is affirmed.

PORTER et al. v. ROBINSON et al.¹

(Supreme Court of Appeals of Virginia. Aug. 1, 1895.)

BILL IN EQUITY—MULTIFARIOUSNESS.

A bill by heirs alleged their heirship; partnership of their decedent in a firm; sale of all the assets of the firm to a corporation in consideration that the vendee paid all the debts of the firm; completion of the sale by themselves, as heirs, and the surviving partners; sale by the vendee of the same property to a second corporation, in which the purchase price was partly secured by bonds, for the payment

of which a vendor's lien was reserved, and subsequently canceled by the president of the first corporation without authority; execution of a trust deed of all the property by the last vendee to secure a fraudulent issue of bonds; the assumption and nonpayment of the debts of the partnership by the first vendee; stock taken by plaintiffs in the second corporation on representation of the president of the first corporation, also a promoter of the second corporation, that the lands would be sold to the latter company for \$300,000, whereas they were sold at \$330,000. The bill asked for the appointment of a receiver, and settlement of the accounts of the partnership; cancellation of the stock taken in the second corporation; a decree against it and its promoters for the full value of the stock, and against the president of the first corporation for the \$30,000 profits made by him by the sale of land; for the restoration of the vendor's lien, and cancellation of the trust deed. *Held*, that the bill was multifarious.

Appeal from circuit court, Wythe county; Williams, Judge.

Bill by S. L. Porter and others, as heirs, against John W. Robinson and others, for the settlement of the accounts of a partnership of which their decedent was a member. From a decree sustaining a demurrer to the bill for multifariousness, complainants appeal. Affirmed.

Blair & Blair and I. H. Larew, for appellants. Walker & Caldwell, for appellees.

HARRISON, J. The only error assigned in this case is to the action of the circuit court in sustaining a demurrer, and dismissing an amended bill filed by the appellants, upon the ground that it was multifarious. There are a large number of complainants, who represent themselves as heirs at law of one James S. Crockett, and charge that said Crockett was in his lifetime a member of the firm of Crockett & Co., which was engaged in mining, smelting, manufacturing, and selling iron, farming, grazing, merchandising, and other lines of business; and further represent that said firm owned a large amount of valuable real and personal property, and was largely in debt. They claim that, as heirs at law of said Crockett, they are interested in having the affairs of said firm settled up, and its debts paid.

It further appears from the bill that the members of this firm, in the lifetime of James S. Crockett, sold the entire assets of the firm to the Wythe & Speedwell Mining & Iron Manufacturing Company, a corporation duly chartered under the laws of Virginia; the consideration for this purchase being that the vendee should assume and pay off all the debts and liabilities of Crockett & Co., the vendor.

James S. Crockett died before this contract was completed by the conveyance of all the assets of Crockett & Co. to the purchasers; and on the 7th day of April, 1890, the appellants, as heirs at law of James S. Crockett, united in a deed with the surviving members of the firm of Crockett & Co., conveying to said Speedwell Company the residue of the assets of said firm. In this deed

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the grantors recognize the former deed executed by their father, James S. Crockett, in his lifetime, and also the contract for the sale of the whole of said assets, executed by him with the other members of the firm of Crockett & Co. Subsequently, on the 30th day of April, 1890, the Wythe & Speedwell Mining & Iron Manufacturing Company sold this same property to the Pulaski Development Company, another duly-chartered corporation, for the sum of \$330,000, part of which was paid in cash, and for the residue bonds were given; and a deed was made to the purchaser, with general warranty of title, conveying the property free from all incumbrance, and reserving a vendor's lien to secure the deferred payments.

It further appears from the bill that the Pulaski Development Company did, by deed of trust dated October 1, 1891, convey all of said property to a trustee, to secure \$400,000 of coupon bonds issued by it.

The defendants to this bill are the administrator of James S. Crockett; the executor and devisees of M. B. Tate, a deceased member of the firm of Crockett & Co.; the Wythe & Speedwell Mining & Iron Manufacturing Company; the Pulaski Development Company; John W. Robinson, and the other promoters of the last-named company; George L. Carter, a creditor thereof; the Pulaski Loan & Trust Company, trustee; and Croker Bros.,—the last named, a firm which had contracted to sell the Pulaski Company's output of pig iron.

The bill alleges that the accounts of Crockett & Co. are unsettled; that the assets of said firm were conveyed to the Speedwell Company, and by it conveyed to the Pulaski Company; that the Speedwell Company assumed the debts of Crockett & Co., and has not paid them; that complainants agreed to take stock in the Pulaski Development Company for their interest in the affairs of Crockett & Co.; that they were induced to do this by the representation of John W. Robinson, president of the Speedwell Company, and a promoter of the Pulaski Company, that the lands would be sold to the latter company at \$300,000, whereas they were sold at \$330,000, whereby Robinson made \$30,000; that the directors of the Pulaski Company have fraudulently, and against the rights of the stockholders in said company, issued to George L. Carter \$400,000 in bonds, secured by a mortgage on all its real estate; that John W. Robinson, as president of the Speedwell Company, had wrongfully marked "Satisfied" the vendor's lien reserved in its deed to the Pulaski Company; that the Pulaski Company had executed a mortgage on the output of its furnace to secure George L. Carter such sums as he might advance to run its business; that these and other ultra vires and fraudulent acts of the directors of the Pulaski Company had rendered its stock worthless.

The prayer of the bill is for a settlement

of the accounts of Crockett & Co.; for a receiver of Crockett & Co.'s assets; for a cancellation of complainants' stock in the Pulaski Company, and a decree against the company for full value of that stock, and so much more as they may be entitled to on settlement of Crockett & Co.'s affairs; and that John W. Robinson be required to account for the profit he made as a promoter of the Pulaski Company. They further pray for a restoration of the vendor's lien in the deed from the Speedwell Company to the Pulaski Company; for a cancellation of the Pulaski Company's mortgages to secure its bonds; for a cancellation of its contract and mortgage to Croker Bros.; and for a decree against George T. Mills, L. S. Calfee, and John W. Robinson, promoters of the Pulaski Company, for the par value of plaintiffs' stock, and against Robinson for the \$30,000 promoter's profit he is alleged to have received; and for general relief.

This bill shows no assumption by the Pulaski Company of the debts of Crockett & Co., and discloses no connection between the Pulaski Company and Crockett & Co., except that the Pulaski Company had bought land at a fixed price that the Speedwell Company had purchased from Crockett & Co. The bill discloses no relation between the plaintiffs and the Pulaski Company, except that of stockholders. It does not charge that George L. Carter, when he contracted for the mortgage bonds of the Pulaski Company, had any connection with any of the parties complained of, nor does it charge that Croker Bros., whose contract is sought to be canceled, had any connection whatever with any of the matters, or any of the parties to the suit. The bill calls for investigation into the affairs of Crockett & Co., the Speedwell Company, and the Pulaski Company, and into the dealings of the last-named company with its stockholders and creditors, and into its dues to each, and the dealings of the promoters of said company with the Speedwell Company, and with the plaintiffs.

It is apparent, upon reading the allegations and prayers of this bill, that several matters, in their nature separate and distinct, are so blended as to produce confusion, and most likely to do great injustice to parties in no way concerned in the object and purpose of the plaintiffs' suit. We cannot see that the defendants Croker Bros., the Pulaski Company, L. S. Calfee, G. D. Carter, or George T. Mills have any connection with the affairs of Crockett & Co., or any concern with the settlement of that company's matters. By "multifariousness in a bill" is meant improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants in the same bill.

In the latter case the proceedings would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants, with which he has no connection. In the former case the defendant would be compellable to unite in his answer and defense different matters, wholly unconnected with each other; and thus the proofs applicable to each would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. *Story, Eq. Pl. § 271; Dunn v. Dunn, 28 Grat. 291; Brown v. Improvement Co., recently decided by this court, and reported in 20 S. E. 968.*

Without further comment, it is sufficient to say that the appellants have improperly joined in their bill several distinct and independent matters, that cannot properly be litigated in one suit; and therefore the action of the circuit court in sustaining the demurrer for the reason that the bill was multifarious was without error, and the decree complained of must be affirmed.

(92 Va. 71)

MAX MEADOWS LAND & IMPROVEMENT CO. v. BRADY.¹

(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

EQUITY RESCISSION OF CONTRACT—FALSE REPRESENTATIONS.

1. To sustain a bill for the rescission of a contract on the ground of fraud, it must appear that the misrepresentations were positive statements of material facts, made for the purpose of procuring the contract, and that the party to whom they were made relied on them, and was induced thereby to enter into the contract.

2. Representations made, in good faith, by a land-improvement company, in its prospectus and advertisement of lots, that negotiations for a machine shop, foundry, etc., to be located on its property, will probably be concluded within a few weeks, and that these industries will employ a large number of men, are mere expressions of opinion, and will not sustain a bill to rescind a contract of sale on the ground of fraud.

3. Equity will not rescind a contract for the sale of land, on the ground of fraud, where, after the lapse of a year, the vendee, with full knowledge, voluntarily paid the first installment of the purchase money.

4. Equity will not rescind a contract for the sale of land, on the ground of a defect in the title, where it appears that the vendee has been put in possession under a deed containing a general warranty; that such possession has neither been disturbed nor threatened; that the grantor is not insolvent, and has taken no steps to collect the unpaid purchase money; and that the existence of the incumbrance complained of was set forth on the face of the deed.

Appeal from circuit court, Wythe county; Williams, Judge.

Bill by John C. Brady against the Max Meadows Land & Improvement Company for the rescission of a deed. From a decree for complainant, defendant appeals. Reversed.

Bolling & Stanley and J. H. Fulton, for appellant. Walker & Caldwell and W. S. Poage, for appellee.

KEITH, P. A bill was filed in the circuit court of Wythe county by John C. Brady, asking the rescission of a deed, dated the 25th day of October, 1890, executed by the Max Meadows Land & Improvement Company, for a lot of ground set out and described in said deed. From an inspection of the record, the following facts appear: The Max Meadows Land & Improvement Company, having purchased land from Randal McGavock and others, divided it into lots, which it advertised for sale, representing through its advertisements, and by a prospectus extensively distributed, that a 150-ton blast furnace was under construction; that iron mines were being opened, and connected with the furnace by a railroad; that a brickyard was in active operation, and that certain industries had agreed to locate at its place, to wit, a rolling mill and horseshoe works, a planing mill, and sash, door, and blind factory, and that negotiations were in progress, and would probably be concluded within the next few weeks, for a machine shop, foundry, boiler and engine works; and that these industries would employ from 700 to 1,000 men, and would insure a population of from 3,000 to 4,000. It, in like manner, represented that it had secured the services of a competent manager, having a large acquaintance among the manufacturers of the North, who would make it his especial business to attract other industries; that negotiations were in progress with quite a number, and that there was every reason to believe that, within the next six months or year, many additional manufactories would be secured, and the population would be largely increased. The plaintiff represents that the statements thus set forth in the prospectus were falsely and fraudulently made to induce him to purchase, and that, relying upon these representations, he on the 25th day of October, 1890, did purchase a lot of ground, and agreed to pay \$1,730 for it, of which sum he paid one-third cash, and subsequently paid one-half of the balance, leaving the third and last installment of \$576.66, with interest thereon, still due and unpaid. It appears that, to secure the deferred payment, the plaintiff, Brady, executed a deed of trust, of even date with the deed from the Max Meadows Land & Improvement Company to him, by which he conveyed the lot so purchased to Joseph S. Clark, trustee, upon trust that, if the deferred installment should not be paid at maturity, the property conveyed was to be sold to satisfy it. He charges that the Max Meadows Land & Improvement Company, by its officers and agents, and by its handbills and advertisements, made certain other false and

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

fraudulent representations with reference to the growth of Max Meadows, among them that a large hotel would be built, and that the Norfolk & Western Railroad Company proposed to erect a handsome stone passenger station on ground reserved for that purpose, and that its construction would be commenced within the coming year. He alleges that the Max Meadows Land & Improvement Company, by its deed aforesaid, conveyed the lots so purchased, with covenants of general warranty, and that when he made the purchase he supposed that he had purchased an unincumbered property; that Randal McGavock and others, from whom the Max Meadows Land & Improvement Company purchased the tract of land in which is embraced the lot which is the subject of this controversy, prior to their sale to the Max Meadows Land & Improvement Company, executed to S. W. Jamison, as trustee for A. M. and W. M. Fuller, a deed of trust to secure to the Fullers the sum of \$20,000, and that said lien or incumbrance still remains unpaid and unsatisfied; that the tract so conveyed to Jamison for the benefit of the Fullers is the same land afterwards conveyed by Randal McGavock and others to the Max Meadows Land & Improvement Company; and the deed of trust to Jamison for the benefit of the Fullers is referred to and made part of the deed from McGavock to the Max Meadows Land & Improvement Company. The deed from McGavock and others to the Max Meadows Land & Improvement Company is filed as an exhibit in the cause. The plaintiff avers that he would never have entered into the contract, and made the purchase of the lot named, had it not been for the false and fraudulent representations of the company, or if the company had disclosed to him the incumbrance on the lot and the defect of the title thereto. He makes the Max Meadows Land & Improvement Company, Joseph S. Clark, trustee, A. M. and W. M. Fuller, and S. W. Jamison parties defendant to the bill, and prays for a rescission of the contract, that he may have a decree for the recovery of the money already paid by him, and that the defendants may be enjoined and restrained from collecting the bond for the last installment of purchase money, amounting to \$576.66.

The Max Meadows Land & Improvement Company answers the bill. It denies all the allegations of fraud. It admits the purchase by the company of the Max Meadows land from McGavock, and the sale of the lot to the plaintiff upon the terms stated in the bill. It admits the deed of trust in favor of the Fullers. It denies that the defendant ever represented that it would cause a large city to be built at Max Meadows, or that the defendant made any other representations, through its officers and agents, except such as were made in the advertisements and prospectus, which were in the hands of the public for weeks before the sale took place, and by which the public and the plaintiff were fully informed of all that the

defendant company had done and contemplated doing in its effort to build a town at Max Meadows; and avers that the public and the plaintiff were honestly put in possession of all facts known to the defendant. It avers that all of the industries and improvements that were promised have been built, and that those which the defendant stated were being negotiated for were, as the defendant fully believed, secured, as stated in the advertisement. The defendant denies that any representations or false statements were made to induce the plaintiff to make the purchase. It points out the fact that the sale was made at public auction, in perfect fairness to all, and that the plaintiff exercised his own judgment and discretion in continuing to bid for the lot until he drove off other competitors, and it was knocked down to him as the highest and best bidder. Without going further into details of the facts, it may be stated that the defendant denies specifically every allegation and charge of fraud and misrepresentation, and especially it denies that the defendant concealed from the plaintiff the fact of the existence of the lien, by deed of trust given by McGavock to S. W. Jamison, trustee, for the benefit of the Fullers. The answer avers that the plaintiff and public were invited to examine for themselves the defendant's title; that the deed of trust, as well as the deed from McGavock to the defendant, were of record in the clerk's office of Wythe county, where they were open to the inspection of the plaintiff, and no representation whatever was made by the defendant with respect to the title.

Upon the issues thus made in the pleadings, evidence was taken, and, the case coming on to be heard before the judge of the circuit court of Wythe county, he rendered a decree against the Max Meadows Land & Improvement Company for the full amount of the cash payment and of the first deferred payment, aggregating the sum of \$1,153.34, with interest from the 25th day of October, 1890, until paid, and perpetuated the injunction as to the deferred payment of \$576.66; and the case is now before us upon an appeal from that decree.

There is little room for controversy as to the facts. The representations relied upon to sustain the bill, and to justify the rescission of the contract, are all set out in the prospectus and advertisements filed with the bill. The representations relied upon may be divided into two classes,—representations of matters of fact, and representations of matters of opinion. In so far as the defendant company made statements of facts, it appears by the evidence that those statements were true, and, in so far as the statements were matters of opinion, it appears that those opinions were honestly entertained, and would, in no event, constitute sufficient ground for a rescission of the contract. The 150-ton blast furnace represented to be

under construction was actually built; the representations as to the iron mines, which were to be connected with the furnace by a railroad, are shown to have been true; and it is in proof that a brickyard was in active operation. The statement that a rolling mill and horseshoe works, and a planing mill, and sash, door, and blind factory had agreed to locate at Max Meadows is borne out by the proof, which contains also evidence that, at the time of the sale, negotiations were in progress with respect to the machine shops, foundry, boiler and engine works. That those industries, if secured, would have employed from 700 to 1,000 men, and that that number of employes would insure a population of from 3,000 to 4,000, were obviously but estimates predicated upon the success of the efforts to secure the industries enumerated, and cannot properly be considered as an unconditional assurance upon the part of the company of the existence of those industries as a matter of fact, and still less as a guaranty of the number of men to be employed, or the population to be expected as a result of their establishment.

The distinction between representations of fact and of opinion have been so clearly set out in the recent opinions of this court that I feel it is unnecessary to do more than to refer to them. They show that the misrepresentations which will sustain an action of deceit, or a plea at law, or a bill for the rescission of a contract, must be positive statements of fact, made for the purpose of procuring the contract; that they must be untrue; that they are material; and that the party to whom they were made relied upon them, and was induced by them to enter into the contract. *Grim v. Byrd*, 32 Grat. 293; *Wilson v. Carpenter* (Va.) 21 S. E. 243; and *Watkins v. Improvement Co.* (decided at the present term) 22 S. E. 554. In *Crump v. Mining Co.*, 7 Grat. 352, it was decided that if, in the written proposals for a sale of stock in a mining company, the representations contained therein are false as to any material fact, by which the purchasers have been misled to their injury, and in which they are presumed to have trusted to the vendors, then the contract founded upon such representations is void, whether the vendors knew the representations to be false at the time they were made, or not, and whether made with fraudulent intent, or not. In *Grim v. Byrd*, 32 Grat., at page 302, which was a bill in equity for the rescission of a contract, Judge Staples, speaking for the court, declares that "the doctrine is well settled, in the United States, that a false representation of a material fact, constituting an inducement to the contract, on which the purchaser had the right to rely, is ground for a rescission by a court of equity, although the party making the representation was ignorant as to whether it was true or false; and the real inquiry is not whether the vendor knew the representations to be false, but whether the purchaser believed it to be

true, and was misled by it in entering into the contract. The representations must, as a general rule, be of a fact, as distinguished from a mere matter of opinion, unless the parties are dealing upon unequal terms, and one has means of information not equally open to the other." It is needless, however, to multiply authority to show that the law is as stated in *Grim v. Byrd* and *Wilson v. Carpenter*, above referred to. Both the appellant and the appellee rest their several contentions upon it. The effect of the fraud upon the contract is to render it voidable only, and it is the duty of the deceived party to elect, on the discovery of the fraud, to rescind it, or else he will be bound by it. In *Fry*, Spec. Perf. § 703, it is stated that, "in the case of a transaction grounded on fraud, the party deceived must, on the discovery of the fraud, elect to rescind or to treat the transaction as a contract." In 2 Add. Cont. p. 772 et seq., it is said that "a party who intends to repudiate a contract on the grounds of fraud should do so as soon as he discovers the fraud; for if, after the discovery of the fraud, he treats the contract as a subsisting contract, or if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit. And whenever a party to a contract has a right to elect whether he will avoid it, or treat it as a subsisting contract, his election may be manifested by acts as well as by words, and, when once made, is final, and cannot be retracted." And, further on, the same author says "the discovery of the new incident in the fraud, which only strengthens the evidence of the original fraud, cannot revive a right of repudiation which has once been waived." These propositions of law are, indeed, elementary, and it is hardly necessary to fortify them by the citation of authority.

The Max Meadows Company, having purchased land, in order to make a profit by selling it in town lots, proceeded, in the usual way, to lay off streets, to build hotels and waterworks, and to induce manufacturing enterprises employing large numbers of operatives to construct their plants upon its property. To this end it advertised extensively. Every circumstance of climate and of situation was set forth in the most attractive manner, and all this it had a perfect right to do without incurring the imputation of the slightest impropriety. As an evidence of good faith, and of the confidence its managers felt in the value of its properties, and the ultimate success of its efforts to develop it, the record establishes that, before a lot was offered for sale, a very large sum of money was expended; and, finally, it pledged itself, in its prospectus, that "if, for any reason which cannot now be perceived, the above industries, or other in-

dustries to employ an equal number of men, should not be absolutely secured within six months from date of sale,—October 25, 1890,—the purchasers of lots will be given the option of having the sale canceled, the cash payments refunded, and being released from making deferred payments. This option must be exercised within fifteen days from the expiration of said six months." This should have had the effect of drawing the attention of the bidders sharply to the line of demarcation between those representations which the company intended should be relied upon as matters of fact and those which were intended as mere expressions of opinion, and is strongly persuasive, if not conclusive, of its good faith. The appellee had the most abundant opportunity to inform himself of the truth of every representation made, and of every step taken by the appellant from the inception to the termination of the enterprise. Everything was done in the light of day. There was nothing covert or concealed, and, if he made a bad bargain, the explanation is not to be found in the suggestion that his innocence and simplicity have been ensnared by the wiles of an unscrupulous vendor. The Max Meadows Company had made its purchase at a price far in excess of normal values. It sold to the appellee at an advanced price, after expending large sums of money in its improvement, and he, in turn, purchased, it may be supposed, in the expectation that fortune would so far favor his venture as to enable him to reap a reward for the risk he assumed. The minds of all men were, at that time, inflamed with the mania for speculation, and no doubt the parties to this transaction were not free from the delusions it produced. While it lasted, hopes were cherished, and expectations indulged and expressed, which, considered in the light of sober reality, seem wild and extravagant in the extreme, but which should not be branded as frauds. Upon this branch of the case, I am of opinion that there was no such misrepresentation of fact as, under the influence of the principles of law above adverted to, would entitle the appellee to a rescission of his contract.

It appears, moreover, that after the lapse of a year, with full knowledge of all that his vendor had promised, of all that it had performed, of all that it had done, and of all that it had failed to do, the vendee, so far from disaffirming the contract into which he was induced to enter, as he now says, by fraudulent misrepresentation of the appellant, distinctly ratified and confirmed it by voluntarily discharging the first deferred installment of the purchase money. If, therefore, the contract had in its inception been voidable, this act of ratification would be construed as a waiver of the right to repudiate it.

The other ground relied upon by the appellee is that he purchased with the expectation that he would get an unincumbered title, and that, as we have seen in the statement of facts, there rests upon the land pur-

chased by the Max Meadows Land & Improvement Company of Randal McGavock a deed of trust to S. W. Jamison for the benefit of the Fullers, which constitutes an incumbrance upon this and all other lots embraced in the tract covered by that deed. If the Max Meadows Land & Improvement Company was here asking the specific performance of the contract of sale upon the part of John C. Brady, the outstanding title in Jamison, trustee, and the incumbrance thereby created, could be relied upon to defeat the recovery; but, in the case before us, the contract has been executed, and the appellee has received what he contracted for,—a deed, with a covenant of general warranty, of the land purchased by him. He is in possession, and his possession has been undisturbed by any suit begun or threatened. It is not alleged that the Max Meadows Land & Improvement Company, the grantor of the appellee, is insolvent, or that it was making any effort to collect the unpaid installment of the purchase money by an enforcement of the deed of trust given to secure it, or by suit, or otherwise.

In the case of *Beale v. Selveley*, 8 Leigh, 658, Judge Tucker, in deciding a somewhat similar case, says that the "vendee has in possession the identical land that he purchased. He has a deed for it, with general warranty, from a vendor whose solvency he does not venture to question. He has never been evicted or sued, or threatened with a suit by any other claimant." Further on in the same case, after discussing the effect of taking a deed with special warranty, and showing that, in that case, the rule of caveat emptor strictly applies, and that the vendee takes the hazard of the title, he points out the distinction where a general warranty is required and given, and continues: "As in the case of special warranty, he discharges himself of all responsibility, and only sells the chance of a good title, so, where he enters into a general warranty, without other covenants, he makes himself only responsible for eviction. In these cases, therefore, the vendee is confined to the covenant of general warranty. He has chosen, or at least agreed upon, his remedy, and to that remedy he must be tied down. However bad his title, he cannot sue upon his warranty unless he be evicted; and, if he cannot do so at law, upon what principle can equity make the vendor liable beyond the terms of his contract? A contract without other covenants than a warranty is, in effect, an agreement between the vendor and vendee that the vendor is never to be responsible until the vendee is turned out by superior equity." If, however, a defect of title exists which is known to the vendor, and by him concealed from the vendee, or if the vendee had no means of knowing it, then the purchaser may either maintain an action at law for the deceit, or for the rescission of the contract itself by an appeal to a court of equity. Judge Tucker con-

cedes that, in Virginia, there has been upon this subject more laxity in practice, but, notwithstanding this relaxation, he declares "that he is aware of no case in which the rights of the party have been extended in equity beyond his covenants. Until the contract is complete, indeed, by the execution of deeds, it is fully within the power of the court, which will not decree execution where it will be unreasonable, or where the title is essentially defective. But after a deed has been made and accepted, though our courts have given relief in anticipation of an eviction which is impending, accompanied by the danger of insolvency, they have never gone one jot beyond the covenants, except where the fraud of the vendor gives rise to a distinct cause of action independent of the covenants. Although, therefore, we may enjoin a judgment or sale, on the ground that the creditor is proceeding under his deed of trust, or that a suit is threatened, and the vendor is in declining circumstances, yet we can never interfere unless the seller has made himself, by some covenant, responsible for the defect complained of, or, by fraudulent concealment, has subjected himself to an action at law for damages, or to relief in equity to rescind the contract for the fraud."

It would appear, then, that the fraud which will entitle a purchaser to ask for the rescission of his contract in equity is that which consists in misrepresentation of facts, or in the concealment of facts from which the defect of title arises, which facts the vendee had no other means of knowing. *Edwards v. McLeay*, 2 Swanst. 237. "If, then," Judge Tucker says, "the vendor does not know of the defect, or, knowing it, does not conceal it, or if the vendee does know of it, there is no ground of relief. The vendee must prove three things: (1) The defect; (2) knowledge and suppression by the vendor; (3) ignorance on the part of the vendee. And as to the second matter, the scienter is essential."

I have quoted thus fully from the case of *Beale v. Seiveley* because the principles of law are there laid down with clearness and precision, and the authority of that case has, so far as I am informed, never been called in question. In *Peers v. Barnett*, 12 Grat., at page 416, Judge Allen, referring to, and, as it were, interpreting, the case of *Beale v. Seiveley*, uses the following language: "It was there decided that where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase money unless he can show a defect of title respecting which the vendor was guilty of fraudulent concealment or misrepresentation, and which the vendee had at the time no means of discovering." A distinction is to be observed between the relief which goes to

the extent of the rescission of the contract complained of and that which merely restrains the sale of the incumbered lands until the title is made clear. The principle that a court of equity will not sell or permit a sale of land with a cloud hanging over the title is affirmed in a great number of cases. I think I may say, after a careful examination, that nearly, if not quite, all the cases relied upon by counsel for appellee are cases which either illustrate this principle or were suits brought for the specific performance of contracts, or were cases in which the insolvency of the vendor appeared, or in which there had been a fraudulent concealment of the defect in title, or, at the least, an ignorance of the defect upon the part of the vendee, or the vendor was taking active steps, either by suit or under a deed of trust, to collect the unpaid purchase money. I have examined the following cases and authorities cited in the appellee's brief, and feel warranted in making this statement: *Griffin v. Cunningham*, 19 Grat. 571; *Pom. Cont.* 193, 203; *Jackson v. Ligon*, 3 Leigh, 189; *Hoover v. Calhoun*, 16 Grat. 109; *Goddin v. Vaughn*, 14 Grat. 117; *Christian v. Cabell*, 22 Grat. 82; *Hendricks v. Gillespie*, 25 Grat. 181; *Bryan v. Lofftus*, 1 Rob. (Va.) 12; and *Garnett v. Macon*, 6 Call, 308.

It appears, then, that the appellee purchased a tract of land of which he has been put in possession; that he has received a deed for it, with general warranty; that his possession has been neither disturbed nor threatened; that his grantor is not insolvent, and has taken no steps, by enforcement of the deed of trust, or otherwise, to collect the unpaid purchase money; that there was no concealment of the incumbrance which rests upon the land, the existence of which was plainly set forth upon the face of the deed under which the appellee derives title to the land purchased, and of which, therefore, he must be presumed to have had notice. Upon the case stated, the law is with the appellant.

If the objection shall be urged to this conclusion that it leaves the appellee with a cloud resting upon his title, the answer is that he is in the precise position which he contracted to occupy, and, as long as he is undisturbed, has no ground of complaint which entitles him to invoke the aid of a court of equity, which, as it has been said, may "mend the consciences of men, but not their assurances." Whenever the appellant seeks to enforce his deed of trust, without having first lifted the paramount lien, a court of chancery will, at the instance of the appellee, be ready to interpose and grant such relief as the nature of his case may then require.

We are of opinion that the appellee has failed to make out a case for the rescission of his contract, and is, therefore, not entitled to the relief given him in the decree complained of, which must be reversed.

DADISMAN v. LONG et al.¹
(Supreme Court of Appeals of Virginia. Sept.
26, 1895.)

ACCOUNTING—LACHES.

L. occupied land which he claimed to own, but which the court, in certain proceedings, decided to belong to D., and ordered the same to be sold to pay L.'s liens upon the property. D. paid off these liens, and took L.'s receipt therefor. Subsequently D. sued L. for an accounting for use and occupation and waste. His proof of damage was vague and uncertain, and he made no claim for damages for 18 months after paying the liens. *Held* properly dismissed.

Appeal from circuit court, Page county; R. H. Turner, Judge.

J. W. Dadisman appeals from a decree in favor of Lee Long and others. Affirmed.

Strayer & Liggitt, for appellant. Richard S. Parks and Marshall McCormick, for appellees.

CARDWELL, J. The appellant, J. W. Dadisman, was in 1880 the owner of a tract of 43 acres of land, with buildings thereon, situated in the county of Page, the title to which was acquired by him from Elizabeth Dadisman and Sarah J. Dadisman, but subject to a life estate in one-half thereof in his brother, George H. Dadisman. In certain chancery suits pending in the circuit court of Page county, for the purpose of subjecting this land to the lien of judgments against Elizabeth Dadisman, Sarah J. Dadisman, and George H. Dadisman, a decree was entered at the April term, 1880, directing a sale of the land, and appointing three commissioners for that purpose, who afterwards, in December, 1880, offered the land for sale at public auction, when the same was struck out to Michael Long, at the price of \$400 for the interest of appellant, and \$25 for the life interest of George H. Dadisman. It appears that prior to the sale an arrangement was made by the Dadismans with Michael Long to buy in the property at the smallest sum possible, but for enough to pay the costs and the liens upon it; Long to pay the purchase money, and give the appellant three years within which to repay it, with interest, and upon the payment of the purchase money by appellant, with interest, he was to have back his land. In accordance with this agreement, Michael Long paid the cash payment to one of the commissioners of the court, but instead of executing his bonds for the deferred payments, payable, according to the terms of sale, at one, two, and three years, he, as it is claimed, arranged with this commissioner to pay off the liens against the land, asserted in the suits in which the land was sold. Michael Long did pay off all of the liens on the land prior to his death, which occurred in 1887, except a balance of about \$90, which balance was, after his death, paid by his son

and executor, Lee Long, one of the appellees here.

The appellant, after the sale, remained in possession of the land, cultivating and using it as before; but at the end of the three years, when all the purchase money was due, he was unable or did not repay it to Michael Long, with interest, as agreed, and asked for an extension of the time one year within which to redeem the land, which extension was granted by Long. At the end of the additional year given him, appellant was still in default in the payment of the amount due to Long, and Long required possession of the property, which was yielded to him by appellant, except as to the house, garden, and some patch ground, appellant retaining possession of these, and agreeing to pay Long therefor an annual rental of \$15. With the exception of the house, garden, and patch grounds occupied by appellant, Long took possession of the land, and proceeded to clear it up and cultivate it. This arrangement continued, it seems, until Michael Long's death, and until some time prior to May, 1890, when Lee Long, who claimed the property under the will of Michael Long, sued out a writ of unlawful detainer against appellant in the county court of Page county, to recover possession of the entire premises; whereupon appellant filed his bill of complaint against Lee Long and Carry Long, as devisees of Michael Long, and John M. Chapman, sheriff of Page county, alleging that Michael Long was a purchaser of this land merely in form, that appellant was the actual purchaser, that he was to have the land whenever he repaid the purchase money and interest thereon from the day of sale, that he had several times tendered the money to Long, but he had refused it; and praying an injunction to restrain the prosecution of the writ of unlawful detainer until the further order of the court, etc., that an account be taken of the value of the crops raised upon the land, and of the pasturage thereof, by either Michael Long or Lee Long, and for general relief. The injunction was granted as prayed for, and later an amended bill was filed in the cause against the same defendants and George H. Dadisman and the three commissioners appointed to make sale of the land in the creditors' suits, and by which amended bill appellant claimed damages against the Longs for their use and occupation of the property, removal of fences, and destruction of timber, the damages claimed being fixed in the amended bill at \$600, and asked to be allowed against any claim of Michael Long or Lee Long which might be asserted against complainant, J. W. Dadisman, in regard to the land. Lee Long, as executor and devisee of Michael Long, filed his answer, denying all the allegations made by complainant as to his right to the land or to redeem it, or to any damages claimed by him for the alleged depredations upon the land, and setting up a claim against complainant for valuable im-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

provements that he claimed had been made on the lands by himself and father, Michael Long.

Quite a number of depositions were taken on either side, which are in the main very conflicting; but the claim set up that Michael Long purchased the land under the agreement or understanding before mentioned seems to be clearly proven, as alleged by appellant in his original bill. It turned out during the progress of this suit that the sale of the land by the commissioners of the court in the creditors' suits against the Dadismans, in December, 1880, had never been reported to the court and by the court confirmed, whereupon one of the commissioners of sale, R. S. Parks, who received the cash payment of Michael Long, made a report to the court in the creditors' suits, and asked the confirmation of the sale; but J. G. Newman, another one of the commissioners, also made a report, differing somewhat in its statements from those made by Commissioner Parks, filing along with his report a written offer from one John Short of \$1,200 for the land, and recommending that the land be reoffered for sale, the bidding to commence at this advanced offer of \$1,200. Upon the hearing of this cause, along with the creditors' suits referred to and the commissioners' reports made therein by Parks and Newman, respectively, the circuit court, on the 22d day of April, 1891, made its decree, refusing to confirm the sale to Michael Long, and refusing to allow the Longs credit for any of their alleged improvements, and directing a resale of the property by the same commissioners, the bidding to commence at the advanced offer of \$1,200 made by John Short; but afterwards, and during the same term of the court, this decree was amended so as to give appellant, as stated in the decree, 30 days from the rising of the court in which to pay and discharge the liens upon the land, as audited in the creditors' suits, the payment of the liens to include the sums paid by Michael Long in his lifetime, or by his executor after his death, with interest. Appellant availed himself of this privilege given him by the amended decree, and within the 30 days paid off the entire amount due to the Longs, and amounting, with interest, to the sum of \$690.21; the payment being made for him through his son-in-law, Reuben Foltz, to whom Lee Long gave his receipt, stating that the money received was "in payment of liens held against the Dadisman land by himself and Michael Long." There were no other proceedings had in the cause until the September term of the court, 1892, when appellant made application to have the cause referred to a commissioner, to report what damages ought to be awarded against the defendant for loss and injury to the land involved in the suit; but the court, having heard the argument of counsel, and maturely considered the question, as stated in the decree entered September 28, 1892, decided that appellant was not entitled to

damages, as claimed, and refused to refer the cause for report on that question. It is from this decree an appeal was allowed to this court.

Counsel for appellees ask that their brief be treated as a cross appeal by Lee Long, and that the decrees of April 22 and 24, 1891, be reversed; but we are of opinion that appellee Lee Long is estopped from questioning the correctness of these decrees by the acceptance from appellant of payment in full of the entire amount of liens paid off by himself and his father, Michael Long, with interest. Moreover, we think the decree of April 22d, as amended by the decree entered April 24th, fairly and justly determines the questions at issue between the parties, and is clearly right. It only remains to be determined whether or not the decree appealed from is erroneous.

The claims set up by the complainant in the court below, in his original and amended bills, are vague and indefinite. He alleges that the lands were cultivated by Michael Long, rails removed from the premises, timber removed, and other depredations committed; but he does not state what crops were made on the place, the value thereof, nor the value of the fencing or the timber removed from the land, except in a general way, that the damage and injury sustained by him amounts to the sum of \$600; and the testimony adduced by him in support of his allegations, which it is fair to assume is all that he could adduce, is equally as vague, indefinite, and unsatisfactory. It is proven on his part by some of the witnesses that a few rails were taken from the place, but no value at all is fixed to the rails so taken. While others testify that the Longs cultivated some of the land, grazed stock thereon, the value of the land for farming or grazing purposes is not shown, and no value is affixed to the timber said to have been taken from the place; and this is the case as to all of the alleged depredations committed by the Longs upon the property. On the other hand, it is shown that the Longs cultivated and used the land by an agreement with the appellant, and that, while some of the fencing might have been moved from the place, other fencing was put up, and the land, in a general way, was in a better condition when the evidence was being taken than when Michael Long took possession of it. The proof by no means sustains the allegations in the original and amended bills as to damages claimed, and when appellant made payment of the liens on the land, as authorized by the decree of April 24, 1891, and held by Lee Long, without protest, so far as the record shows, or without assertion of any claim for an abatement of the amount due for the damages alleged to have been committed on the land, he evidently regarded at that time this settlement as the end of all controversy between him and Lee Long, appellee. The application to the court, made,

as it was, nearly 18 months after this settlement of the liens held by appellee, seems to have been an afterthought on the part of appellant; and his application was, as we think, rightly refused by the circuit court, it being perfectly apparent, from the nature of the allegations and the testimony in the record, that a reference to a commissioner and a report by him would not have put the court in any better position from which to determine the questions at issue than it occupied when the decree appealed from was made. We see no error in the decree, and, for the reasons stated, it is affirmed.

(92 Va. 789)

STROUTHER v. COMMONWEALTH.¹
(Supreme Court of Appeals of Virginia. Sept. 26, 1895.)

CRIMINAL JURISDICTION — BRINGING STOLEN PROPERTY INTO STATE.

1. Code, 1887, § 3890, providing for the punishment of certain offenses within the state when committed without the state, has no application to one bringing property stolen without the state into the state.

2. The common-law rule that where goods are stolen in one country, and brought within another country, the latter has no jurisdiction of the offense, applies to the different states of the Union.

Error to corporation court of Winchester; William T. Clarke, Judge.

Carter Strouther was convicted of bringing stolen property into the state, and brings error. Reversed.

J. M. Steck, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

HARRISON, J. The question raised in this case is whether or not one who steals property at a place beyond the jurisdiction of this state, and brings the same into this state, can be lawfully convicted of the larceny in our courts.

The attorney general relies on section 3890 of the Code, as furnishing legislative authority for taking jurisdiction in such cases. This section was only intended to define the jurisdiction of our courts to try offenses arising under certain special statutes, and has no application here.

The case of *Com. v. Gaines*, 2 Va. Cas. 172, is also relied on as a precedent to support this conviction. That case turned on the construction of a statute which disappeared from our laws in 1819, and, it may be fairly presumed, was repealed because the legislature preferred that the rule in Virginia should continue as at common law.

There being no statute in this state and no decision of this court to which we can look for an answer to the question here raised, we must turn to the common law for the rule that is to govern us. It has been a settled principle of the common law from an early

day in England that where property is stolen in one county, and the thief has been found with the stolen property in his possession in another county, he may be tried in either. This practice prevailed notwithstanding the general rule that every prosecution for a criminal cause must be in the county where the crime was committed. The exception to the general rule grew out of a fiction of the law, that, where property has been feloniously taken, every act of removal or change of possession by the thief constituted a new taking and asportation; and as the right of possession, as well as the right of property, continues in the owner, every such act is a new violation of the owner's right of property and possession. There is no principle in respect to larceny better settled than this, and it has received repeated sanction in this state. *Cousin's Case*, 2 Leigh, 709.

This rule of the common law, however, was never extended further than to counties.

Where goods were stolen in one country, and brought by the thief into another country, the latter country, by the English common law, has no jurisdiction. 1 Whart. Cr. Law (9th Ed.) § 291; *Stanley v. State*, 24 Ohio St. 166; *Com. v. Uprichard*, 3 Gray, 434.

This question has arisen in a number of the states. Some hold to the view that the states, being all under one general government, stand in the relation of counties, and that, therefore, the common law, by analogy, applies. We think, however, that the weight of authority sustains the view that the states are separate and independent; that, in the administration of criminal law, they are sovereign, and, in their respective jurisdictions and the laws which regulate their internal policy, they are as foreign to each other as each state is to foreign governments; and therefore, except in those states where statutory provision is made for the punishment of crimes committed in another jurisdiction, the common-law rule prevails, which, we have seen, furnishes no warrant for the conviction in this state of one who steals property in another state, and brings it within our borders. *State v. Brown*, 1 Hayw. (N. C.) 100; *Lee v. State*, 64 Ga. 203; and other cases.

A perpetual extradition treaty exists between the states, it being provided in the constitution of the United States (article 4, § 2) that "a person charged in any state with treason, felony or other crime, who shall flee from justice, and shall be found in another, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Under this provision of the constitution, there is no need for the guilty to escape. We sustain no relation to the accused when arrested here, charged with stealing in a place beyond the jurisdiction of this state, than that of detaining him temporarily, as a fugitive from justice, until the requisition provided

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

for can be secured to return him to the jurisdiction where his crime was committed.

A number of states have enacted laws for the punishment of crime in cases like this. Virginia has not; and the arguments for and against the policy of such laws may with propriety be addressed to the legislature. Courts must administer the law as it is.

For these reasons, we are of opinion that the corporation court of the city of Winchester was without jurisdiction to try the plaintiff in error for the crime charged in the indictment; and its judgment is therefore reversed, annulled, and set aside.

DUNFORD et al. v. JACKSON'S EX'RS
et al.¹

(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

WILLS — CONSTRUCTION — PERSONAL PROPERTY — LIEN OF LEGACY.

1. A husband, by one clause in his will, devised to his wife, during her life, a part of the "Porter" tract, to be divided by a line which left one part adjoining the homestead and the other part adjoining the "Ivanhoe" tract. By another clause he gave his executors power to sell and convey the portion of the "Porter" tract near the "Ivanhoe" tract. *Held*, a devise of that portion of the "Porter" tract next the homestead to the wife.

2. Where a devise of land includes the personal property thereon, crops growing on it at the time of the testator's death pass with the land to the devisee.

3. Where the fund out of which demonstrative legacies are payable is insufficient, the legacies must be reduced proportionally.

4. Demonstrative legacies are a prior claim on the fund out of which they are made payable.

5. A husband devised his farm to his wife for life, the remainder to his two sons in fee, together with all "personal property" thereon at his death. *Held*, that crops growing on the land at the testator's death, together with all other personal property thereon, passed to the wife for life, with remainder to the sons, while those on other land not devised, together with all moneys, bonds, and choses in action, passed to the executors.

Appeal from circuit court, Wythe county; Williams, Judge.

Bill by one Dunford and others against George Jackson's executors and others for construction of a will. From the decree rendered, part of the plaintiffs appeal. Affirmed.

Blair & Blair, for appellants. Walker & Caldwell, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Wythe county construing the will of George Jackson, deceased. The will provides for certain general pecuniary legacies to children and grandchildren, and a demonstrative legacy to the widow and to some of the children and grandchildren of the testator, about which

there is no contest. Therefore the contest over the will arises out of the following portions of the first and ninth clauses, to wit: "Clause 1st: I give and bequeath to my beloved wife the lands and appurtenances situated thereon on which I now reside, known as the 'Home Tract,' and also a portion of the tract known as the 'Porter Tract,' to be divided by a line commencing at the drawbars on the Grayson Sulphur Spring road on the east side, by a straight line to a hickory tree near the line fence; to be hers during her natural life, and at her death to be divided equally between my two sons, John S. and James M. Jackson. It is my wish that all of the personal property on my farm at the time of my death, including farming implements of all kinds, horses, cattle, sheep, and hogs shall be included in the devise to my wife and two sons, John S. and James M. Jackson." "Clause 9th. * * * It is my wish that my executors hereinafter named shall have full power to sell and convey what land I own on Brushy creek, in Carroll county, Va., and the remainder of my Porter tract of land, near Ivanhoe furnace, and out of the proceeds of sale of same to pay over to my beloved wife the sum of twenty-five hundred dollars, to be hers absolutely, to dispose of in such way as she may think proper; and to my children and grandchildren, in addition to what I have heretofore bequeathed to them, as follows: To my son Joseph Jackson, two hundred dollars; to my son Geo. Tho. Jackson, two hundred dollars; to my daughter, Mary A. Pugh, two hundred dollars; to my granddaughter Maggie Courtney, one hundred; to my granddaughter Sallie Aker, one hundred dollars."

The only error assigned by appellants, which, if error, in the court below, could affect the interests of appellants is in construing the first clause of the will so as to give to the widow for life, with remainder to John S. and James M. Jackson, that portion of the Porter place on the east adjoining the home place, it being contended that there is nothing in the record to show any intention on the part of the testator to devise that portion of the Porter tract to the widow, and that, therefore, the court should have directed an issue, and called for proof, to ascertain what was the intention of the testator in this particular. As it is admitted in the record that the Porter tract of land adjoins the home place on the east and the lands of the Ivanhoe furnace on the west, we are of opinion that the plain meaning and intent of the first part of the first clause of the will is that the home place, and that portion of the Porter place adjoining the home place and between the line indicated by the testator and the home place, is devised to the widow for life, with remainder in fee to John S. and James M. Jackson, and that by the latter part of this clause all the personal chattels on the home place, including grain harvested in the testator's lifetime, household and

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

kitchen furniture, hay, grain in barns and cribs, live stock of every description, farming utensils and implements of all kinds, are by the will bequeathed to the widow for her natural life, with remainder in absolute ownership to the said John S. and James M. Jackson. It is much more reasonable to construe the language of the will to mean that the testator's widow takes the portion of the Porter tract adjoining the home place than that it was intended to give her the portion separated from the home tract, and, in view of the fact that the testator directs the remainder of the Porter tract, after the portion intended for the wife is taken off, and situated near the Ivanhoe furnace on the west, to be sold by his executors, it is plain to our mind that the testator intended that his devise in the first clause of his will should include that portion of the Porter place next to the home place. We are further of opinion that all bonds, choses in action, and money belonging to the testator at the time of his death passed to the executors as a fund to pay debts and pecuniary legacies, and that all personal chattels not on the home place at the testator's death also passed to the executors for the same purpose; that the growing crop on the home place, and that portion of the Porter place devised to the widow for life, at the death of the testator, passed with the land to the life tenant, and that the growing crops on the land not devised to the widow for life passed to the executors, and the proceeds constitute a fund for the payment of debts and legacies; and further, that the money, choses in action, personal chattels, and growing crops not on the home place, or that portion of the Porter place devised to the widow for life, etc., together with the proceeds of the sale of the Brushy creek land and the remainder of the Porter place, directed by the testator in the ninth clause of his will to be sold by his executors, constitute a fund in the hands of the executors to pay (1) all debts of the testator, and all proper charges against his estate; (2) the pecuniary legacies bequeathed by the will, but the pecuniary legacies given by the ninth clause of the testator's will, namely, \$2,500 to the widow, \$200 to Joseph Jackson, \$200 to George Thomas Jackson, \$200 to Mary A. Pugh, \$100 to Maggie Courtney, \$100 to Sallie Aker, are demonstrative legacies, which should have priority over all other pecuniary legacies on the fund arising from the sale of the Brushy creek and Porter lands, and the same should be first paid out of said fund, if sufficient, and, if not, that the demonstrative legacies must abate ratably, and after the payment of the demonstrative legacies named any balance of the proceeds of the sale of the said lands, together with all other funds in the hands of the executors, constitutes a fund to pay all general legacies pro rata. The foregoing construction given by us to the will in question is substantially the

construction placed upon it by the court below, and, if there were any ground of complaint that could be made by any of the parties interested, other than the division of the Porter place, it does not appear that appellants are aggrieved, but the widow alone would be affected by the errors they assign, and she acquiesces in the decree of the court, and lays no claim to a greater interest than the decree gives her. The decree of the circuit court is right, and must therefore be affirmed.

(92 Va. 86)

MORGAN v. GLENDY et al.¹

(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

VENDOR AND PURCHASER—ENJOINING COLLECTION OF PURCHASE MONEY—CLOUD ON TITLE.

1. Enforcement of a trust deed to secure payment of the purchase money of land will not be enjoined by reason of an ineffectual deed in the chain of title, where a deed perfecting the title is given.

2. Though a deed in trust to secure the trustees and other creditors was in effect a mortgage, and should have been foreclosed by suit, still the trustees having sold and deeded the land, with the knowledge of the creditors, all of whom participated in the proceeds, and the action of the trustees having been ratified by a deed of the maker of the trust deed, the trustees' grantee got the legal title; and collection of purchase money by the trustees' grantee from one to whom he sold the land will not be enjoined, at the suit of such purchaser, on the ground of a cloud on the title, notwithstanding it does not affirmatively appear that the last payment due on the sale by the trustees was distributed among the creditors, they having slept on their rights for 20 years, with knowledge of all the facts, and allowed rights of others to intervene, and their conduct being unexplained, and therefore amounting to laches, barring claim against the land.

Appeal from circuit court, Pulaski county; Williams, Judge.

Suit by Joseph Morgan against J. W. Glendy and others for injunction. Decree for respondents. Complainant appeals. Affirmed.

Phlegar & Johnson and Gardner & Wharton, for appellant. I. H. Larew and J. C. Wysor, for appellees.

KEITH, P. J. W. Glendy conveyed to Joseph Morgan, on the 25th day of March, 1891, a tract of land containing 300 acres for \$10,000, all of which has been paid except the last installment, for \$3,000, due on the 31st day of August, 1893, which was secured by a deed of trust from Joseph Morgan to I. H. Larew, trustee. This land was originally owned by I. N. Naff and wife, who conveyed it to J. K. Miller and J. D. Noble in trust, to sell at public auction, and pay certain creditors of Naff, and to pay the balance, if any, to Naff and wife. On the face of the deed from Naff and wife, it appears that "Cynthia M. Naff is seised in fee of more than one-half of the real estate" therein

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

conveyed, and that she agreed to unite with her husband, and in consideration thereof she was to be paid the sum of \$2,500 out of the proceeds of sale. It was further agreed that J. K. Miller and J. D. Noble, who were themselves creditors, and the other persons whose names and seals are subscribed and set to said deed, should execute a release to Isaac N. Naff of the several debts secured to them. Miller and Noble advertised the land for sale, and J. K. Miller, one of the trustees, became the purchaser. Subsequently, in order to clear the title of the cloud occasioned by the purchase by trustee at a sale made by himself, Miller and Noble conveyed to W. J. Glendy, who immediately reconveyed to J. K. Miller, and Miller afterwards conveyed the land to J. W. Glendy, who, as before mentioned, conveyed to Morgan. When the note for the deferred payment of \$3,000 became due, the trustee I. H. Larew advertised the land for sale, and thereupon Morgan presented a bill for an injunction to the judge of the circuit court of Pulaski county, in which he sets out the title above recited, and alleges various defects therein, only two of which need be adverted to. As has been seen, a part of this land was owned in fee by Mrs. Cynthia M. Naff, who united with her husband in the deed to Miller and Noble. That instrument, however, was ineffectual to pass the title out of her, because the acknowledgment thereto was taken by James H. Darst, as notary public, who was one of the creditors secured by the deed, and who executed it. Mrs. Naff, however, has since died; and a deed from her heirs at law, conveying whatever interest she may have had in this land to Joseph Morgan, is duly signed and acknowledged for recordation, and, when recorded as it should be (and at the cost of the appellees), will, it is conceded, perfect the title in Morgan to the land therein conveyed. No further reference will be made to this branch of the case.

With respect to that portion of the land to which I. N. Naff had title in fee, and which was conveyed by his deed to Miller and Noble, the bill seeks to enjoin the sale upon the ground that it should not be sold by the trustee until the title of the complainant was perfected and all clouds resting thereon had been removed. It is alleged that the deed from Naff and wife to Miller and Noble, they being creditors secured therein, was, in legal effect, a mortgage; and this, we think, is the proper construction to be placed upon it. Being a mortgage, the regular course of procedure would have been to file a bill in equity for its foreclosure. This, however, was not done, and the question before us is as to the legal effect to be attributed to what was, in point of fact, the course pursued by Miller and Noble. Without doubt, it has placed the legal title in their allies, and the most that can be said is that it does not affirmatively appear that the whole of the last payment

due by Miller upon the sale by himself and his cotrustee, at which he became the purchaser, has been paid over and received by those entitled. It does appear that the cash payment and the first deferred payment were properly disbursed. It does appear that the greater part, indeed, I may say that all of the last payment, has been properly disbursed, except about \$250, with interest, due to Keffer, Howe, Boyd, Kirkwood, Preston, and John Jordan for their proportions of the last payment. With respect to the sums so due upon the last installment of purchase money to the parties named, the record is silent.

The question, then, is, does this constitute such a cloud upon the title as requires the court to forbid the sale of the property for the payment of the purchase money due the vendor until it has been removed? In *Koger v. Kane*, 5 Leigh, 607 (and other cases might be cited to the same effect), it is decided that a vendee in possession of land under a conveyance with general warranty may enjoin the collection of the purchase money on the ground of defect of title, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective. The same result would follow an attempt to sell under a deed of trust under like circumstances. We have here, then, all the conditions which warrant the interposition of a court, and, in addition thereto, the alleged insolvency of the grantor, provided it can be said, upon the proof exhibited in this record, that the purchaser has shown clearly that the title is defective. Naff and wife parted with their title to Miller and Noble, trustees, in December, 1876, by a deed to secure certain creditors, who, in consideration of the security thus given, executed a release of the debts due them. It appears from the record that the creditors knew of the sale made by the trustees, which took place on the 25th of August, 1877. As we have seen, all of them received a part of the proceeds of said sale, and by far the greater part of them have joined in a deed of release. A deed from I. N. Naff is filed, ratifying and confirming what was done by Miller and Noble in execution of the trust confided to them. The only apparent cloud, therefore, that obscures the title to the land which the trustee I. H. Larew offers for sale, is the possibility that the creditors, whose names have already been given, who have lain by for nearly 20 years with full knowledge of all their rights, with knowledge that this property had been conveyed for their benefit, that a sale of it had been made, and a part of the proceeds paid over to them, and who have in the meantime permitted the rights of others to intervene, may at this late day successfully assert their stale demands. This conduct would without explanation constitute such laches as would defeat their recovery. It is, of course, possible that each, or, it may be, all of them,

might satisfactorily account for their want of diligence; but it cannot be said that the purchaser, Morgan,—to use the language of Judge Tucker in *Beale v. Seiveley*, 8 Leigh, at page 675,—placing himself in their shoes as superior claimant, can show a clear outstanding title or incumbrance in them. So far from establishing clearly an incumbrance in them, the proof adduced in this case shows the apprehension of the appellant as to the insufficiency of his title to the altogether shadowy and unsubstantial, and suggests, at the utmost, a mere possibility of the existence of an outstanding charge upon the land decreed to be sold. We are of opinion that the decree of the circuit court was right, and that it should be affirmed.

(92 Va. 124)

ROBINETT'S ADM'R v. ROBINETT'S HEIRS.¹

(Supreme Court of Appeals of Virginia. Sept. 19, 1895.)

REFERENCE—EXCEPTIONS TO COMMISSIONER'S REPORT.

1. Exceptions to a commissioner's report, which point out that the commissioner erred in disregarding the instructions of court to treat a former report as correct, except as proved otherwise, are sufficiently definite to allow the trial court to review the report. 19 S. E. 845, reversed.

2. A commissioner was directed to state and settle an account, treating a former account as correct, except as it was surcharged and falsified. The commissioner rejected all items not established to his satisfaction. *Held* error.

On rehearing. Reversed.

For former report, see 19 S. E. 845.

Walker & Caldwell, for appellant. W. N. Harman, for appellees.

CARDWELL, J. This cause was decided at the June term, 1894, of this court, at Wytheville, Judge Fauntleroy delivering the opinion. 19 S. E. 845. A rehearing was allowed, and the cause was again argued and submitted at the recent term at Wytheville, and we are unable to concur in the opinion of the court rendered at the former hearing. James Robinett qualified in the county court of Bland county, at its November term, 1865, as administrator of the estate of his deceased son, Jezreel Robinett, and made three settlements of his accounts as such administrator before one J. H. Hoge, a commissioner in chancery, who had been designated or appointed, according to law, assistant commissioner of accounts, for the county court of Bland. The last settlement was made by the administrator March 1, 1879, showing a balance of principal due from the estate to the administrator of \$1,478.61, and this settlement, as well as all prior settlements, was duly reported to the county court of Bland

county, and was by that court approved and confirmed. In October, 1885, the heirs of Jezreel Robinett, deceased, filed their bill of complaint and later an amended bill, in the circuit court of Bland county, against James S. Robinett, as administrator of James Robinett, who had died, and others, the object of said bills being to surcharge and falsify the accounts of James Robinett as administrator of Jezreel Robinett, deceased, which had been settled and confirmed by the court, as before stated, and to have the accounts restated and finally settled. The defendant, James S. Robinett, administrator of James Robinett, deceased, demurred to and answered the original bill, and, the cause coming on to be heard at the November term of the circuit court, 1886, a decree was made setting forth that the complainants were entitled to have final settlement of the accounts of James Robinett as administrator of Jezreel Robinett, deceased, and to this end ordered that C. P. Muncy, who was appointed a commissioner for the purpose, should state and settle the account, and directing Commissioner Muncy to "take as the basis of his settlement the *ex parte* settlement made by James Robinett before the commissioner of accounts, and modify the same so far only as the proof before him was sufficient to change said settlements as to the items of surcharge and falsification set out in the bill, or as to other items that may be set out by statement in writing filed before him by the complainant or defendant, so as to give either party notice thereof, and the same sustained by evidence." Commissioner Muncy, in execution of this decree, and after considerable delay, made his report, and returned it to the court with the evidence and vouchers upon which it was based, whereby a balance of \$1,410.76 is shown to be due to the complainants from James Robinett, administrator of Jezreel Robinett, deceased, as of the 1st of March, 1890, instead of a balance in favor of the administrator, as shown by his former settlement. To this report the administrator of James Robinett, deceased, filed a number of exceptions. At the April term, 1891, the circuit court overruled these exceptions, and confirmed the report of Commissioner Muncy, and decreed to the complainants the sum of \$1,410.76, shown to be due by the report to them, with interest from March 1, 1890, till paid, and the costs of this suit. From this decree an appeal was allowed the administrator of James Robinett, deceased, to this court. The report of Commissioner Muncy discloses the fact that there were no transactions by James Robinett as administrator of Jezreel Robinett, deceased, after the settlement of his last account before Commissioner Hoge, March 1, 1879, which account, as we have seen, was duly confirmed by the county court of Bland county; hence this balance found against him by Commissioner Muncy was arrived at by re-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

stating all the accounts of the administrator settled before Commissioner Hoge, and the rejection by Commissioner Muncy of such vouchers as he thought should not have been allowed the administrator in his former settlements. It also clearly appears that Commissioner Muncy, in reaching the results reported by him, has totally disregarded the directions of the court given in the decree referring this cause to him to settle a final account of the transactions of James Robinett as administrator of Jezreel Robinett, deceased, and has treated the settled accounts as *prima facie* wrong instead of *prima facie* correct. These accounts settled by Commissioner Hoge, and duly confirmed by the county court of Bland county, should have been treated as correct, and conclusive as to all matters included therein, except in so far as the evidence adduced before Commissioner Muncy showed them to be incorrect. Code Va. § 2699; *Carter v. Edmonds*, 80 Va. 58, and cases cited.

The exceptions filed by James Robinett's administrator to the report of Commissioner Muncy in the court below are as follows: "(1) Though called a 'report,' it is but an argument not sustained by facts, law, or reason. (2) The report and settlement is not made upon proper or legal principle, if the data on which its assumptions are based really existed as assumed. (3) There is absolutely no testimony whatever, verbal or written, in the case, that warrants the commissioner in any way in disturbing the *ex parte* settled accounts of the administrator, James Robinett; and his assuming to do so in this case in violation of law, without evidence, after the long lapse of time and death of administrator James Robinett, deceased, makes his conclusions simply monstrous. (4) The commissioner, instead of taking the *ex parte* settlements as *prima facie* correct, and valid and binding, as the law and chancery practice prescribes, he counts the said settled accounts as *prima facie* wrong, and proceeds to take up each voucher, and item by item to pass judgment upon them, without any testimony whatever to support his conclusion, and reject such of said vouchers and items as seems to him to be wrong. This is in violation of all well-settled principles governing such settlements. (5) The report is wrong, and contrary to law in every particular. It is excepted to as a whole, and to every part of it. The testimony in the case, instead of impeaching, fully sustains, the *ex parte* settlements in every particular." The contention of appellees here is that these exceptions are not sufficient, because too general in their nature; and that for this reason alone they should have been overruled by the court below. It is true that exceptions to a commissioner's report should speci-

fy with reasonable certainty the particular grounds of objection relied on, so as to enable the opposing party to see clearly what he has to meet, and the court what it has to decide. *Crockett v. Sexton*, 29 Grat. 46; *Simmons v. Simmons*, 33 Grat. 457; *Morrison v. Householder*, 79 Va. 627; *Ashby v. Bell*, 80 Va. 811; *Cralle v. Cralle*, 84 Va. 201, 6 S. E. 12, and authorities cited. This rule is as well established in Virginia as the rule that fiduciary accounts, regularly settled and confirmed by the court having jurisdiction, are to be treated as correct until shown by proper testimony to be incorrect; but, observing this rule strictly, the exceptions to Commissioner Muncy's report must be held sufficient. They clearly point out to the court that the commissioner has fallen into the error of disregarding the directions of the court to treat the former accounts of the administrator, James Robinett, as correct, and to modify the same so far only as the proof before him should be sufficient to change them, etc.; and the exceptions are sufficient to bring up for the consideration of the trial court the question as to whether the evidence adduced before Commissioner Muncy was sufficient to warrant him in disturbing the *ex parte* settlements made by the administrator formerly. The exceptions being sufficient, the question remains whether the evidence returned with the report of the commissioner justified him in disturbing the former accounts of the administrator, James Robinett. As the commissioner himself says in his report, "A considerable part of the testimony has but very little bearing in the case," and as it is manifest that the exceptions to his report should have been sustained, and the report recommitted by the circuit court, we deem it unnecessary to discuss this evidence at length. To our minds, the evidence was not sufficient to justify the commissioner in the changes that he made in the account formerly settled by Commissioner Hoge, and duly confirmed, as we have seen, by the county court of Bland. For the foregoing reasons, we are of opinion that the circuit court of Bland county erred in overruling the exceptions taken by appellant to the report of Commissioner Muncy of March 26, 1890, and in confirming said report. Therefore its decree of April 11, 1891, must be reversed and annulled, and this cause will be remanded to the circuit court to be by it recommitted to Commissioner Muncy, or to some other commissioner of the court, for the purpose of stating and settling the final account of the transactions of James Robinett as administrator of Jezreel Robinett in accordance with the decree of the circuit court entered in this cause at the November term, 1886, and in accordance with this opinion.

(92 Va. 772)

GRAY v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Sept. 19, 1895.)

CRIMINAL LAW—REVIEW ON APPEAL—EXCLUSION OF EVIDENCE — ARREST OF JUDGMENT — OBJECTIONS TO JUROR — MANSLAUGHTER.

1. A bill of exceptions to the exclusion of evidence showing threats of deceased against the prisoner, should state the nature of the threats sought to be proved, and whether made recently.

2. Instructions are to be read together, whether given at the instance of the defendant or commonwealth.

3. A motion in arrest of judgment because of the incompetency of a juror will not be granted.

4. The failure to take exception to a juror, on the ground of his incompetency, before verdict, is fatal, where it appears that the prisoner knew the facts of the incompetency prior to the trial.

5. It appears that the prisoner had ill will towards the deceased, and had, just before the fight, threatened that he would take his life with a pistol with which he was armed; that he provoked him with words, and, after being warned, repeated them; that the deceased stooped down in the dark, as if feeling for a stone, went up to the prisoner, and struck him; and that the prisoner drew a pistol and fired three times, killing his adversary. *Held*, that a verdict of voluntary manslaughter should be sustained.

Error to circuit court, Botetourt county; Henry E. Blair, Judge.

William Gray was convicted of voluntary manslaughter, and brings error. *Affirmed*.

J. W. Marshall, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

RIELY, J. The prisoner was indicted in the county court of Botetourt county for the murder of John Barton. At the November term, 1894, of the court, he was tried, and convicted of manslaughter, and the period of his confinement in the penitentiary fixed at five years.

During the progress of the trial the prisoner offered to prove that the deceased had made "threats against him," but, it appearing that they had not been communicated to the prisoner previous to the homicide, the court refused to admit the evidence. What the threats were which he proposed to prove, the bill of exceptions does not disclose. Their nature or character does not appear. Whether they were relevant or material or proper, we have no means of determining. Nor does it appear whether they were made recently, or long prior to the killing. It is necessary that the bill of exceptions should disclose the nature of the threats, and whether they were recently made, or not, in order that we may determine upon the propriety of the admission of the evidence. The omission renders it impossible for us to consider the matter intended to be raised by this bill of exceptions; and any discussion of the important question

when, if ever, uncommunicated threats are admissible in evidence, would be out of place.

When the evidence was closed, the court, on the motion of the attorney for the commonwealth, gave the jury ten instructions, and at the instance of the prisoner, by his counsel, gave to them three instructions. The prisoner excepted to all of the instructions given for the commonwealth. Without going into a detailed discussion of them, it is sufficient to say that they correctly expound the law. They announce plain and familiar principles of the law in relation to the offense of homicide, and are expressed substantially in language that has often received the sanction of this court. See *Bristow's Case*, 15 Grat. 634; *Honesty's Case*, 81 Va. 283; *Lewis' Case*, 78 Va. 733; and *Valden's Case*, 12 Grat. 717. The three instructions given for the prisoner are as favorable to him as the most favorable view of the evidence given on the trial by himself and his witnesses would justify. All of the instructions are in fact the instructions of the court, whether given at the instance of the commonwealth or of the prisoner, and are to be read together; and, so considering them, they set forth the law of the case upon the whole evidence correctly and fairly.

After the jury had rendered their verdict, the prisoner moved the court in arrest of judgment, on the ground that one of the jurors was incompetent, which motion the court overruled. It appears from the bill of exceptions that the juror, when examined on his *voir dire*, suggested himself that he might not be competent to serve, as he was deputy sheriff when the killing took place, which was more than two years prior to the trial, and had the warrant for the arrest of the prisoner. but, on being fully examined by the court, answered that he made no arrest, and had not formed or expressed any opinion as to the guilt or innocence of the prisoner, and could give him a fair and impartial trial. He was thereupon accepted by the court as a juror, without objection from either side. The prisoner claimed that he had discovered after the jury was sworn that the said juror had not only the warrant for his arrest, but also, with a number of other persons, had pursued him for some days, and had several times visited the neighborhood in search of him. It is not the province of a motion in arrest of judgment to correct an error like the one alleged. That lies only to correct an error that is apparent on the face of the record. *Com. v. Stephen*, 4 Leigh, 679; *Watts' Case*, Id. 672; *Bish. Cr. Proc.* (3d Ed.) §§ 1282, 1285; and 4 *Minor, Inst.* (3d Ed.) pt. 1, p. 939. The ground of the objection nowhere appears in the record. This bill of exceptions was not, therefore, properly taken. But, even if the proper proceedings had been resorted to, the statement set forth in the bill of exceptions, which is not supported by the affidavit of the prisoner or any one else, did not disqualify the juror, or furnish ground for a new trial, and certainly not when the objection was not

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

brought to the attention of the court until after the verdict. *Bristow's Case*, supra.

The remaining assignment of error relates to the refusal of the court to grant the prisoner a new trial upon the ground that the verdict was contrary to the law and the evidence. The homicide was committed on July 11, 1892, as the deceased, the prisoner, and several other persons were returning home from the county court. They left Fincastle together, but after going some distance the deceased and two of the others (not the prisoner) stopped for a while. The deceased had been drinking freely during the day, and was drunk. Starting on home again, the deceased and his two companions overtook the prisoner and the persons who had gone ahead with him, they having also stopped. It was then after nightfall, and dark. When the deceased rode up, the prisoner "bantered" him for a horse trade. He replied: "All right; that there had been an old fuss between them, but that was over now." Saddles were exchanged, and the prisoner mounted the horse of the deceased, which was being ridden by his son-in-law, and rode it to the foot of the hill and back. Finding that the horse was blind, he demanded to rescind the trade, and ordered Charles Thompson, a colored man, who had changed the saddles, to put them back as they were, which he did. The deceased then mounted, and after riding up the road, away from the crowd, returned, and asked if he was on the right horse. As he came back the prisoner said, according to one witness, "That man has a grudge against me, and it must be settled," and, according to another witness, "There is an old grudge between us, and it's got to be settled now, and I'll shoot his heart out." When the deceased got back where the prisoner was, the prisoner said something to him which evidently provoked and irritated him, but which was not heard by the persons present. The deceased replied that if he said that again he would mash his mouth. The prisoner repeated it, and the deceased, after stooping down and feeling around on the ground as if looking for a stone, went up to the prisoner, and struck him. The prisoner immediately drew his pistol and fired. The deceased repeated the blow, having hold of the prisoner, and the latter again fired. The deceased then struck the prisoner a third blow, which knocked him down, and got on him, when the prisoner fired the third and fatal shot, from which the deceased died in a few minutes. The deceased had a knife, but was otherwise unarmed. His knife was picked up, after his death, some 10 steps from the place where the scuffle between him and the prisoner took place. It was unopened. Nor was there any blood upon it, or other evidence that it had been used by him in the fight. He was not seen to have a rock in his hand, or other weapon, when engaged in the fight, nor is there any evidence that any was found after his death. The last and fatal shot penetrated the body of the deceased just

above the left lung, and one of the other shots passed through his clothing at the pocket on the right side. The prisoner immediately fled, calling back, as he ran, to take care of his horse. After being a fugitive for more than two years, he returned and surrendered himself. It thus appears that the prisoner had ill will towards the deceased, and had, just before the difficulty commenced, threatened that he would take his life with the deadly weapon with which he was armed; that he provoked him with words, and, after being warned, repeated them, as if to induce the deceased to resent them; and that immediately upon being struck he used the deadly weapon with which he was armed, and continued to use it against the deceased until he had slain him. Instead of avoiding a difficulty, he seems to have invited it. The jury found him guilty of voluntary manslaughter. Upon the evidence, as certified and considered by us, under the familiar rule prescribed in such case (section 3484 of the Code), we see no ground to interfere with the verdict. The judgment of the circuit court must be affirmed.

WILLIAMS v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Sept. 19, 1895.)

BUGGERY—SUFFICIENCY OF EVIDENCE.

When defendant, charged with buggery, was under 12 years of age, and no complaint was made for 2 years, a conviction will be set aside.

Error to Highland county court; C. R. McDonald, Judge.

Brown Williams brings error to judgment entered on a verdict convicting him of buggery. Reversed.

J. C. Lightner, S. B. Sleg, and Curry & Blease, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

CARDWELL, J. The plaintiff in error, Brown Williams, was indicted at the November term, 1894, of the county court of Highland county, for the crime of buggery, under section 3793 of the Code of Virginia,—the offense having been committed, as alleged, in August, 1892,—and at the January term, 1895, was convicted, and his term of imprisonment in the penitentiary fixed by the jury at two years. A motion was made by the accused to set aside the verdict because contrary to the law and the evidence, which motion was continued to the March term of the court, 1895, when the judge of the county court overruled the motion, and entered judgment in accordance with the verdict of the jury. From this judgment a writ of error was awarded by this court, it having been refused by the judge of the circuit court of Highland county.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

The sole question to be disposed of is whether the evidence is sufficient to sustain the verdict of the jury. In treating of the offense of which the plaintiff in error is charged, Russell, in his work on Crimes (volume 1, 9th Ed., p. 937), says: "When strictly and impartially proved, the offense well merits strict and impartial punishment; but it is, from its nature, so easily charged, and the negative so difficult to be proved, that the accusation ought clearly to be made out. The evidence should be plain and satisfactory, in proportion as the crime is detestable." The evidence in this case is of such a character that we will not repeat it. Suffice it to say that it by no means clearly and satisfactorily shows that the crime of which the plaintiff in error was charged had been committed, and signally fails to identify the accused as the person who committed the offense. Moreover, the principal witness for the commonwealth, who waited more than two years before making the accusation upon which this indictment was found, states that the person whom he charges with having committed the offense was a boy that he supposed to be about 10 or 12 years of age; thereby rendering it, according to the weight of authority, extremely doubtful, to say the least, whether the plaintiff in error was capable of committing the offense for which he was indicted and convicted. Indeed, all the testimony in the case fixes his age, at the date at which this offense is alleged to have been committed, under 12 years. We are clearly of opinion, for the reasons stated, that the evidence in this case is not sufficient to sustain the verdict of the jury, and that the county court of Highland county erred in not awarding the accused a new trial; and its judgment, therefore, must be reversed and annulled, and the case remanded to that court for a new trial, to be had in accordance with this opinion.

SIMON et al. v. ELLISON et al.¹
(Supreme Court of Appeals of Virginia. Aug. 1, 1893.)

**FRAUDULENT CONVEYANCES—HOMESTEAD DEED—
SUIT TO SET ASIDE—WHO CAN MAINTAIN—
JURISDICTION—EVIDENCE OF FRAUD.**

1. The filing of a homestead deed, claiming as exempt, under the homestead law, store fixtures and certain merchandise in stock, is not a conveyance or assignment which can be attacked as in fraud of creditors, under Code, § 2460, as amended.

2. To give a court in which a homestead deed, claiming goods as exempt, is attacked as in fraud of creditors, jurisdiction over the goods, there must be a valid attachment thereof, and, the attachment being dismissed, the suit should also be dismissed.

3. Suit attacking a conveyance as in fraud of creditors cannot be maintained by creditors whose claims are not due.

4. In order to set aside an assignment as

fraudulent, it is not enough that there is evidence creating a strong suspicion that the assignee and preferred creditors had notice of and participated in the fraud, but there must be clear and satisfactory proof thereof.

Appeal from circuit court, Washington county; Sheffey, Judge.

Suit by John B. Ellison & Son and others against H. J. Simon and others to set aside a homestead deed and an assignment for creditors, with preferences, as fraudulent. Decree for complainants. Defendants appeal. Reversed.

A. H. Blanchard, for appellants. Fulker-son, Page & Hurt and H. G. Peters, for appellees.

CARDWELL, J. H. J. Simon, one of the appellants here, resided in the city of Bristol, on the Tennessee side of the dividing line between Tennessee and Virginia, and conducted business as a merchant tailor on the Virginia side from some time in 1890 to about the 2d of April, 1892. On the latter date, or about that time, he moved his residence into Virginia, and on the very day that he took up his residence here, or within two days thereafter, he made and filed for record a homestead deed, claiming as exempt, under the homestead law, provided by the constitution and laws of this state, the fixtures in his store and certain specified articles of goods and merchandise in stock, aggregating in amount \$2,177.82, and then conveyed or assigned the residue of his stock of goods and merchandise to one H. E. Jones, to secure a long list of creditors, but preferring those who are put in the first class, in amount considerably beyond the value of the goods assigned. Immediately upon the recordation of this deed of assignment and the homestead deed, appellees John B. Ellison & Son, the C. Kenyon Company et al., G. L. Kahn et al., and Boyd Jones & Co. et al., filed their several bills of complaint against H. J. Simon and H. E. Jones, his assignee, in the corporation court of the city of Bristol, assailing the deed of assignment and the homestead deed executed by Simon and recorded on April 4, 1892, as fraudulent and void, charging that they were made for the purpose of hindering, delaying, and defrauding the creditors of Simon; Jones, as alleged, having notice of Simon's fraudulent intent; and upon the filing of these several bills of complaint, attachments were sued out in each case, and levied upon the goods embraced in both deeds. Subsequently, and on April 23, 1892, upon motion of H. J. Simon, the corporation court of Bristol abated the attachments, with costs to the defendants, but overruled the motion to dismiss the bills. Upon the final hearing of the causes, which were brought on together on the bills of complaint, defendants' demurrer, and answer to each bill, and the deposition of witnesses, the corporation court of the city of Bristol overruled defendants' demurrer to each bill, decreed to the several complainants

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the amounts alleged to be due them, and set aside, as fraudulent and void, both the deed of assignment and the homestead deed. From this decree an appeal with supersedeas was allowed to this court, and upon the hearing of which this court reversed the decree of the corporation court of the city of Bristol, because erroneous in decreeing upon the bills in the cause, without causing the same to be amended, making the beneficiaries under the deed of trust of April 4, 1892, parties to the suit; and, without passing on any other question, remanded the cause to the court below for further proceedings in accordance with this opinion of the court. 80 Va. 157, 17 S. E. 836. Amended bills were filed in accordance with the opinion of this court on the former appeal, which were demurred to and answered by Simon, Jones, assignee, and the preferred creditors secured in the deed of assignment; and upon the completion of the testimony of both plaintiffs and defendants, the causes were, by order of the judge of the corporation court of the city of Bristol, for reasons stated, removed to the circuit court of Washington county; and upon the records in the several suits transmitted and certain exceptions filed by the defendants, and other pleadings filed, the circuit court of Washington county sustained certain of the exceptions (which need not be specially noticed), and overruled exceptions taken by defendants "to the deposition previously taken under the original bill, which were proved by copies of the depositions, or the originals, on re-examination of the same witnesses under the amended bills," upon the ground that the defendants "had ample opportunity at the retaking to cross-examine as to any matter stated in original depositions"; and further decreed that the deed of homestead made by Simon, dated on the — day of April, 1892, and the deed of assignment to Jones, assignee, recorded on April 4, 1892, were fraudulent and void, because made for the purpose of hindering, delaying, and defrauding the creditors of Simon; and further decreed to the several plaintiffs in the amended bills the amount alleged to be due them, respectively, fixing their priority as to the funds arising from the sale of the goods embraced in the assignment to Jones, and directing the assignee, Jones, to distribute the proceeds arising from the sale of the goods made by him according to the priorities fixed by the decree. From this decree an appeal with supersedeas was allowed the defendants to this court.

A number of assignments of error are made by appellants, but many of them need not be specially noticed, as this case is to be disposed of upon the main questions involved, viz.: (1) Whether the court should have dismissed complainants' bills, because the claims sued on were not due and payable at the time of the institution of the suits; (2) whether or not the court erred in refusing to dismiss the bills at the time the attachments were

abated; (3) whether the court erred in holding that the homestead deed was fraudulent and void, because Simon moved into the state of Virginia for the purpose of claiming a homestead exemption; and (4) whether or not the court erred in holding that the assignment to Jones was fraudulent and void as to appellees, and in decreeing priorities as to claims of appellees to the proceeds arising from the sale of the goods embraced in the assignment.

As to the first question to be considered, we are of opinion that the court should have dismissed all the bills, as to the goods embraced in the homestead deed, when the attachments were abated; and also dismissed the suits of Boyd, Jones & Co., Emel Wiel & Co., Cluett, Coon & Co., John B. Ellison & Sons, Alex Cohn & Bro., Jonas Bros., Edward R. Hawkins & Co., and the C. Kenyon Company, because the claims sued on by these plaintiffs were not due at the time of the institution of their respective suits; and the attachments were, we think, properly abated, the motion to abate being heard, as it was, upon the bills and exhibits, and the affidavit of one Waynick, and the answer of Simon, responsive to the bill in all respects, the affidavit of Simon and of one J. E. Smithdeal. Without the lien of the attachments, the court was without jurisdiction as to the homestead goods, and as to the suits instituted by Boyd, Jones & Co., Emel Wiel & Co., Cluett, Coon Co., John B. Ellison & Sons, Alex Cohn & Bro., Jonas Bros., Edward R. Hawkins & Co., and the C. Kenyon Company, as it could not be held that the filing of the homestead deed was a conveyance or assignment which could be attacked under the provisions of section 2460 of the Code of Virginia, as amended, or that the court had jurisdiction, under this section, of the suits instituted by the plaintiffs whose claims were not due when their respective suits were instituted; nor can it now be maintained that the amended bills gave the court jurisdiction that it did not have when the original suits were instituted. We are not to be understood, however, as expressing any opinion as to the right of H. J. Simon, under the circumstances surrounding him at the time of the making of his homestead deed in question, to avail himself of the benefit of the homestead exemption provided for by the constitution and laws of this state, because this question is not involved in this appeal, the court below being without jurisdiction as to the goods embraced in the deed of homestead from and after the abatement of the attachment levied thereon; but this question may be raised and determined in any proper proceedings hereafter instituted by any of the creditors of the said Simon, and, in addition to this right, the plaintiffs named above, whose suits should have been dismissed, as we have seen, upon the abatement of the attachments, are to be considered at liberty to institute any proceedings that they, or either of them, may be advised, to have set aside as fraudulent

and void the deed of assignment executed by Simon to Jones, assignee, April 4, 1892; the respective claims of these plaintiffs against Simon having become due.

This brings us to the consideration of the question whether there is error in the court below decreeing that the deed of assignment from Simon to Jones, assignee, of April 4, 1892, was fraudulent and void as to appellees. The evidence of the fraudulent intent of Simon in making this assignment to hinder, delay, and defraud his creditors is abundant; indeed, conclusive; and while it strongly tends, at least, to establish notice to Jones, the assignee, and to some of the preferred creditors secured, of Simon's fraudulent intent, the question remains, is it sufficient to fix the notice upon the assignee or these creditors that is required to justify the court below in declaring, by its decree complained of, the assignment null and void? The grounds upon which the court below declared the homestead deed and the assignment fraudulent and void are stated in the decree as follows: " * * * And the court being further of the opinion that, whether the debts of the defendants, the preferred creditors, were genuine or not, the reservation of an illegal homestead to said H. J. Simon, upon the face of said assignment, and as a part thereof, the homestead reserved amounting to more than \$2,000, and the failure of the assignee to accept the assignment until two days after the said assignment was recorded, thus leaving the property so assigned in the possession and under the control of the said H. J. Simon until the assignee accepted the same, the raising of the debt due the Dominion National Bank, of which H. E. Jones was the cashier, from \$200 to \$250, was such constructive notice to the parties claiming under the assignment of fraud in the transaction as to put them upon inquiry, and affect them with the knowledge thereof. And, the court being further of the opinion that, although the debt of L. D. Radgesky was a genuine debt, yet that he had actual notice from said H. J. Simon in his letter of February 19, 1892, to him, of an understanding between Weinman and Simon, that Weinman should be protected, as shown by the words, 'of course, he is sure that he is fully protected by me, and that, whatever happens, his interests are carefully guarded,' and that Radgesky has also actual notice in that letter of Simon's intended removal to Virginia to secure the homestead of \$2,000 allowed in Virginia, the state he was, as he wrote, 'doing business in, and which, come what may, seems to me quite an amount of exemption rights,' and that both Weinman and Radgesky had actual notice of Simon's failing and doubtful financial condition; and the court being further of opinion that their loaning him money under the circumstances enabled him to buy more goods on credit from others, while there was a secret understanding that whatever happened they should lose nothing,

and to pay for the homestead goods, if they were paid for, out of the moneys to be secured by prior liens on the other goods not paid for. * * * This statement in the decree is substantially the facts and circumstances shown by the record which bear upon the question as to whether Jones, assignee, and L. D. Radgesky, and Jacob Weinman, the preferred creditors, before referred to, had notice of Simon's fraudulent intent in making the assignment, and whether these creditors participated in the fraud. While the facts and circumstances proven in the record create a strong suspicion that the assignee, Jones, Radgesky, and Weinman had notice of the fraud, and that Radgesky and Weinman participated and aided therein, they do not, we are constrained to say, afford such proof as is required, under a well-recognized rule of law in Virginia, to justify the decree annulling the assignment,—a rule, the application of which is decisive of this case, namely: Fraud must be proved, and by clear and satisfactory testimony. Courts cannot act upon mere suspicion or presumption. *Herring v. Wickham*, 29 Grat. 628; *Kerr, Fraud & M.* 382-384; *Bump, Fraud. Conv.* 36; *Hickman's Ex'r v. Trout*, 83 Va. 490, 3 S. E. 131; *Jeffries v. Improvement Co.*, 88 Va. 869, 14 S. E. 661; *Williams v. Lord*, 75 Va. 390; *Crebs v. Jones*, 79 Va. 384; *Jones v. Degge*, 84 Va. 690, 691, 5 S. E. 799; *Saunders v. Parrish*, 86 Va. 592, 10 S. E. 748; *Moore v. Butler*, 90 Va. 683, 19 S. E. 850; *Dashiell v. Bank (Va.)* 22 S. E. 169. The party alleging fraud must clearly and distinctly prove it. The onus probandi is upon him to prove his case as charged in the bill. If the fraud is not strictly and clearly proved as it is alleged, although the party against whom the relief is sought may not have been perfectly clear in his dealings, no relief can be had. *Hord's Adm'r v. Colbert*, 28 Grat. 57; *Kerr, Fraud & M.*, supra. For the foregoing reasons, we are of opinion that the decree complained of is erroneous in all respects, except in so far as it decreed to Gerson L. Kahn against H. J. Simon the amount of his debt sued on, namely, \$325.63, with interest thereon from the 24th of March, 1892, until paid; to the C. Kenyon Company against said Simon \$419.57,—that portion of the debt sued on by the C. Kenyon Company due at the institution of its suit, with interest from April 1, 1892; to Lewis N. Dibble, a merchant under the name of Dibble & Warner, against said Simon for \$78.90, with interest from April 1, 1892; to McTeers, Payne, Hood & Co. against said Simon for \$375.20, with interest from April 4, 1892; and the decree must therefore be reversed and annulled, except in so far as it decrees to Gerson L. Kahn, the C. Kenyon Company, Lewis N. Dibble, and McTeers, Payne, Hood & Co. their respective claims against H. J. Simon, as above stated. The claims of these plaintiffs being due when their suits were instituted, the court acquired jurisdiction of

their respective suits, and it was therefore right and proper in the court to decree to these plaintiffs against H. J. Simon the amount of their respective debts sued on (*Walters v. Bank*, 76 Va. 12; *Penn v. Ingles*, 82 Va. 65; *Beecher v. Lewis*, 84 Va. 632, 6 S. E. 367; *Grubb v. Starkey*, 90 Va. 834, 20 S. E. 784), and this court will enter such order in this cause as the circuit court of Washington county should have entered, dismissing the bills of appellees.

(93 Va. 815)

MILLS v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Sept. 19, 1895.)

SEDUCTION — CORROBORATING EVIDENCE — PRESUMPTION OF CHASTITY.

1. Upon a trial for seduction under promise of marriage, an instruction that the facts of the promise of marriage and the seduction must be proved by some "corroborating" evidence in addition to that of the woman, to support a conviction, is proper.

2. The additional evidence required to sustain a conviction of seduction under promise of marriage must be such as does not emanate from the mouth of the seduced woman, and must not rest wholly upon her credibility, and must be such as strengthens and corroborates her testimony.

3. The words of the statute, "any unmarried female of previous chaste character," refer to those who have preserved their chastity and kept their persons from actual defilement.

4. The chastity of the prosecutrix is presumed, and the burden of impeaching it lies on the accused.

5. Without reviewing the evidence, the court holds that there is no corroborating evidence to sustain the prosecutrix.

Error to corporation court of Danville; A. M. Aiken, Judge.

Sydney D. Mills was found guilty of seduction of Berta Puryear, under promise of marriage, and brings error. Reversed.

Berkley & Harrison, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

KEITH, P. S. D. Mills was indicted in the corporation court of the city of Danville, at its June term, 1895, for seducing, under promise of marriage, Berta Puryear, a female of previous chaste character. Upon this indictment he was subsequently tried, found guilty, and sentenced to confinement in the penitentiary for the period of two years. To this judgment he obtained a writ of error from one of the judges of this court.

The plaintiff in error asked for six instructions, the first three of which were granted as asked for, and need not, therefore, be further considered.

The fourth instruction as asked for was in the following words: "That the facts of the promise of marriage and the seduction

cannot be proved by the unsupported testimony of the said Berta Puryear, but there must be some independent evidence in addition to hers to support the said facts of the promise of marriage and the seduction." The corporation court struck out the word "independent," and substituted the word "corroborating," so as to make the latter clause of the instruction read: "But there must be some corroborating evidence in addition to hers to support said facts of the promise of marriage and the seduction." The refusal of the court to give this instruction as asked for, and the giving of it in its changed form, are made the subjects of the plaintiff in error's first bill of exceptions.

There can be no doubt that under our statute a conviction cannot be had upon the testimony of the female seduced unsupported by other testimony. This branch of our statute has not been construed by this court except in the case of *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683; but that case affords little aid in the determination of the question here presented, because the corroborating evidence was so strong as to place it beyond the reach of all doubt or cavil. No case has occurred, it is believed, in which it has been necessary accurately to weigh and discriminate the character, quantity, or degree of supporting testimony necessary to justify a conviction; nor is it the purpose of this opinion to undertake to indicate the precise amount of corroborating testimony which would in all cases be found sufficient. It is sufficient here to say that it must be evidence which does not emanate from the mouth of the seduced female; that it must not rest wholly upon her credibility, but must be such evidence as adds to, strengthens, confirms, and corroborates her testimony. The instruction under consideration, as given by the court, seems to us properly to expound the law. Indeed, the word "independent" might have had a misleading influence upon the minds of the jury, and the word "corroborating" is the word apt and fitting and generally adopted by judges and law writers to indicate the confirmatory evidence required in this and like cases.

Nor do we think the court erred in its refusal to grant instructions Nos. 5 and 6, but it is not deemed necessary to show specifically the points in which those instructions as offered are believed to be objectionable.

After the verdict was rendered, the court was asked to set it aside upon the ground of misdirection to the jury, and that the verdict was contrary to the law and the evidence, but the court overruled the motion, and its action is the ground of the plaintiff in error's third bill of exceptions, which is accompanied by a certificate of the evidence adduced upon the trial. To constitute the crime of which the defendant has been found guilty, it is necessary to show—First, the seduction; secondly, the promise of mar-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

riage; and, thirdly, the previous chaste character of the female seduced. It was earnestly contended on behalf of the plaintiff in error that the statute, in the phrase used, "any unmarried female of previous chaste character," intends something more than a woman who has preserved her chastity and kept her person from actual defilement. There are women in whose presence every evil thought stands abashed. They are guarded by their innocence and purity, and need no other protection. They stand invulnerable in their own virtue. There are others whose dispositions are more easy and complaisant, but who would have perhaps escaped irretrievable ruin had not their confidence been secured and their apprehensions put at rest by a promise of marriage. To shield and save them from the arts of the seducer was the object of the law. It would be but a mockery to extend its protecting care only to those who have no need of its assistance. It should be here and ever the refuge and support of those who most need its protection.

It has been held in *Barker's Case*, 90 Va. 820, 20 S. E. 776, that in prosecutions of this character the "chastity of the prosecutrix is presumed by the law, and the burden of impeaching it lies on the accused." We are asked to reconsider the proposition of law here announced. We think that it properly states the rule, and in any view of it, so far as the previous chastity of the female is concerned, the evidence in this case is with the commonwealth. There is, at least, a strong conflict of testimony upon the subject; and, under the rule of decision in such cases established by section 3484 of the Code, the verdict upon that point cannot be disturbed. To sustain the conviction of the accused, however, the evidence must establish the other elements of the crime; that is to say, the seduction and the promise of marriage. Berta Puryear was put upon the stand, and, if her testimony were sufficient, the case is made out; but the law declares that no conviction for this offense shall be had upon her unsupported testimony, and without prolonging this opinion by going into a minute examination of the evidence, which would be a most unpleasant task, barren of any useful result, it is enough to say that, after a careful scrutiny of all that is contained in the record, we have been unable to discover any testimony or circumstance that tends in the slightest degree to support her statement. There is much to detract from its probability; there is absolutely nothing to corroborate or confirm it. We are therefore of opinion that, while the law of the case was correctly given to the jury by the learned judge who presided at the trial, we are further of the opinion that the facts are wholly insufficient to warrant the verdict, and that the motion to set it aside ought to have been granted.

For these reasons, the judgment should be

reversed, a new trial awarded, and the case remanded to the corporation court of the city of Danville.

(93 Va. 810)

McGAVOCK et al. v. CLARK et al.¹

(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

PERSONAL JUDGMENT—JURISDICTION.

There can be no personal decree against a defendant who is not served with process, and who does not appear.

Appeal from circuit court, Wythe county; Samuel W. Williams, Judge.

Bill by J. C. McGavock and others against O. M. Clark and others. From the judgment rendered, plaintiffs appeal. Affirmed.

Fulton & Fulton, Walker & Caldwell, and J. W. Caldwell, for appellants. Bolling & Stanley, R. G. H. Kean, Scott & Staples, and Phlegar & Johnson, for appellees.

KEITH, P. J. C. McGavock and others filed a bill in the circuit court of Wythe county against Clarence M. Clark, A. O. Denniston, S. W. Jamison, James S. Simmons, and the Max Meadows Land & Improvement Company, in which they aver that in 1890 they sold a tract of land on the south side of Reed creek, adjoining the land of the Max Meadows Land & Improvement Company, containing 262 acres, at the price of \$200 per acre, to the defendants, of which sum \$20,000 was paid in cash, and the residue bore interest from 30th day of September of the year named. The claim of the bill is that this sale was negotiated by Jacob C. McGavock, on the part of the plaintiffs, and Clarence M. Clark, on the part of and as agent for all the defendants named. The deed, which was executed in pursuance of the contract, conveys the land to Arthur C. Denniston only, and a lien for the unpaid purchase money is expressly reserved upon the face of the deed. The object of this bill is to establish the liability of the other parties named as defendants, and to have a personal decree against them as a security additional to the land itself for the money due upon it. To this bill a demurrer was filed, which appears to be upon behalf of the defendants; and in September, 1892, the court entered a decree sustaining the demurrer, with leave to file an amended bill. The amended bill was filed, and sets out more in detail the facts above stated, and, in addition, shows that there was a lien upon this property by deed to Jamison, for the benefit of the Fullers, for \$20,000, but in the main presents the same ground for relief as the original bill. Subsequently a second amended bill was filed, in order to meet certain difficulties which arose upon the coming in of the answers of the Max Meadows Land & Improvement Com-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

pany, James S. Simmons, and S. W. Jamison, who had answered the original and first amended bill. In the second amended bill the plaintiffs charge that the denials of the respondents who answer the original bill are evasive, and they, therefore, in their second amended bill, seek to probe the consciences of the defendants by calling upon them to answer 13 interrogatories, answer under oath as to the residue of the bill being expressly waived. To this amended bill, the Max Meadows Land & Improvement Company, S. W. Jamison, and James S. Simmons filed their answers. The answer of James S. Simmons does not appear in the printed record, but counsel admit by a written stipulation that his answer was filed in the cause, and is in all respects identical with that of S. W. Jamison. Clark and Denniston have not answered, are nonresidents, and there has been no service of process upon them, and it seems that no one has been authorized to appear for them. Upon the pleadings thus made, evidence was taken, and the cause was submitted to the judge of the circuit court for decision, who entered a decree dismissing the bill as to all of the defendants except Denniston, and decreeing, as to him, the full amount of the purchase money remaining unpaid, and, with a view to the sale of the land under the vendor's lien, directed certain accounts to be taken. From that decree the plaintiffs have appealed, which brings the case before us for review.

There are many questions of interest presented with much learning and ability upon the brief of counsel for the appellants, which, in the view taken of the case by the court, it will be unnecessary to consider. It seems to us that, however the law may be upon the subject discussed by the appellants, the facts of the case are plainly against them. Against Denniston the court decreed in their favor all that was prayed for; against Clark, who never appeared in person or by counsel, there could be no personal decree; while with respect to the other defendants, the Max Meadows Land & Improvement Company, James S. Simmons, and S. W. Jamison, there is a total absence of evidence to justify the court in granting the relief sought against them. For the foregoing reasons, we are of opinion that there is no error to the prejudice of the appellants in the decree complained of, and that the same must be affirmed.

McFARLAND v. MOOMAW et al.¹

(Supreme Court of Appeals of Virginia. Sept. 19, 1895.)

VENDORS' LIENS—PRIORITY—CONSTRUCTION OF CONTRACT.

Defendant being unable to pay plaintiff a balance due on the purchase of land, the latter agreed to extend the time of payment, pro-

vided T. paid a portion of the money due. It was agreed that T. was to be substituted to the lien of plaintiff, for the sum paid and any amount that he might thereafter pay, and that, when the whole was paid, plaintiff would deed to defendant and T. in proportion to the amounts paid by them. *Held*, that T. became a purchaser of the land to the extent of his payments, and that plaintiff's lien for the balance of the purchase money should be first paid, and after that the sums paid by T.

Appeal from circuit court, Roanoke county; Henry E. Blair, Judge.

Bill by Sarah McFarland against B. F. Moomaw and others. From the decree rendered, plaintiff appeals. Reversed.

Phiegar & Johnson, for appellant. G. W. Hansbrough, for appellees.

KEITH, P. It appears from the record that in the year 1880 Sarah McFarland sold to B. F. Moomaw a tract of land in the county of Roanoke for \$10,000, payable in 10 years, the interest payable annually, and in default of payment of interest or principal the land was to be surrendered to the vendor. In the year 1890 default was made in the payments, and the debt due to Mrs. McFarland was ascertained to be about \$9,000. Moomaw desiring an extension of time, a new contract was entered into, bearing date April 1, 1890. This agreement is in the following words: "This agreement, made and entered into on the 1st day of April, 1890, between B. F. Moomaw, party of the first part, Charles B. Trout, Mrs. Sarah C. Trout, and Mrs. Mary F. Moomaw, parties of the second part, and Mrs. Sarah McFarland, party of the third part, witnesseth: That whereas, the party of the first part is due and owing to the party of the third part the purchase money for the hundred acres, more or less, on the south side of Roanoke river, in Roanoke county, which purchase money, with its interest, now amounts to about the sum of nine thousand dollars; and whereas, the party of the first part is unable at this time to pay the same, and the party of the third part is willing to extend the time upon the terms hereinafter stated: Now, therefore, it is agreed that in consideration of the sum of twelve hundred dollars, cash in hand, paid by the parties of the second part to the party of the third part, and the further sum of five hundred and ten dollars to be paid on the 1st day of August, 1890, and such other sums as the parties of the second part may hereafter pay for and on account of said debt at the request of the party of the first part, the parties of the second part shall be substituted to the lien of the party of the third part for all and each of said sums of money so paid or to be paid; and, whenever the entire purchase money shall be paid to the party of the third part, then the party of the third part shall convey said tract of land to the parties of the first and second part, and they shall hold the same in proportion to the several amounts of money paid by them, respectively. And the party of the third part, in consideration of

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the prompt payment of the interest annually upon the purchase money on the first day of August, does hereby agree to extend the time of the payment of the principal of said purchase money for five years from the 1st of August, 1890, but, should interest at any time remain unpaid for the period of three months after the first day of August, then the party of the third part shall have the right to have said land sold to satisfy the unpaid purchase money. And the parties of the first and second part agree that the said farm shall be managed and used in a good, farm-like manner; that all buildings and fences shall be kept in good repair; and that no waste of any kind shall be committed on said farm. Witness the following hands and seals, this, the day and year first above written: B. F. Moomaw, Jr. [Seal.] Chas. B. Trout, [Seal.] Sarah C. Trout. [Seal.] Mary F. Moomaw. [Seal.] Sarah McFarland. [Seal.]" Under this agreement the parties of the second part paid the sum of \$1,200, and the further sum of \$510; but Moomaw, the party of the first part, having paid the interest for the years 1891-92, made default in the payment of the interest for the year 1893. On the 2d of January, 1893, B. F. Moomaw, the original purchaser, and Mary F. Moomaw, Charles B. Trout, and Sarah C. Trout, named as parties of the second part in the contract of 1890, sold the land to Boliver S. Webb at the price of \$21,000.

In December, 1893, Sarah McFarland filed a bill in which she made B. F. Moomaw, Mary F. Moomaw (his wife), Joel E. Moomaw, Mrs. Sarah Good, George W. Hansbrough, L. C. Hansbrough (as trustee, and as administrator of Mrs. Sarah C. Trout), Chas. B. Trout, and B. S. Webb parties defendant. Sarah Good, Charles B. Trout, and L. C. Hansbrough, administrator of Sarah C. Trout, filed their answers to said bill; and, upon the pleadings so made and exhibits filed, a decree was made, passing upon the rights of the parties. The papers in this cause appear to have been lost or mislaid, and cannot now be produced. It appears, however, that on the 8th day of January, 1894, a decree was entered construing the agreement of April 1, 1890, which was filed as an exhibit with the bill; and the court being of opinion that the parties of the second part to the agreement were entitled to a lien upon the land mentioned in the bill, for the money paid by them under the said contract, superior to that of the complainant, Sarah McFarland, decreed that John E. Penn, who was appointed a commissioner for that purpose, should, unless the unpaid purchase money due on said land was paid within 30 days, sell the same at public auction to the highest bidder, upon the terms set out in said decree, and from the proceeds of the sale, after paying costs of suit and sale, he was directed to pay to Charles B. Trout, or to G. W. Hansbrough, his attorney, the sum of \$500, and L. C. Hansbrough, administrator of

Sarah C. Trout, the sum of \$1,200, with interest on both of said sums from April 1, 1890, until paid; and to Mrs. Sarah McFarland, the sum of \$7,300, with interest from April 1, 1890, subject to a credit of \$438 paid August 1, 1891, and \$438 paid August 1, 1892,—directing him to report his proceedings to the court. At a subsequent day, Sarah McFarland filed a petition praying that this decree might be reheard. To this petition L. C. Hansbrough, as administrator of Sarah C. Trout, deceased, and Charles B. Trout in his own right, filed their joint demurrer and answer; and the cause coming on to be further heard before the judge of the circuit court of Roanoke county, in vacation, on the 26th day of July, 1894, it was ordered that the prayer of the petition for the rehearing of the decree entered at the January term, 1894, should be denied; and, after making some modifications of that decree which do not affect the questions now presented for our consideration, the petition was dismissed. From this decree, Sarah McFarland obtained an appeal from one of the judges of this court.

The sole question to be considered is whether or not Charles B. Trout and Sarah C. Trout acquired liens superior to that of Mrs. McFarland upon the land sold by her to B. F. Moomaw. About the facts of the case there seems to be no controversy. It is not disputed that on the 1st day of April, 1890, B. F. Moomaw owed upon the purchase made by him from Mrs. McFarland about the sum of \$9,000, that he was unable to pay it, and that she was pressing for the money. The contract of April, 1890, was thereupon entered into, which, after stating the amount due, the inability of Moomaw to pay the same, and the willingness of Mrs. McFarland to extend the time upon the terms set out in the agreement, provided that the sum of \$1,200 in cash should be paid by the parties of the second part to Mrs. McFarland, and that the further sum of \$510 should be paid on the 1st day of August, 1890, and that for these and such other sums as the party of the second part might thereafter pay, for and on account of said debt, to Mrs. McFarland, at the request of the party of the first part, the contract provided that the parties of the second part, to wit, Charles B. Trout, Sarah C. Trout, and Mary F. Moomaw, should be substituted to the lien of Mrs. McFarland, and that, whenever the entire purchase money should be paid to Mrs. McFarland, she should convey the said tract of land to B. F. Moomaw, the original purchaser, and the Trouts and Mary F. Moomaw, in the proportion of the several amounts of money paid by them, respectively. Now, the contention of the appellees is that by virtue of this arrangement the parties advancing the money for B. F. Moomaw acquired a lien upon this land superior to that of Mrs. McFarland. If this had been the object, all that would have been necessary was that Mrs. McFarland should assign to those advancing the money

her lien, as against Moomaw. It was unnecessary that Moomaw should have been a party to the transaction at all. The effect, however, of the provision to which we have just adverted, is to make the parties of the second part purchasers of the land in proportion to the amounts of money paid by them, and upon the payment of the whole purchase money they became entitled to a conveyance. We are therefore of opinion that the lien for the unpaid purchase money due Mrs. McFarland by B. F. Moomaw upon the purchase of the land in the bill mentioned is unaffected, as to its priority, by anything contained in the contract dated April 1, 1890; and we are further of opinion that there is due her, as vendor, for the unpaid purchase money, the sum of \$7,300, with interest from the 1st of April, 1890, subject to a credit of \$438 as of August 1, 1891, and to a like sum as of August 1, 1892, and that Charles B. Trout has a lien for the sum of \$500, and L. O. Hansbrough, administrator of Sarah C. Trout, a lien for the sum of \$1,200, with interest on both of said last-mentioned sums from the 1st of April, 1890, until paid. The two liens last mentioned are, between themselves, of equal dignity, but are both subordinate to the lien of Mrs. McFarland. We are therefore of opinion that the decree of the circuit court is erroneous, and that the same must be reversed and annulled.

(32 Va. 118)

NORFOLK & W. R. CO. v. CLARK.¹

(Supreme Court of Appeals of Virginia. Sept. 19, 1895.)

APPEAL FROM JUSTICE—AMOUNT OF JUDGMENT.

1. Code 1887, § 2947, as amended March 1, 1894, provides: "If a judgment of a justice be for a sum exceeding \$10 and not exceeding \$20, exclusive of interest and costs, the justice rendering it may stay execution on it forty days. * * * From any such judgment, the justice may, within ten days, * * * allow an appeal where the matter in controversy, exclusive of interest, is of greater amount or value than \$10." *Held*, that an appeal does not lie to a judgment of \$10, exclusive of costs.

2. By "matter in dispute" is meant the subject of litigation, and it does not include costs in determining the right of appeal.

Error to circuit court, Pulaski county; S. W. Williams, Judge.

Action by P. B. Clark against the Norfolk & Western Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Moore & Hull and Phlegar & Johnson, for plaintiff in error. J. C. Wysor, for defendant in error.

HARRISON, J. In this case judgment was rendered by a justice of the peace for Pulaski county in favor of P. B. Clark against the Norfolk & Western Railroad Company

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

for \$10, the sum claimed as damages for killing a steer, and costs of judgment, \$2.70, consisting of \$1 magistrate's fee, \$1 witnesses' fees, and 70 cents constable's fee. The justice denied an application for an appeal to the county court of Pulaski, upon the ground that the matter in controversy did not exceed \$10. Thereupon the defendant company presented to the judge of the circuit court of Pulaski a petition praying for a writ of mandamus to compel the justice to grant the appeal. This petition being refused, a writ of error and supersedeas was awarded to this court.

The sole question presented by the record is whether, under section 2947, Code Va. 1887, as amended March 1, 1894, costs are to be included as forming a part of the matter in controversy in computing the sum fixed by the statute as the limit of appeal to the county court from the decision of a justice. So much of section 2947 as is necessary to be read in considering this question is as follows:

"If a judgment of a justice be for a sum exceeding ten, and not exceeding twenty dollars exclusive of interest and costs, the justice rendering it may stay execution on it forty days from its date. * * * From any such judgment, the justice rendering it may, within ten days, on such security being given as he approves, for the payment, and all costs and damages, (if it be affirmed) allow an appeal, where the matter in controversy exclusive of interest, is of greater amount or value than ten dollars."

In construing a statute we must look for the legislative intent, and, if possible, gather it from the statute itself. No one can read this provision of the law without being impressed with the legislative purpose to afford a summary and speedy settlement of trifling controversies before justices of the peace. Delays are avoided by providing that there shall be no stay of execution and no appeal unless the judgment is for a sum greater than the minimum named.

It is provided that if the judgment of the justice is for a sum exceeding \$10 and not exceeding \$20, exclusive of interest and costs, he may stay execution for 40 days. It is clear that no stay of execution is allowed, however large a sum may have been adjudged for costs. The section then reads as follows: "From any such judgment the justice may grant an appeal," etc.

Giving the words "such judgment" the meaning they would seem to derive from the context, the statute, so far as applicable to this case, would read as follows: "From any such judgment amounting to ten dollars, exclusive of interest and costs, the justice may grant an appeal, where the matter in controversy, exclusive of interest, is of greater amount or value than ten dollars."

It is contended that the latter part of the section excludes interest, but not costs, and that costs were intended, therefore, to be in-

cluded as part of the matter in controversy. It must be observed, however, that the first part of the section, excludes both interest and costs. It was unnecessary to repeat the exclusion of either. The repetition added nothing to the force or clearness of the law, and the unnecessary repetition of the exclusion of interest cannot mean that costs are to be included. For costs to be regarded or computed as part of the matter in controversy, the legislature must so declare in express terms.

Taking this section as a whole, and gathering from its very terms the manifest purpose of the legislature, already adverted to,—that is, to have a summary and speedy conclusion of small controversies before justices,—and reading it in the light of the general legislative policy in regard to appeals, we conclude that the reasonable and legitimate construction of the statute is that there can be no appeal from the judgment of a justice unless the matter in controversy, exclusive of interest and costs, is of greater amount or value than \$10.

There is, however, another view that seems to us conclusive of this question. It is insisted that the latter part of section 2947 is to be considered by itself in determining the right of appeal from a justice. This provision is as follows: "From any such judgment the justice may allow an appeal where the matter in controversy exclusive of interest, is of greater amount or value than ten dollars."

As the matter in controversy, exclusive of interest, must exceed \$10, in order to give the right of appeal, the question arises, what is the matter in controversy?

These words have received judicial interpretation by this court. Judge Burks, in *Harman v. City of Lynchburg*, 33 Grat. 38, quotes with approval the following exposition of their meaning by Mr. Justice Field in *Lee v. Watson*, 1 Wall. 337: "By 'matter in dispute' is meant the subject of litigation, the matter for which the suit is brought, and upon which issue is joined, and in relation to which jurors are called, and witnesses examined." It is, however, contended that the numerous decisions of the state and federal courts holding costs to be no part of the matter in controversy are not applicable in determining the right of appeal from a justice, because they relate to the jurisdiction of the courts by which they were pronounced, and in fixing said jurisdiction costs are expressly excluded by statute. It is so manifest upon principle, and for reasons of public policy, that costs should not be included in deter-

mining the right of appeal, that we do not doubt the decisions referred to would have been the same if there had been no statute on the subject. It is contended that the exclusion of costs by statute shows the opinion of the legislature to have been that costs formed a part of the matter in controversy. You cannot exclude what was never included, and therefore the legislative purpose seems rather to have been to put the question beyond the realm of controversy, and to emphasize the fact that costs did not form a part of the matter in controversy, and could not be so regarded. The subject of controversy exists before the suit is brought. The suit is the result which follows the existence of a matter of controversy. Costs follow as an incident in the growth or progress of the suit. There can be no costs until the matter in controversy has culminated in a suit, and costs can in no way alter the nature or change the character of the matter in controversy. So far as we have had access to authorities, not one has been found holding costs to be any part of the matter in controversy. On the contrary, costs are everywhere regarded as adventitious and merely incidental, and in no way affecting the jurisdiction. As an incident of the controversy, costs are taxed under statutory authority, to pay officers who have rendered services in the case, or for witnesses who have testified.

Under the construction of this statute contended for by the plaintiff in error, that costs are to be treated as part of the matter in controversy, the judgment of a justice could never be final, notwithstanding the plain purpose of the legislature to make it so, for the reason that, if the litigants saw proper, either side could unnecessarily increase the costs, and thus secure the right of appeal, no matter how small the sum for which the suit was brought. In this way the power and right of the legislature to regulate the matter of appeals would be defeated, and transferred to the litigants, to be determined as their caprice might dictate.

The legislature has said that there shall be no appeal from a justice except when the matter in controversy, exclusive of interest, exceeds \$10; and, as we have seen that costs form no part of the matter in controversy, it follows that costs are not to be computed by the justice in determining the right of appeal from his judgment.

For the foregoing reasons we are of opinion that the circuit court properly refused to award the writ of mandamus prayed for by the plaintiff in error, and its judgment is therefore affirmed.

(93 Va. 791)

BERTHA ZINC CO. v. MARTIN'S ADM'R.
(Supreme Court of Appeals of Virginia. Aug. 8, 1895.)

**OBJECTIONS TO PLEADINGS—INJURY TO EMPLOYE—
NEGLECT OF MASTER—ASSUMPTION OF
RISK—REASONABLE CARE.**

1. An objection that there is a variance between the evidence and the allegations should be made at the trial, so that the opposite party may be given the opportunity to amend, under Code 1887, § 3384.

2. It is not negligence per se in an employe to warm his hands in cold weather at a fire where dynamite is being thawed, where there is evidence that the fire was built for the purpose of allowing the employes to warm themselves, as well as thawing dynamite, and that the master knew that his servants were so using the fire.

3. In entering an employment, the servant assumes such risks as are ordinarily incident to the employment, from causes open and obvious to him, the dangerous character of which he had an opportunity to ascertain; and he must exercise reasonable care and caution for his own safety while in such service.

4. The court instructed the jury: "It is the duty of the master to provide safe, sound, and suitable appliances and instrumentalities for the use of the servant, and to provide generally for his safety in the course of the employment, and to use proper diligence to avoid exposing the servant to extraordinary risk." *Held* erroneous, in that it made such duties absolute, and not simply to use such care as reasonable and prudent men use under the circumstances.

5. A court is bound to give any instruction asked for by either party which correctly expounds the law upon any evidence before the jury.

6. In thawing dynamite, such reasonable care is required of the master as is commensurate with the danger which may reasonably be apprehended from such use, and such ordinary care as reasonable and prudent men under like circumstances use in thawing the same.

7. Ordinary care depends upon the circumstances of the particular case, and is such care as a person of ordinary prudence, under all the circumstances, would have exercised, and must be ascertained by the general usages of the business.

8. The master is not bound to use the newest and best appliances, but may furnish those of ordinary character and reasonably safe.

9. Allowing evidence to be introduced after both parties have announced that they have finished rests in the sound discretion of the court, and its action will not be held erroneous unless the error plainly appear.

10. Expert evidence should not be allowed after both sides have concluded their testimony.

Error to circuit court, Wythe county; Samuel W. Williams, Judge.

Action by Samuel Martin's administrator against the Bertha Zinc Company. Judgment for defendant, and plaintiff brings error. Reversed.

In the opinion, reference is made to a number of instructions offered by both sides and given by the court, which are as follows:

"Plaintiff's Instructions.

"No. 1 (as given). Duty of Master: The court instructs the jury that, before using a high dangerous explosive, it is the duty of

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the master to ascertain and make known to his servants the dangers to be reasonably apprehended from its use, and the proper method of manipulating it with reasonable safety; and the ignorance of the master as to the dangers to be apprehended from its use, or the proper methods of manipulating it, will furnish no excuse when the master, by the exercise of reasonable diligence, could have obtained such knowledge.

"No. 2 (as given). The court instructs the jury that if they believe from the evidence that it is dangerous to thaw frozen dynamite by an open fire, and that the method of thawing dynamite by an open fire is not reasonably safe, and that such dangers could be avoided or greatly reduced by the use of appliances and methods which were within easy reach of the master, and that the existence of such danger and the means of avoiding it or greatly reducing it were known to the master, or by the exercise of reasonable care and diligence on his part could have been known to him, that it was a duty that the master owed his servants to adopt such methods and use such appliances as were reasonably safe, and any other methods which were not reasonably safe will not excuse the master for injuries to the servant resulting therefrom.

"No. 3 (as given). The court instructs the jury that the servant assumes the ordinary risks incident to the service after the master has used proper care, diligence, and caution for the safety and protection of the servant, commensurate with the danger to be reasonably apprehended from the service; and if the master fails to use such care and caution, and an injury results therefrom, it is not a risk incident to the employment, and the master is liable therefor, unless the danger was open and apparent or the servant had actual knowledge thereof.

"No. 4 (as given). The court instructs the jury that while the master is not required to use the highest degree of care, or the latest, most-approved, and expensive appliances, yet, in using high dangerous explosives, the master owes a duty to his servant to employ experienced agents who know the dangers ordinarily incident to its use, and the proper methods of manipulating it with reasonable safety, to have his servants whose duties bring them in contact therewith properly instructed and informed as to such dangers, and to adopt such reasonably safe methods and use such well-known and practical appliances to avoid or lessen accidents as are reasonably safe and well adapted to promote safety and give protection to the servant.

"No. 5 (as given). The court instructs the jury that if they shall believe from the evidence that on the day on which plaintiff's intestate, Samuel Martin, was injured, he, the said Samuel Martin, had been placed by the defendant company to work at a place of safety, and that said Samuel Martin (with

the knowledge and in the presence of the agent of the defendant company who was in authority over said Samuel Martin) left his said place, and went a short distance to a fire, and was there injured by the negligence of the defendant company; and if the jury shall further believe from the evidence that the said Samuel Martin, in leaving his said place of work and in going to said fire, had reasonable and proper cause for so doing, and which cause was sanctioned by the defendant company,—then the said Samuel Martin, in so doing, was not thereby guilty of such contributory negligence as to bar a recovery in this action."

"Defendant's Instructions Asked.

"And the defendant asked the court to give to the jury the seven instructions following, to wit:

"No. 1 (as given). The court instructs the jury that negligence cannot be assumed in this case against the defendant company, but the burden of proving negligence is on the part of the plaintiff, who alleges it.

"No. 2 (refused). The court instructs the jury that the degree of caution, care, and diligence exacted by the law of the defendant company, in providing appliances, methods of work, and means of safety for the employes in thawing dynamite, was only ordinary and reasonable care, caution, and prudence in providing and adopting reasonably safe appliances and methods in thawing said dynamite. Therefore, if the jury shall believe from the evidence that the method of thawing dynamite by the defendant company, at the time the injury occurred from the explosion complained of, was the method of thawing dynamite before an open fire, in the open air, and if the jury shall further believe from the evidence in this case that the method of thawing dynamite was reasonably safe, then the court instructs the jury that the defendant company was not negligent in using that mode of thawing dynamite, and the jury will find for the defendant.

"No. 3 (refused). The court instructs the jury that while the master assumes the duty of providing reasonably for the safety of his employes, yet such employe has also the duty to take care of himself; and such employe, if he goes into a dangerous employment, assumes all of the dangers, perils, and accidents that are ordinarily incident to such dangerous employment. Therefore, if the jury believe from the evidence that the injury complained of in this case was produced by the purely accidental occurrence of the explosion of dynamite, and that the defendant company, in the performance of its duty, had exercised reasonable care, and that the injury occurred under such circumstances, with the use of such methods and appliances, as were reasonably safe and ordinarily used and adopted by other companies using similar dynamite, then there can be no recovery in

this case for the plaintiff, and the jury must find for the defendant.

"No. 4 (refused). The court instructs the jury that where a servant has been assigned to do work at a particular place, wanders voluntarily away from his post of duty, prompted by curiosity, idleness, or otherwise, and is injured, he has no remedy against his employer. Therefore, if the jury shall believe from the evidence that Samuel Martin, the deceased, was employed by the defendant company to work at drilling earth, on top of a bank at its mines, and that his duty was, with a drill, pick, or shovel, to drill a hole in said earth, and that it was a safe position; and if the jury believe from the evidence that the said Samuel Martin voluntarily and without the direction of the said defendant company or its agents, left said position to which he was assigned, and exposed himself to danger by going to a fire at which dynamite was being thawed by other servants of the defendant company, and that said Samuel Martin was injured by an explosion of said dynamite at said fire, to which he went voluntarily and without the direction of the defendant company or its servants,—then the said Samuel Martin cannot recover for an injury thus sustained.

"No. 5 (refused). The court instructs the jury that if they believe from the evidence that Samuel Martin's post of duty or place of work was not at the fire where the dynamite was being thawed, but that he went there for a purpose unconnected with his business, and without being requested or ordered to go there, and that, by reason of his leaving his post of duty, he was injured, then his own negligence contributed to his death, and the defendant is not liable therefor; and they will find for the defendant.

"No. 6 (refused). The court instructs the jury that it is not necessary for the defendant company to have adopted the most modern methods for the thawing of dynamite, nor such as are safest for use, nor is it necessary that the company should have provided such means or methods as would absolutely insure the safety of its employes; but the court instructs the jury that in the thawing of dynamite it was only necessary for the defendant company to have exercised reasonable and ordinary care in the adoption of the method of thawing said dynamite used by the company was a reasonably safe one, or such as from practical experience had been found to be reasonably safe, then the defendant company was not guilty of negligence in adopting and using such method of thawing its dynamite.

"No. 7 (refused). The court instructs the jury that if they believe from the evidence that thawing dynamite by an open fire is reasonably safe, and the method ordinarily used by persons thawing dynamite, then the defendant was not guilty of negligence in thawing in this way, and the plaintiff can-

not recover damages for any injury caused therefrom."

"Court's Instructions.

"No. 2 (as given). The court instructs the jury that the degree of caution, care, and diligence exacted by the law of defendant company in providing appliances, methods of work, and means of safety for its employes in thawing dynamite, was such ordinary and reasonable care, caution, and diligence in providing and adopting reasonably safe appliances and methods in thawing dynamite as were commensurate with the danger which might reasonably be apprehended therefrom; and, if the jury shall further believe from the evidence in this case that the method of thawing dynamite used by the defendant at the time of the injury complained of was reasonably safe, then the court instructs the jury that the defendant company was not negligent in using that mode of thawing dynamite.

"No. 3 (as given). The court instructs the jury that where a servant who has been assigned to work at a particular place, without any reasonable or proper cause for so doing, voluntarily goes away from his post of duty, and is injured in consequence thereof, he has no remedy against his employer. And if the jury shall believe from the evidence that Samuel Martin, the deceased, was employed by the defendant company to work at drilling earth on top of a bank at its mines, and that his duty was, with a drill, pick, or shovel, to drill a hole in said earth, and that it was a safe position; and if the jury shall further believe from the evidence that the said Samuel Martin voluntarily, and without the direction of the defendant company or its agents, and without any reasonable or proper cause for so doing, left said position to which he was assigned, and voluntarily exposed himself to known danger, by going to a fire at which dynamite was being thawed by other servants of the defendant company, and that the said Samuel Martin was injured by an explosion of said dynamite at said fire to which he went voluntarily, and without the direction of the defendant company or its servants, and without any reasonable or proper cause for so doing; and if the jury further believe from the evidence that the said Samuel Martin in so doing was guilty of negligence which proximately contributed to his injury,—then the said Samuel Martin's administrator cannot recover for an injury thus caused.

"No. 4 (as given). The court instructs the jury that in thawing dynamite it was the duty of the defendant company to exercise such ordinary care and caution in the adoption and the use of methods therefor as were reasonably safe and commensurate with the danger which might be reasonably apprehended therefrom; and if the jury shall believe from the evidence that the defendant

company, in thawing dynamite at the time of the injury to said Samuel Martin, did exercise such care and caution as is above stated, and that the method of thawing dynamite as used by the defendant company was reasonably safe and commensurate with the danger reasonably to be apprehended, then the defendant company was not guilty of negligence in the adoption and use of such methods.

"No. 5 (as given). The court instructs the jury that a servant entering into a dangerous employment assumes such risks as are ordinarily incident to the employment from causes open and obvious to the servant, the dangerous character of which he had opportunity to ascertain, and he must exercise reasonable care and caution for his own safety while engaged in the master's service; and it is the duty of the master to provide safe, sound, and suitable appliances and instrumentalities for the use of the servant, and to provide generally for his safety in the course of the employment, and to use proper diligence to avoid exposing the servant to extraordinary risk."

F. S. Blair and John C. Blair, for plaintiff in error. Walker & Caldwell, for defendant in error.

BUCHANAN, J. It is assigned as error that while the declaration avers that the defendant's intestate was required by the plaintiff in error to work near by a fire where dynamite was being thawed, and which place of work was improper, unsafe, and dangerous, on account of its proximity to the dynamite, the proof shows that the intestate was not at his place of work, but had gone from it to a fire where the dynamite was being thawed from 15 to 50 feet distant, and received the injuries which caused his death at the fire, and not at his place of work, and that, therefore, there was a variance between the pleading and proof, for which the judgment of the court should be reversed and the verdict of the jury set aside. If there was such a variance as that complained of, the objection ought to have been made in the trial court, either by objecting to the evidence when offered, or by a motion to exclude after the evidence had been received. Section 3384 of the Code was enacted to obviate the difficulties which frequently arise after a trial has been commenced, when it appears that there is a variance between the evidence and allegations in the pleadings, by allowing the pleadings to be amended upon such terms as to continuance and costs as the court may deem reasonable, or by directing the jury to find the facts; and after such finding, if the court be of opinion that the variance was such as could not have prejudiced the opposite party, it gives judgment according to the right of the case.

The objection now made for the first time should have been made in the court below,

so that the plaintiff in that court might have had an opportunity to have moved the court to have adopted the one or the other of the courses provided by the statute. Having failed to do this, we do not think that the question can be raised here for the first time, and this assignment of error must be overruled.

The assignment of error as to the notice for taking the depositions of witness Walker in this cause, and in two other causes by different plaintiffs against the same defendant, was waived in the oral argument.

Errors are assigned as to the action of the court in allowing certain questions to be asked and answered by certain witnesses introduced by the defendant in error as experts, as shown by bills of exceptions Nos. 4, 5, 6, and 7. We see no error in the court's action in allowing such evidence to go to the jury, and these assignments of error must be overruled.

Nor do we see that the court erred in its rulings referred to in bills of exceptions numbered from 8 to 19, inclusive, in allowing certain questions to be asked and answered, and in refusing to allow certain other questions to be asked. The assignments of error based upon these bills of exceptions must also be overruled.

The defendant in error moved the court upon the trial of the cause to give five instructions, embodying the law of the case as he contended for it. The plaintiff in error objected to the giving of these instructions, but the court overruled its objection, and gave the instructions as asked. The plaintiff in error moved the court to give seven instructions, embodying its view of the law of the case. To the giving of these instructions the defendant in error objected, and the court sustained his objections to all of the instructions except No. 1, which was given. After the court had refused to give the instructions of the plaintiff in error numbered from 2 to 7, inclusive, the court gave four instructions of its own, which are called in the record the "Court's Instructions," and numbered 2, 3, 4, and 5. To the giving of the instructions of the defendant in error by the court, to its refusal to give the instructions of the plaintiff in error except the first, and to its giving its own instructions, the plaintiff in error filed its three bills of exception, numbered 1, 2, and 3; and upon these three bills of exception are based its first three assignments of error.

We see no error in the court's action in giving instructions Nos. 1, 2, and 5 of the defendant in error. They correctly state the law upon the points upon which they were given.

Instruction No. 4 offered by the plaintiff in error does not clearly and plainly state the law, while the instruction given by the court upon that point does so state it. We think the action of the court in rejecting that instruction, and in giving its own in lieu of it, was correct.

Instruction No. 5 offered by the plaintiff in

error was properly rejected by the court. The intestate of the defendant may have left his work, and gone to the fire where the dynamite was being thawed, without either being requested or ordered to do so, and yet not have been there improperly. There is evidence in the cause which tends to show that the fire was built for the purpose of allowing the hands to warm by, as well as for the purpose of thawing the dynamite, and that the hands, the intestate of the defendant in error among them, had gone there several times the morning of the accident, with the knowledge of, and without objection by the foreman or boss in charge of that squad of hands.

Instruction No. 3 of the court, upon the same point, correctly states the law, and was properly given.

That portion of the instruction of the court numbered 5 which defines the duty of a servant when he entered into a dangerous employment, and declares that he "assumes such risks as are ordinarily incident to the employment, from causes open and obvious to the servant, the dangerous character of which he had an opportunity to ascertain, and that he must exercise reasonable care and caution for his own safety while engaged in the master's service," is a clear and correct statement of the law; but the other portion of the instruction, which declares that "it is the duty of the master to provide safe, sound, and suitable appliances and instrumentalities for the use of the servant, and to provide generally for his safety in the course of the employment, and to use proper diligence to avoid exposing the servant to extraordinary risk," is plainly incorrect, as it imposes a much higher duty upon the master in providing appliances and instrumentalities for his servant's use than the law imposes. The rule upon the subject in this state is that it is the duty of the master to exercise ordinary care,—that is, such care as reasonable and prudent men use under like circumstances,—in providing safe and suitable appliances and instrumentalities for the work to be done, and in providing generally for the safety of the servant in the course of the employment; regard being had to the work, and the difficulties and dangers attending it. *Iron Co. v. Elkins*, 90 Va. 249, 261, 17 S. E. 890; *Bailey*, *Mast. Liab.* pp. 8, 9; *Bish. Noncont. Law*, § 645.

The instruction given on this point declares it to be the master's duty to provide, not reasonably safe, sound, and suitable appliances and instrumentalities for the use of the servant, but it implies that they must be absolutely safe, sound, and suitable; and he is required, not to exercise ordinary care in providing generally for the safety of the servant in the course of the employment, but he must do so absolutely. The duty thus imposed by the instruction upon the master for the safety of his servant is a higher degree of duty than is imposed upon the servant for his own protection, and is contrary to reason, as well as

to law, for no master can be required to do more for his servant's safety than the servant is required to do for his own safety.

Instruction No. 2 offered by the plaintiff in error correctly states the law, and ought to have been given; and the refusal of the court to give it was error, and reversible error, unless some other instruction given by the court cured it. A party has the right to have his own instruction given as he offers it, if it clearly and correctly states the law and is applicable to the facts of the case. In *Rosenbaums v. Weeden*, 18 Grat., at page 799, Judge Moncure, in delivering the opinion of the court, says that "a court is bound to give any instruction asked for by either party which correctly expounds the law upon any evidence before the jury." *Railroad Co. v. Polly*, 14 Grat. 447, 448, 468.

The instruction of the court numbered 2, given in lieu thereof, was substantially the same instruction, except the addition that the reasonable care required of the master was such as was commensurate with the danger which might reasonably be apprehended from the use of dynamite. If the court had added, further, "and such ordinary care as reasonable and prudent persons under like circumstances use in thawing dynamite," there would be no objection to the instruction given by the court; but the addition that was made by the court was calculated to mislead the jury, and to make the impression upon them that something more than ordinary care was necessary on the part of the master in providing and adopting methods and appliances for thawing dynamite.

According to the rule in this state and generally (though in some jurisdictions there seems to be required a higher degree of care), the master is not required to exercise more than ordinary care for the safety of his servant, no matter how hazardous the business may be in which the servant is engaged. But, while the rule of duty upon the master in providing for the safety of his servant is always and invariably the exercise of ordinary care, it is not to be understood that the ordinary care required is the same in all undertakings and under all circumstances. "Ordinary care depends upon the circumstances of the particular case, and is such care as a person of ordinary prudence, under all the circumstances, would have exercised." This was the doctrine laid down by this court in the case of *Railroad Co. v. Ormsby*, 27 Grat. 455, and which has been reiterated in substance in subsequent cases, as late as the case of *Iron Co. v. Elkins*, 90 Va. 249, 291, 17 S. E. 890.

If the court, in any other instruction given, had instructed the jury that the ordinary care required of the master, in providing safe appliances and methods in thawing dynamite, was such care as reasonable and prudent men exercise under like circumstances when using dynamite, it would, perhaps, have cured the defect in the court's instruc-

tion; but no such instruction was given, although the plaintiff in error, in its instructions numbered 3, 6, and 7, attempted to have the jury instructed upon that point; and while the language used in each of those instructions upon that point was objectionable, and they could not be given as offered, the court ought to have amended them, or, if it rejected them as it did, it was error to give its own in lieu of them without instructing upon that point, which was a vital one in the case. Scientific experts of the highest character and reputation had testified in the case that the thawing of dynamite before an open fire, in the open air, was very dangerous, and that there were cheap appliances for thawing it which greatly decreased the danger. Practical experts, railroad builders, of character and wide experience, who had been engaged in using dynamite for many years in the building of railroads and other works requiring the use of powerful explosives, testified that the usual and common method of thawing dynamite was before an open fire, in the open air, and that they regarded that method as safe and the most practicable, and had known very few instances in which injuries had resulted from dynamite being thawed in that manner.

If the view of the scientific experts were to prevail with the jury, the thawing of dynamite before an open fire, in the open air, was gross negligence. If the opinion of the practical experts were to control, that method seemed to be the usual and common one, and reasonably safe. The plaintiff in error, if it requested it, had the right to have the court instruct the jury that the measure of ordinary care imposed upon it for the safety of its servants in the use of dynamite was that ordinary care which reasonable and prudent men would and do exercise under like circumstances.

The degree of care required in such cases, under our law, must be ascertained by the general usages of the business. The reason for such a rule is clearly and forcibly stated in the case of *Titus v. Railroad Co.*, 136 Pa. St. 618, 626, 20 Atl. 517. In that case it was said: "All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of the implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average

prudent man. The test of negligence in the employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set a standard which shall, in effect, dictate the customs or control the business of the community." *Berns v. Coal Co.*, 27 W. Va. 285, 301.

Instruction No. 4 given for the defendant in error was misleading, and, under the facts of the case, erroneous. It informs the jury, among other things, that it was the master's duty "to adopt such reasonably safe methods, and use such well-known and practical appliances, to avoid or lessen accidents, as are reasonably safe and well adapted to promote safety and give protection to the servant." The evidence in this case showed that the method of the defendant in error in thawing dynamite was before an open fire, in the open air, and that he had no appliance for the purpose. It also tended to show that there were practical appliances in use for the purpose of thawing dynamite reasonably safe. There was no charge in the declaration and no evidence in the case that the plaintiff in error was negligent in providing appliances of any kind except as to the thawing of dynamite. The portion of the instruction quoted above could therefore have no relevancy to the case, unless it referred to the appliances to be used in thawing dynamite. If it did refer to that, it was clearly misleading. The plaintiff in error, as above stated, had no appliances whatever for thawing dynamite, and the very question in issue was whether or not its failure to provide such appliances was negligence. This instruction does not say that it was its duty to adopt reasonably safe methods, or use well-known and practical appliances, but it says it was its duty to do both; thus, in effect, taking from the jury the right to determine whether its method of thawing dynamite before an open fire, without such appliances, was reasonably safe. As a general proposition, the instruction is correct; but, when applied to the facts of this case, it was clearly misleading, and ought not to have been given.

Without discussing further the instructions given and rejected, we have said enough to show what principles of law should govern upon the next trial of the case if the evidence be substantially the same as it was upon the last trial.

The assignment of error based upon bill of exceptions No. 20 is that after the evidence was all in, and the instructions had been argued before the court, the counsel for the defendant in error announced that they wanted to introduce some after-discovered evidence, which they stated they had just

discovered, to which the plaintiff objected, but the court overruled its objection, and allowed the evidence to be introduced. The witness was introduced as a practical expert upon the subject of the use of dynamite, and his evidence covers some 13 pages in the printed record. No cause was shown for its introduction at that late period of the trial in which it was offered, except that the counsel of the defendant had just then discovered it.

The question of allowing the introduction of evidence after the parties have announced that they are through, or after the case has been submitted to the jury, rests in the sound discretion of the court; and its action will not be held erroneous unless it appears that, in the exercise of that discretion, it has plainly erred. The evidence allowed to be introduced in this case was expert evidence, and not evidence of any fact affecting the issue in the case. Expert witnesses can ordinarily be had without much difficulty, and the parties are therefore not dependent upon any particular witness by which to make out their case, and should not be allowed to introduce expert evidence after both sides have announced that they are through with their evidence, and further steps have been taken in the case, except under very extraordinary circumstances and for good cause. But, as this case has to be reversed upon other grounds, it is unnecessary to say more upon this point, as such a question is not likely to arise upon the next trial.

The judgment in this case must be reversed, and a new trial had, in accordance with the views expressed in this opinion.

(92 Va. 780)

STOVER v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Sept. 19, 1895.)

LIFE SENTENCE ON THIRD CONVICTION—INSANITY—EFFECT OF CONVICTION.

1. Under Code 1887, §§ 3905, 3906, providing for sentencing for life a convict who has been previously twice sentenced to the penitentiary, one cannot be so sentenced unless it appears that the previous offenses were made felonies in themselves, and not made so in the particular case because of prior convictions.

2. Where defendant's sanity is directly in issue, a conviction necessarily establishes his sanity, and the refusal to afterwards inquire into that fact is proper, nothing having transpired since the trial to raise the question.

Error to hustings court of Staunton; Charles Grattan, Judge.

Joshua H. Stover was convicted of larceny, and brings error. Reversed.

R. Lockhart Gray, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

BUCHANAN, J. The accused was indicted for petit larceny in the hustings court of the city of Staunton. The indictment, in addition to the charge of petit larceny, contained the further allegations that the accused had, before the commission of the offense for which he was then indicted, been convicted of like offenses four times, and sentenced therefor; that after these four convictions, and prior to the commission of the offense charged in the indictment, he had been twice convicted and sentenced to confinement in the penitentiary in the United States for offenses of like character.

The jury found that he was guilty of the offense charged in the indictment, and that he had, before the commission of that offense, been twice convicted and sentenced for like offenses. They also found that he had twice before been convicted and sentenced to confinement in the penitentiary in the United States.

The trial court, being of opinion that the allegations of the indictment and the findings of the jury brought the case within the provisions of section 3906 of the Code, sentenced the accused to confinement in the penitentiary for life. This action of the court is assigned as error.

Section 3906 of the Code provides that, "when any such convict shall have been twice before sentenced in the United States to confinement in the penitentiary, he shall be sentenced to be confined in the penitentiary for life." The preceding section of the Code, and the one to which we must look for the meaning of the words "such convict," provides that, "where any person is convicted of an offense, and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had before been sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced." This section shows, we think, that the words "such convict," as used in section 3906, refer to a person who has been twice before indicted, convicted, and sentenced to confinement in the penitentiary in the United States for offenses which are penitentiary offenses in themselves when committed, and not made so because of repeated convictions and sentences for offenses which would otherwise be misdemeanors. In other words, we do not think that, under sections 3905 and 3906 of the Code, any person can be sentenced to confinement in the penitentiary for life upon conviction of an offense which is punishable by confinement in the penitentiary because he has been twice before convicted and sentenced to confinement in the penitentiary, unless it appears that these offenses were felonies in themselves, and not made felonies in the particular case because of the prior conviction of the party

accused. This view is strengthened by the prior legislation upon this subject.

The law of 1796 (Code 1803, p. 355, c. 200) which provided, among other things, for the establishment of the penitentiary and the abolition of capital punishment (except for murder in the first degree), declared, in the twenty-fourth section, that "if any person convicted of any crime, which is now capital or a felony of death without benefit of clergy, shall commit any such offence a second time, and shall be legally convicted thereof, he shall be sentenced to undergo an imprisonment in said penitentiary house at hard labor for life," etc.

In 1 Rev. Code, p. 619, c. 171, § 13, it is provided that "if any person guilty of an offence punishable by confinement in the penitentiary shall have been convicted thereof," etc., "and shall afterwards commit any other offence, which by law, if there had been no previous conviction, would have been punishable with confinement in the penitentiary for a period not less than five years, every such offender being thereof lawfully convicted, shall be punished by confinement in said penitentiary for life."

These provisions have been in various respects modified by subsequent legislation, but in none of the changes made, so far as we can ascertain, is there any such change in the language used as to show an intention on the part of the legislature to alter or dispense with the requirement that the original offense (upon which are based the subsequent proceedings which result in a life sentence in the penitentiary) must be a felony, or a crime punishable by confinement in the penitentiary, because of the character of the offense, and not because of the character of the offender. This construction of these sections of the Code seems to be, not only the natural and proper one from their language and history, but it avoids bringing them in conflict with the next section (3907) of the Code. That section provides that "when any person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury or justice before whom he is tried, found that he has been before sentenced in the United States for the like offence, he shall be confined in jail not less than thirty days, nor more than one year; and for a third time or any subsequent offence, he shall be confined in the penitentiary not less than one nor more than two years." If it be held, as was done by the trial court, that a party who has been convicted and sentenced to confinement in the penitentiary twice before for petit larceny can, upon a third conviction for the same offense, be sentenced to the penitentiary for life, that portion of section 3907 which provides that "for a third or any subsequent offence he shall be confined in the penitentiary not less than one year nor more than two years," is rendered inoperative after he has been convicted and sentenced to the peni-

penitentiary twice for petit larceny, for then his punishment would no longer be controlled by section 3907, but by section 3906.

By holding that sections 3905 and 3906 of the Code do not apply to convictions for petit larceny and sentences to the penitentiary therefor, but that such cases are governed by section 3907, the different provisions of these statutes are reconciled, and they are made consistent and harmonious, and thus a result is reached which one of the cardinal rules of construction makes it the duty of courts to accomplish, if possible, in construing statutes.

It is also assigned as error that the court refused to exclude from the consideration of the jury the evidence introduced to prove that the accused had been convicted and sentenced to the penitentiary on the 16th day of November in the year 1887, because the allegation of the indictment was that such conviction and sentence were on the 10th day of that month, and there was therefore a variance between the time alleged and the time proved.

It is unnecessary to decide this question whether there was a variance, as that evidence was wholly immaterial in the view we have taken of this case. Its admission did not prejudice the accused. The jury fixed his term of confinement in the penitentiary at one year, the shortest period which they could fix. Their verdict was clearly and fully sustained by the material and legitimate evidence introduced. An appellate court does not reverse the trial court for errors in the admission of evidence when it can clearly see that no prejudice did or could result therefrom to the accused.

Neither is it necessary to consider the assignments of error based upon the action of the court in sentencing the accused to confinement in the penitentiary for life, since that action of the court was erroneous and must be reversed.

The instructions given by the court upon the subject of the prisoner's insanity correctly stated the law to the jury under the facts of this case, and this assignment of error to the action of the court in giving and refusing instructions upon this point must be overruled.

The court properly refused, after the verdict of the jury had been rendered, to impanel another jury to determine the sanity of the accused. That question had been directly put in issue upon the trial of the case, and the jury, in finding him guilty of the offense charged, necessarily found that he was sane when it was committed. Nothing had transpired since the trial which could cause the court to have any reasonable doubt as to his sanity, or authorize it to proceed under section 4032 of the Code. The after-discovered evidence relied on upon the motion for a new trial was plainly insufficient, under the well-settled rules of this court. It was merely cumulative. No sufficient reason was shown

why these alleged after-discovered witnesses could not have been produced at the trial. The hustings court did not err in overruling the motion for a new trial.

We see no error in the proceedings of the hustings court prior to its action upon the verdict of the jury. In sentencing the accused to confinement in the penitentiary for life it erred, and for this error its judgment must be reversed, and the cause remanded to the said hustings court, with directions to it to enter judgment in accordance with the verdict of the jury, which fixed his term of confinement in the penitentiary at one year.

(22 Va. 120)

CENTRAL LAND CO. OF BUCHANAN v. OBENCHAIN et al.¹

(Supreme Court of Appeals of Virginia. Sept. 26, 1895.)

PAYMENT OF COSTS ON NEW TRIAL—WAIVER—APPEAL—RECORD—COMMISSIONS FOR SALE OF LAND.

1. Under Code 1887, § 3542, providing for the payment of costs by the party to whom a new trial is granted before the new trial may be had, where the opposite party proceeds with the second trial without making a motion that the costs be paid, he will not be allowed to object that said costs have not been paid, either in the lower or appellate court.

2. Though the record should show that a motion for a new trial was made and overruled, it is not necessary that a formal bill of exceptions be taken to the action of the court in overruling the motion.

3. The prospectus of a company, reciting that if the company take and hold certain lands it shall pay therefor "actual cost," held to mean that the company should pay for the lands the actual price paid to the owners thereof, excluding therefrom all profits to promoters received as commissions from the owners.

4. The prospectus of a company provided for the payment of compensation to its promoters. O. and J. sold to the company a tract of land as agents of the owner, who had agreed to allow them a commission. The company paid the entire purchase price to the owner, and subsequently collected of him the commission due O. and J., and the latter sued the company for this money. The agents received a part of the promoters' fund. Held that, if O. and J. were not promoters of the company at the time they made the contract with the owner for the land, they were entitled to said commissions, but, if they were promoters at that time, they were not entitled to the same.

Error to circuit court, Botetourt county; H. E. Blair, Judge.

Action by O. E. Obenchain and William Joliffe against the Central Land Company or Buchanan. Plaintiffs had judgment, and defendant brings error. Reversed.

Defendant's instruction No. 1 (refused as offered, but modified): "The court instructs the jury that if they believe from the evidence that William Joliffe and O. E. Obenchain, at the time they received the sum of \$2,286 for their services, as set forth in the prospectus, knew that the Central Land Company considered that sum as in payment of

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

commissions on lands purchased by said company from land owners whom the plaintiffs acted for, and that the said company paid it in full of said claims, and that Joliffe and Obenchain knew it, and received it knowing that it was so paid, that there can be no recovery in this action by the plaintiffs."

Defendant's instruction No. 2 (refused as offered, but modified): "The court instructs the jury that if they believe from the evidence that William Joliffe and O. E. Obenchain were associates of E. Dillon, as described in the prospectus; that they so regarded themselves, and were so regarded by the Central Land Company; that the property, the securing of which is there described, embraces the property bought of Henry Felix, and that the Central Land Company paid the sum of \$2,286, or about that sum, to each of the plaintiffs, and intended that sum to cover the plaintiffs' charges for getting the Felix property, now inquired about, and the plaintiffs knew that the defendant company so intended the said sum of \$2,286 to each of the plaintiffs to cover said charge, and they received said sums knowing that the said defendant company intended said payment to cover the claim sued on here,—then the plaintiffs are not entitled to recover in this action."

Defendant's instruction No. 3: "The court instructs the jury that the clause in the prospectus, 'It proposes to take and hold the properties desired, paying therefor the actual cost,' means that the Central Land Company of Buchanan was to pay for the lands the actual price paid for the land to the owners thereof, excluding therefrom all profits to promoters or middlemen."

Defendant's instruction No. 4 (refused as offered, but modified): "The court instructs the jury that if they believe from the evidence that William Joliffe and O. E. Obenchain were instrumental in the organization or creation of the Central Land Company of Buchanan, and secured the option from Henry Felix for the purpose of aiding in the organization of a company for the purchase of the lands from Felix, and that the Central Land Company of Buchanan was subsequently organized by their efforts, with the assistance of others, then the jury are instructed that the said William Joliffe and O. E. Obenchain stood in a fiduciary relation to the said Central Land Company of Buchanan, as its promoters and trustees, and said Joliffe and Obenchain are not entitled to make a profit on the sale of said Felix lands to the company, unless the company, with knowledge of all the facts, agreed that the said Joliffe and Obenchain might make said profit; and if the jury believe from the evidence that when the Central Land Company of Buchanan adopted the prospectus (Ex. F.), and agreed to accept the option of Felix, it was also intended by said company that the 10 per cent. clause in said prospectus was to cover all compensation to the promoters, then the jury are instructed

that the plaintiffs are not entitled to recover in this action."

Defendant's instruction No. 5: "If the jury believes from the evidence that William Joliffe and O. E. Obenchain were appointed upon an option committee at a public meeting held in the town of Buchanan for the purpose of promoting the organization of a company for the development of the town of Buchanan and vicinity, before taking the option or power of attorney from Henry Felix and wife, and that the object of the appointment of said option committee was to secure options upon or control of lands upon which subsequently to form said company, and that the defendant company was afterwards organized by Dillon, Joliffe, and others, as was contemplated at such meeting, and that the option or power of attorney of Henry Felix and wife, offered in evidence in this case, was turned over to and accepted by the defendant company, and that Joliffe and Obenchain received compensation from the defendant company for having secured the property and for having been instrumental in the organization of the said company, then the jury must find for the defendant company."

Defendant's instruction No. 6: "If the jury believe from the evidence that E. Dillon, president of the Central Land Company of Buchanan, paid to Joliffe and Obenchain their part of the 10 per cent., etc., provided for in the prospectus of said company to 'E. Dillon and his associates,' and at the time such payment was made by E. Dillon under the authority of the Central Land Company, such payment of their part of the 10 per cent. was understood by said Dillon as in lieu of the 5 per cent. provided for in the options or power of attorney, and that Joliffe and Obenchain, when receiving such payment of their part of the 10 per cent. aforesaid, knew that Dillon intended it in lieu of the 5 per cent. aforesaid, and accepted their proportion, or any part of their proportion, of the 10 per cent. aforesaid with such knowledge, then the court instructs the jury that they must find for the defendant."

Defendant's instruction No. 7: "If the jury believe from the evidence that Wm. Joliffe and O. E. Obenchain were appointed upon an option committee at a public meeting held in the town of Buchanan for the purpose of promoting the organization of a company for the development of the town of Buchanan and vicinity, before taking the option or power of attorney from Henry Felix and wife, and that the object of the appointment of said option committee was to secure options upon or control of the lands upon which subsequently to form said company, and that the defendant company was afterwards organized by Dillon, Joliffe, and others, as was contemplated at such meeting, and that the option or power of attorney of Henry Felix and wife, offered in evidence in their case, was turned over to and accepted by the defendant company, and

that Joliffe and Obenchain received compensation from the defendant company for having secured the property and for having been instrumental in the organization of the said company, the jury must find for the defendant, unless the jury further believe from the evidence that the defendant company, after being informed that the plaintiffs claimed commissions from Felix and wife and also from the said company, under the agreement in the prospectus, consented that Joliffe and Obenchain might receive compensation for taking the said power of attorney from the said Felix and wife, as well as from the said company."

Defendant's instruction No. 8: "If the jury believe from the evidence that Wm. Joliffe and O. E. Obenchain had associated themselves with others for the purpose of organizing a company, before they secured the power of attorney from Henry Felix and wife, and that the Central Land Company of Buchanan was subsequently formed in pursuance of such purpose, and that said William Joliffe and O. E. Obenchain were afterwards paid by the Central Land Company of Buchanan for their services in securing the property, then the court instructs the jury that any profit or pay which the said Joliffe and Obenchain may have contracted for to be paid to them by the said Felix growing out of the sale of his property to said company inures to and becomes the property of the Central Land Company of Buchanan, unless the jury believes from the evidence that said company, with full knowledge of all the facts, agreed that said Joliffe and Obenchain should receive such pay, profit, or commission from said Felix in addition to the compensation paid them by said company for securing the property."

Defendant's instruction No. 9: "If the jury believes from the evidence that the prospectus of the Central Land Company of Buchanan was used by William Joliffe or O. E. Obenchain, or either of them, in assisting in the organization of said company, and that said Joliffe and Obenchain were promoters of the company, and that at the meeting for organization of said company on the — day of April, 1890, that William Joliffe and O. E. Obenchain, or either of them, were present, and there in the meeting, before any property was purchased by said company, a stockholder asked the chairman of the meeting whether the ten per cent., etc., provided for in the prospectus was all the compensation that the promoters would get for securing the property and organizing the project, and the chairman then replied in the affirmative, and that afterwards the option or power of attorney from Felix and wife to Joliffe and Obenchain was accepted by the Central Land Company, then the court instructs the jury that William Joliffe and O. E. Obenchain are estopped from claiming anything more than the amount provided for under the ten per

cent. clause of said prospectus, and cannot recover in this action."

Defendant's instruction No. 1 (modified instruction given): "The court instructs the jury that if they believe from the evidence that William Joliffe and O. E. Obenchain, at the time they received the sum of \$2,286 for their services, as set forth in the prospectus, knew that the Central Land Company considered that sum as in payment of commissions on lands purchased by said company from landowners whom the plaintiffs acted for; and that the said company paid it in full of said claims, and that Joliffe and Obenchain knew it, and received it knowing that it was so paid, without objection or contention to the contrary by O. & J., that there can be no recovery in this action by the plaintiffs."

Defendant's instruction No. 2 (modified instruction given): "The court instructs the jury that if they believe from the evidence that William Joliffe and O. E. Obenchain were associates of E. Dillon as described in the prospectus; that they so regarded themselves, and were so regarded by the Central Land Company; that the property, the securing of which is there described, embraces the property bought of Henry Felix, and that the Central Land Company paid the sum of \$2,286, or about that sum, to each of the plaintiffs, and intended that sum to cover the plaintiffs' charges for getting the Felix property, now inquired about, and the plaintiffs knew that the defendant company so intended the said sum of \$2,286.12 to each of the plaintiffs to cover said charge, and they received said sums knowing that the said defendant company intended the said payment to cover the claim sued on here, without objection or contention to the contrary by Joliffe and Obenchain,—then the plaintiffs are not entitled to recover in this action."

Defendant's instruction No. 4 (modified instruction given): "The court instructs the jury that if they believe from the evidence that William Joliffe and O. E. Obenchain were instrumental in the organization or creation of the Central Land Company of Buchanan, and secured the option from Henry Felix for the purpose of aiding in the organization of a company for the purchase of the lands from Felix, and that the Central Land Company of Buchanan was subsequently organized by their efforts, with the assistance of others, then the jury are instructed that the said William Joliffe and O. E. Obenchain stood in a fiduciary relation to said Central Land Company of Buchanan, as its promoters or trustees, and said Joliffe and Obenchain are not entitled to make a profit on the sale of said Felix lands to the company, unless the company, with knowledge of all the facts, agreed that said Joliffe and Obenchain might make said profit; and if the jury believe from the evidence that when the Central Land Company of Buchanan adopted the prospectus (Ex. F.), and agreed

to accept the option of Felix, it was also intended by the parties to said agreement that the 10 per cent. clause in said prospectus was to cover all compensation to the promoters, then the jury are instructed that the plaintiffs are not entitled to recover in this action."

Plaintiffs' instruction No. 1 (given): "If the jury believe from the evidence that there was a contract between the plaintiff and the defendant, as set forth in the prospectus, that there should be allowed to E. Dillon, for himself and his associates (and that the plaintiff was one of those associates), who have secured the property and have been instrumental in the organization of this project a commission of ten per cent. on the cost of the property purchased, and that the said commission of 10 per cent. was not intended, with full knowledge of the facts by the parties to said agreement, to include, and was to be in addition to, any commission that might be due from the owners of the property who gave option or powers of attorney for the sale of their lands, then the jury should find for the plaintiff."

Plaintiffs' instruction No. 2 (given): "If the jury shall believe from the evidence that there was a contract between the plaintiff and the defendant, as set forth in the prospectus, that there should be allowed to E. Dillon, for himself and his associates (and that the plaintiff was one of these associates), who have secured the property, and have been instrumental in the organization of this project, a commission of ten per cent. on the cost of the property, etc., and that the said commission of 10 per cent. was intended by the parties to said agreement, with full knowledge of the facts, to include any commission that might be due from the owners of the property who gave options or powers of attorney for the sale of their lands, and that when said 10 per cent. was paid it was to be in satisfaction of the said 5 per cent. commission, as well as for other services in organizing the project,—then the jury should find for the defendant."

Griffin & Glasgow and Benj. Haden, for plaintiff in error. E. M. Pendleton and F. T. Glasgow, for defendants in error.

BUCHANAN, J. Where a verdict has been set aside, and a new trial granted, section 3542 of the Code requires that the party to whom the new trial is granted shall, previous to such new trial, pay the costs of the former trial, unless the court shall enter of record that the new trial was granted because of the misconduct of the opposite party, and shall otherwise order. But if he fails to pay the costs on or before the next term after the new trial is granted, the court may, upon motion of the opposite party, set aside the order granting it, and proceed to judgment on the verdict, or award execution for such costs as may seem to it best. If, however, the

costs have not been paid as required, and the opposite party does not move the court to set aside the order granting the new trial, and render judgment upon the verdict, but proceeds with the new trial, he will not be heard afterwards to object in the trial court, or in an appellate court, that the costs of the former trial have not been paid.

The record shows in this case that the defendant company moved the court to set aside the verdict and grant it a new trial because the court erred in admitting and rejecting evidence, in giving and refusing instructions, and because the verdict was contrary to the law and the evidence. It also shows that the court overruled the motion, and that it excepted to the action of the court, and tendered its bill of exceptions to such rulings of the court, as well as to other rulings made during the trial, which were signed, sealed, and made a part of the record. All the bills of exceptions referred to in the order of the court, except the one based upon the action of the court in refusing to set aside the verdict and grant a new trial, are found in the record.

This court, in the case of *Newberry v. Williams*, 89 Va. 298, 15 S. E. 865, held that, unless the record showed that a motion was made for a new trial in the court below, and was overruled, and that such action was excepted to, this court could not review the judgment; but it did not, as the defendants in error insist, hold that a formal bill of exceptions should be taken to the action of the court in overruling the motion for a new trial. All that the rule requires is that the record shall show that such a motion was made and overruled, and that this action of the court was excepted to. In this case the judgment complained of shows that such motions were made, overruled, and excepted to. This was sufficient.

Obenchain and Joliffe, the plaintiffs in the trial court, brought an action of assumpsit against the Central Land Company of Buchanan to recover \$500. The ground upon which they based their right to recover this sum was that, as agents of one Felix and wife, they had sold to the defendant company a tract of land at the price of \$10,000, for the sale of which Felix was to pay them 5 per cent. commissions; that the defendant company paid Felix the whole purchase price of the land, but afterwards collected from him their commissions, amounting to \$500, and refused to pay the same over to them.

The defendant company made defense upon the grounds that when Obenchain and Joliffe became the agents of Felix and acquired an option upon or the right to sell the land, they were engaged in promoting the organization of the defendant company, and getting control of that and other lands, which were to be transferred and conveyed to the defendant company when organized; that the company was afterwards organized, and the lands turned over to it; that Obenchain

and Joliffe, along with E. Dillon and others, the special promoters of the company, were paid by the company, after its organization, for all their services in securing property for and in organizing the company in accordance with the provisions of the prospectus under which the company was organized, viz.: "But it is understood that there shall be allowed E. Dillon, for himself and associates, who have secured the property, and have been instrumental in the organization of this project, a commission of ten per cent. on the cost of the property purchased, and that they shall have, in addition, the right to purchase at any time within three years, for themselves and others whose services may be considered important to the success of the company, four hundred shares of development stock above mentioned, at fifty cents in the dollar, which shall be reserved for them;" that Obenchain and Joliffe, prior to the institution of this suit, received from the company some \$2,200 each, in full for their services in acquiring the property and in organizing the company, and that the \$500 commissions on the Felix land, and for which the company was sued, belonged to it, and not to Obenchain and Joliffe.

Upon the trial of the cause the defendant company moved the court to give nine instructions, six of which, numbered 3, 5, 6, 7, 8, and 9, the court refused to give, and three of which, numbered 1, 2, and 4, it refused to give as offered, but gave them with amendments. It also gave two instructions asked for by the plaintiffs. To all of which rulings of the court the defendant company excepted.

The defendant company, by its instruction No. 3, asked the court to instruct the jury that the clause in the prospectus, "It proposes to take and hold the properties desired, paying therefor actual cost," means that the Central Land Company of Buchanan was to pay for the lands the actual price paid for the land to the owners thereof, excluding therefrom all profits to promoters or middlemen. This construction correctly construed the clause in the prospectus referred to, and ought to have been given, though it would have been clearer if the words "or middlemen" had been omitted. Upon the next trial of the case, if this instruction is asked for, it should be given with the words "or middlemen" omitted.

It will serve no good purpose to enter into a detailed discussion of the other instructions. We will content ourselves, therefore, with stating the principles of law which ought to control in the trial of the case.

If the plaintiffs were not promoters of the defendant company when they entered into the contract made between them and Felix and wife, they were entitled to receive the commissions provided for in that contract.

But if they were promoters of the defend-

ant company, and engaged, with others, in obtaining control of lands for the purpose of organizing such company, when they entered into the contract with Felix and wife, then they stood in a fiduciary relation to the company, in whose interests and for whose organization they were working, and they were not entitled to the commissions provided for in their contract with Felix and wife, unless, with full knowledge of all the facts, the defendant company agreed that they might not only receive the commissions provided for in the prospectus, but also the commissions contracted for with Felix and wife.

It is settled law that an agent employed to purchase or to sell, or to act in any other business, will not be permitted to make profits for himself out of the transaction, and that profits so derived inure to the benefit of the principal. And this rule of law applies equally to the promoters of a corporation who occupy, like agents, fiduciary relations to the new company.

It may be stated as a general principle that in all cases where a person is either actually or constructively an agent for another all profits and advantages made or contracted for by him in the business beyond the ordinary compensation to be paid him by his principal are for the benefit of his principal. Story, Ag. (8th Ed.) § 211; 2 Pom. Eq. Jur. § 959; 1 Beach, Priv. Corp. § 237.

These principles are specially applicable to corporations, which can only act by trustees or agents. The great number of corporations, the enormous amount of wealth invested in them, and placed under the control and management of agents and trustees, strongly demand of courts of justice a firm adherence to these principles and a rigid application of them to every case coming within their operation.

Tested by these principles, the instructions given by the court ought not to have been given, and the defendant company's instructions numbered 2, 4, 7, and 8, which the court refused to give, ought to have been given.

Upon the first trial of this case there was a verdict in favor of the plaintiffs, which was set aside upon motion of the defendant company, and a new trial granted, which resulted in the proceedings which we have been considering. The verdict rendered on the first trial was properly set aside (if not upon the grounds stated in the order setting it aside and granting a new trial, upon which we express no opinion) for erroneous rulings of the court in giving the plaintiffs' instructions Nos. 1 and 2 and for refusing to give defendant company's instructions Nos. 1 and 3.

The judgment of the circuit court upon the last trial must be set aside, and a new trial awarded, to be had in accordance with this opinion.

(45 S. C. 4)

HALL v. HALL.

(Supreme Court of South Carolina. Sept. 9, 1895.)

APPEALABLE ORDER—COSTS ON APPEAL—TAXATION.

1. An order refusing to allow a party to tax costs incurred on appeal to the supreme court is appealable.

2. The prevailing party in the supreme court has the right to tax costs incurred on appeal, and they do not fall within the statutory provision empowering the judge to direct, in equity cases, which of the parties shall pay the costs.

3. In order to have the action of the clerk in taxing costs reviewed by the court, it is not necessary that exceptions to his report be filed within 10 days after receiving written notice thereof.

Appeal from common pleas circuit court of Kershaw county; James Benet, Judge.

Motion by Louisa Hall to tax costs against Harrison H. Hall. From an order entered for defendant, plaintiff appeals. Reversed.

The order of his honor, Judge Benet, referred to in the opinion, is as follows: "The plaintiff moved before the clerk of this court, on the 16th day of August past, to tax the costs and disbursements of plaintiff on appeal to the supreme court; and the clerk refused to tax said costs, upon the ground that the application was premature, the case not having been finally decided. This decision of the clerk, in writing, was rendered on the 17th of August, and was served on Gen. Kennedy, representing Mr. Stuckey, the plaintiff's attorney, on the 18th of August, and was in Mr. Stuckey's hands not later than the 24th of August. On the 4th of September inst., exceptions were served on Mr. Hay, defendant's attorney, to the ruling of the clerk, which notice of exceptions also contained a notice that the plaintiff would move for an order requiring the clerk to tax the said costs of appeal. In this case a decree was rendered on the circuit in favor of defendant, dismissing the complaint, and for costs. On appeal, this judgment was set aside, "without prejudice," and the case remanded for new trial. 19 S. E. 305. Upon the second trial, a judgment was again rendered in favor of defendant, dismissing the complaint, and for costs. From this last judgment an appeal has been taken by plaintiff, and is now pending. See 22 S. E. 777. Under the circumstances, this being a case in chancery, and this court having control of the question of costs, I do not think it right that the defendant should now be called on to pay the costs of appeal. He has the judgment of the circuit court for the costs of two trials of this case, which he cannot enter up at present. It appears, also, that the plaintiff is insolvent, and that the costs of the defendant cannot be recovered from her. The settlement of the whole question of costs should abide the final event of this action. In addition, I hold that the exceptions of the plaintiff to the rulings of the clerk were not

taken in time, and should, for that reason, be dismissed. It is, therefore, ordered and adjudged that the exceptions of plaintiff to the rulings of the clerk be overruled and dismissed, and her motion be refused, and that the rulings of the clerk herein be sustained."

The plaintiff excepted to the rulings of his honor, Judge Benet, herein, in refusing to require the clerk of the court to tax up the costs of the former appeal to the supreme court in this cause, and to issue execution thereon, as follows: "(1) Because his honor erred in not holding that the judgment of the supreme court was final as to the costs on the appeal, and remitting the case to the circuit court for a new trial could not have the effect of delaying the payment of costs. (2) Because, while his honor was correct in the doctrine that, as chancellor, he had the discretion as to payment of costs, he erred in not holding that this discretion applies only to a coram judice on its merits for adjudication, and not to a case in which the judgment of the circuit court had been set aside, and a new trial ordered. (3) Because his honor erred in holding that the notice of motion to order the clerk to tax costs was an appeal, whereas he should have held that it was an original motion, which the moving party had a right to make, and that no appeal lies from such ruling of the clerk, as his office does not constitute it a court; that the word 'except' in the motion was surplusage, and the rule as to not serving notice of appeal within time does not apply."

A. B. Stuckey and J. D. Kennedy, for appellant. J. T. Hay and W. D. Trantham, for respondent.

GARY, J. The facts in this case are set forth in the order of his honor, Judge Benet, which will be incorporated in the report of the case. From this order appellant has appealed to this court on three exceptions, which will also be incorporated in the report of the case.

Respondent's attorneys, in their argument, urge the objection to the hearing of the appeal at this time on the ground that the order of his honor, Judge Benet, is not appealable. The order of the presiding judge involved the merits, in so far as the costs of the supreme court were involved, and, as they were in no way dependent upon the final determination of the action, there is no reason why an order involving the merits, as to them, should not be appealable. This objection cannot, therefore, be sustained.

The first and second exceptions will be considered together, as they raise substantially the question whether the prevailing party in the supreme court has the right to tax the costs of the appeal before final judgment in the cause. The question is conclusively settled by the case of Huff v. Watkins, 25 S. C. 243. These costs are not within the discre-

tion of the circuit judge, sitting as a chancellor. They do not fall within that statutory provision empowering the judge to direct, in equity cases, which of the parties shall pay the costs. The question of setting off one judgment against another cannot be considered at this time, because the appellant has no judgment. A motion for that purpose cannot properly be made until the judgments proposed to be set off have been entered up. These exceptions are sustained.

The third exception questions the correctness of the ruling of the presiding judge that the exceptions of the plaintiff to the ruling of the clerk were not taken in time, and should, for that reason, be dismissed. When the clerk of the court taxes the costs in a case, it is not the action of the court, but the judicial act of a ministerial officer, and therefore it is not necessary to file exceptions to his report, within 10 days after receiving written notice of the same, to prevent the party dissatisfied with it from having the same reviewed by the court. The practice where a party is dissatisfied with the taxation is thus stated in *Bradley v. Rodelsperger*, 6 S. C. 290, cited with approval in *Cooke v. Poole*, 26 S. C. 328, 2 S. E. 609: "If the allowances made by the clerk for costs or disbursements are objected to by either party, the proper practice is to bring the matter before the court on motion to correct such allowances." There is no requirement of law that notice of this motion should be given within 10 days after receiving written notice of the action of the clerk of the court in taxing the costs. The circuit judge, therefore, erred in ruling that the exceptions of the plaintiff to the rulings of the clerk were not taken in time, and should, for that reason, be dismissed. It is the judgment of this court that the order of the circuit court be reversed.

(45 S. C. 265)

MOLE v. FOLK et al.

(Supreme Court of South Carolina. Oct. 1, 1895.)

ADVERSE POSSESSION—BY TENANT IN COMMON.

Where land is devised for life with remainder to certain persons, and the life tenant deeds the land in fee to a third person, one claiming as heir of such third person, under such deed, may acquire title by adverse possession against the remainder-men, though himself entitled to claim an interest in common as a remainder-man.

Appeal from common pleas circuit court of Barnwell county; Izlar, Judge.

Action by M. A. E. Mole, against J. C. Folk, Jr., and others. Judgment for defendants. Plaintiff appeals. Affirmed.

B. T. Rice, for appellant. Robt. Aldrich, for respondents.

POPE, J. This action was commenced on the 12th day of September, 1893. Its pur-

pose was to secure a partition between the plaintiff and defendants of a tract of land situate in Barnwell county, in this state, so that the plaintiff might have allotted to her one-fifth part of said land, conceding that the other four-fifths thereof belonged to the defendant Susan P. Folk. The defendants denied that the plaintiff was entitled to any share in said lands. On the contrary, they asserted that Susan P. Folk held the same in fee simple. Judge Izlar heard the action on an agreed statement of facts, about as follows: The lands in controversy were owned in fee simple by Hannah R. Varn, who, by her last will and testament, devised the same to her son, John A. Varn, for life, and at his death to such child or children as the said John A. Varn might leave at his death; but, in default of any such child or children living at the death of the said John A. Varn, then to Mary Ann Breland, who should have the same for life; and at her death, in fee simple, to her children living at her death. John A. Varn sold and conveyed by deed the said lands to one James Wiggins. Thereafter, to wit, in August, 1870, the said James Wiggins conveyed the lands to one Hansford Rizer, for full value, in fee simple, with full warranty,—deed duly probated, wife's dower renounced, and all duly recorded in the office of the register of mesne conveyances for Barnwell county,—and the said Hansford Rizer at once occupied and possessed said lands. Hansford Rizer died intestate on 10th April, 1883, when his daughter Susan P. Folk, by partition duly made, was allotted said lands as heir at law of said Hansford Rizer. Mrs. Folk has held said lands continuously until now. John A. Varn died in 1869, leaving no child or children. Mary Ann Breland died during the year 1877, leaving five children then living, of whom the plaintiff is one. Upon the pleadings and this agreed statement of facts, Judge Izlar (a jury trial having been waived) decided and adjudged that Susan P. Folk "does not hold the said lands as tenant in common with the plaintiff, but as owner, under an independent title"; and he therefore dismissed plaintiff's complaint. From this judgment the plaintiff now appeals: (1) Because it was error to hold that the defendant held the lands in question by an "independent title," as the agreed statement of facts showed a tenancy in common from the year 1877, and the question was as to the effect of the statute of limitations upon the right and title of the plaintiff. (2) Because it was error to hold that the defendant, who is a tenant in common with the plaintiff, could hold adversely to her, and thus acquire a title to her interest in said premises. (3) Because there was no proof of ouster by the defendant of the plaintiff. Neither could there be a presumption of ouster, as 20 years had not expired since the death of the life tenant, Mary Ann Breland, which occurred during the year A. D. 1877, at which time the plaintiff's right of action accrued. (4)

Because the judgment is entirely contrary to the facts and the law.

So far as the fourth ground of appeal is concerned, it is too general to require any notice. It is overruled.

The first three grounds of appeal may be considered together. It is always well to remember, when we come to consider the effect of the statute of limitations upon title to lands, that there is a recognized difference in the cases when urged by the plaintiff as a sword by which his title will be won, and when urged as a shield behind which a defendant whose title is assailed screens himself. The plaintiff seeks to obtain possession of land in the possession of another. The defendant seeks to hold that of which he has been in uninterrupted possession for 10 years. If a defendant's paper title was complete, he would not need any statute of limitations. If a plaintiff's paper title was not complete, he could not hope to take possession of land out of the hands of another. In the case at bar it will be seen that the plaintiff (appellant) seeks to construe the possession of the land by the defendant (respondent) as a tenant in common with herself. On the contrary, the defendant (respondent) says: "My ancestor and myself have held this land adversely to the world for 16 years before suit brought, as I have held, myself, for more than 10 years adversely to the world. I do not admit now, nor have I ever admitted, that I hold this land as a child, or as the successor of a child, of Mary Ann Breland. I use my deed (that is, the deed of my ancestor Hansford Rizer) to show the extent of my possession, and its character, namely, that I hold it in fee simple, with ample warranties." Appellant admits that, if the possession of said lands by the respondent was an ouster of plaintiff, the statute would apply, but she relies upon the recent case of *Stone v. Fitts*, 38 S. C. 393, 17 S. E. 136, to uphold her position that the defendant's possession of that land was in subordination to her right as a tenant in common therein. It needs no extended remark on our part to show that, when a life estate precedes the falling in of a contingent remainder, no act of the life tenant can divest the estate of the contingent remaindermen. The latter are not obliged to act until the life estate determines. *Moseley v. Hankinson*, 22 S. C. 323. But the life estate determines at the moment there is an owner to land who has the right to sue touching the same. Granted that, if one of a set of contingent remaindermen is in possession of said land, such possession of one is the possession of all. However, if there should be an ouster by that one in possession, who should hold the land 10 years after such ouster, the statute is a bar. All that *Stone v. Fitts*, supra, decided, was that in that case the possession was by one of the tenants in common, with no ouster of the other tenant in possession. The case at bar is widely different from *Stone v. Fitts*, for

here Hansford Rizer entered into possession long before the death of Mary Ann Breland, which occurred in April, 1877, and the holding of Hansford Rizer was devolved upon the defendant (respondent), as his heir at law. Such being the case, the citation of the authority by the appellant fails. The case at bar was heard by the circuit judge, by consent, without the aid of a jury. His judgment must be treated as the verdict of a jury, which presumes the finding of any fact necessary to give it effect. Hence, when the circuit judge found that the title in defendant (respondent) was independent of that of plaintiff (appellant), it necessarily negated the existence of any facts in plaintiff's (appellant's) favor. This being so, in our consideration of this appeal we are obliged to confine ourselves to errors of law in the judgment appealed from. We fail to find any such errors of law. Therefore it is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 278)

JENKINS v. McCARTHY.

(Supreme Court of South Carolina. Oct. 1, 1895.)

NEGLIGENCE—PLEADING—ISSUE.

In an action for injury to an employe engaged in making an excavation, caused by the falling of one of the piles put around the place to be excavated, the complaint alleging as negligence that the piles were "carelessly and improperly driven," and this being denied, the issue is not whether they were driven sufficiently deep, but whether they were driven carefully and properly.

Appeal from common pleas circuit court of Beaufort county; Ernest Gary, Judge.

Action by Nancy Jenkins, as administratrix of the estate of Joseph Jenkins, deceased, against Justin McCarthy. Judgment for defendant. Plaintiff appeals. Affirmed.

W. J. Verdier, for appellant. Thomas Talbird and Elliott & Elliott, for respondent.

POPE, J. This action came on for trial before his honor, Judge Ernest Gary, and a jury, at the February term, 1895, of the court of common pleas for Beaufort county, in this state. It seems that one Joseph Jenkins, while laboring for the defendant in making excavations between piling at or connected with the naval dry dock at Paris Island, in the county of Beaufort, in 1894, was killed by the falling in of two piles. The plaintiff, as his widow, secured letters of administration, and under the act of the legislature of this state commenced an action against said defendant for \$7,000 damages, alleging that the cause of the death of her intestate was the careless and improper driving of some large piles. To be accurate, we will reproduce the third paragraph of the complaint, as this is the only allegation of the complaint bearing on this

particular point: "(3) That for the purpose of such excavation the defendant had driven around the space to be excavated a number of large piles; that said piles were so carelessly and improperly driven, and the defendant had so negligently conducted himself in such behalf, that while said Joseph Jenkins was so engaged in excavating as aforesaid, on the 7th day of May, 1894, one of said piles fell into said excavation or culvert, and struck and instantly killed the said Joseph Jenkins." This was the only contested point, and to this the plaintiff directed her testimony. When she closed such testimony, defendant moved for a nonsuit. The circuit judge, in granting the motion, said: "Now, what is the charge of negligence? It is in driving said piles. What is the proof as to how they were driven, whether carefully or not? The witness testified that they were driven with a steam hammer. There is no proof before this jury whether that is the proper way to drive them or not. Therefore I must assume, till negligence has been proven, that they have been driven in the proper manner. There is no evidence how piles shall be driven, or what is the prescribed form of driving piles. So far as that jury knows, or as I know, if these piles were to be driven again they would be driven just as they were driven. There is no proof of negligence, and for that reason there is no issue of negligence to submit to the jury, and I will grant the nonsuit." After judgment was entered, the plaintiff appealed upon the following grounds: (1) Because the circuit judge erred in deciding there was no evidence of negligence on the part of the defendant. (2) Because it was testified to that the piles would not have fallen had they been driven deep enough, and it was negligence and carelessness not to drive them sufficiently deep. (3) Because the circuit judge erred in confining the question of defendant's negligence to the means used in driving the piles; for, if said piles were not sufficiently driven to hold them fast while the space between them was being excavated, they were improperly driven, without reference to the means used. (4) Because there was evidence of negligence and carelessness on the part of the defendant, and it was error to grant the nonsuit.

The object of pleadings is to reach an issue or issues essential to plaintiff's cause of action or the defendant's defense thereto. The burden is placed upon the plaintiff to establish his cause of action. Now, what was plaintiff's cause of action in this instance? That the life of her husband had been lost through the negligence of the defendant in the careless and improper driving of certain piles, by which Joseph Jenkins lost his life. This was denied by the defendant. Plaintiff elected to go to trial upon this issue so squarely made. At the trial of this issue she offered no testimony as to

the proper mode of driving piles generally, or of these piles in particular. The only testimony, bearing upon the piles' being driven was that it was done by a "big steam hammer," which would drive a pile "until they got enough; as long as they would go they would drive them," and that "the United States officers were down there, watching that work all the time." So that, with issue squarely made, was there any testimony offered at the trial which tended to establish that the defendant was guilty of negligence in the careless and improper driving of these piles? The circuit judge, after plaintiff had finished her testimony, found that there was no such testimony. After a careful review of the pleadings and the testimony, we are not able to say that the circuit judge was in error. So, therefore, the first ground of appeal is overruled.

Next, as to the second ground of appeal. We hold that the plaintiff should have shown that the piles were carelessly and improperly driven. It is quite true that the intestate was unfortunately killed while employed by the defendant in making the excavation between the two rows of piles by the falling of one or more of such piles upon him, and that one of the witnesses for plaintiff did say: "Do you know how far these piles were in the ground? Answer. No, sir; not exactly how deep they were in the ground. Question. I mean from the level when you were excavating,—how much deeper were they in the ground than where you had dug down? A. No, sir; I could not tell you how deep they were in the ground at all. Q. Do you know what caused them to fall? A. Yes, sir. Just from digging. That is what I saw. Q. How would the digging cause them to fall? Ans. In some places the pile goes deeper; and in some places the hammer batters by the stroke, and they stop it; and some places they get hard underneath, and cannot get them deep enough. Q. Were these piles among those that were deep enough or not? A. These were among those that were deep enough. Q. I don't want to know if they were scattered among those that were deep enough, but I want to know if these that fell were deep enough? A. I could not say that they went as deep as the rest. Q. If they had gone as deep as the rest, would they have fallen? A. That is just it, sir. They would not have fallen at all." Yet when this testimony is examined in the light fixed by the complaint, it does not bear upon the issue joined, to wit, that the defendant was guilty of negligence in not carefully and properly driving the piles which were intended to hedge about the excavation while the same was being made by the defendant and others employed by him for that purpose. There is an utter absence of testimony to the effect that the means used by the defendant were not consistent with all proper care in driving down the piles in

question. This ground of appeal must be dismissed.

So far as the third ground of appeal is concerned, we see no error in the circuit judge when he held the plaintiff to the issue as tendered, to wit, negligence in that the piles were not driven carefully and properly by the defendant. It is well known that accidents sometimes occur that human foresight cannot anticipate. While masters, as to their servants, should be held, under the strict rules of law, to providing all proper protection to them, still they are not to be held as insurers against all possible accidents that may imperil their servants. This ground of appeal is dismissed.

Lastly, in the fourth ground of appeal it is alleged that there was some evidence of negligence and carelessness on the part of the defendant. We have before stated the issue joined by the parties litigant here. This exception complains of some evidence of some kind of negligence and carelessness on the part of the defendant. This goes far beyond the scope adopted by the plaintiff in her complaint. It would be hazardous to litigants when brought into court to answer for a specified negligence to open wide the door to proof of any kind of negligence. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

(45 S. C. 269)

CROCKER v. COLLINS et al.

(Supreme Court of South Carolina. Oct. 1, 1895.)

ESTOPPEL—ADVERSE POSSESSION—EVIDENCE.

1. On an issue as to whether a strip of land was a public alley, proof that, before plaintiff purchased the land, he went to inspect the city's map, but it was out of place, and that he found a map in possession of a person who copied it from a copy of the original, and that the strip in controversy was marked as other lots were, will not preclude the city from claiming that the strip was an alley.

2. The fact that an adjoining owner gave his permission to another to have a door swing over a strip of land used as an alley does not indicate that the former claimed title thereto.

Appeal from common pleas circuit court of Beaufort county; D. A. Townsend, Judge.

Action by Daniel W. Crocker against Joseph W. Collins and others, constituting the town council of Beaufort, to enjoin defendants from interfering with his possession of certain property. There was judgment for plaintiff, and defendants appeal. Reversed.

The decree of his honor, Judge Townsend, referred to in the opinion, is as follows:

"This action is for injunction against defendants for interfering with plaintiff in erecting a house on what the plaintiff calls a lot. The defendants claim that it is an alley. This case was heard first by Judge Norton. There was a demurrer to the complaint, which was overruled; and there was a decree for plaintiff, on the ground of adverse pos-

session and nonuser. The defendants appealed, and the supreme court (37 S. C. 327, 15 S. E. 951) reversed the decree below, except as to the demurrer, but intimated that, while the plaintiff could not acquire a title to an alley or public street by adverse possession and nonuser, yet circumstances might arise in connection with either that would work an estoppel against the public. The question of estoppel had not been in the appeal, and the supreme court did not consider it, and the case was heard again by me at Beaufort, at the May term, on the same testimony on which it was heard by Judge Norton.

"It appears from the testimony that as far back as 1825 there was an old plat of the town of Beaufort on record which represented the land in dispute as an alley; that during the war the United States direct tax commissioners made a new map of said town, making some changes in the mode of designating the lots; that the town then ignored the old plat, and adopted the new one, but, so far as appears, did not have it recorded; and, in 1884 or 1885, the marshal of the town lost the certified copy thereof which it had for its use, and since that has had neither the original nor a certified copy. When the plaintiff, in 1890, by his attorney, W. H. Townsend, Esq., examined the title to said property, with the view of purchasing it, he could get no plat from the town nor from any source, it seems, except a copy of a certified copy of the United States direct tax commissioners' plat, which copy had been made by Mr. Talbird, in 1879, from the certified copy then in the possession of the town. From this copy of a certified copy, which it appears was the only information that could there be obtained that was worth anything, the plaintiff's attorney drew the deed from Mrs. Martha A. Barnwell to the plaintiff. This copy of a certified copy is in evidence as Exhibit B, and on it the property in dispute is marked 'F,' just as other lots are marked, and has also the number 30. This shows the conduct of the town officers in regard to the plat of the town. Next, as to the land itself: It nowhere appears that the town ever exercised any authority over it until their interference with the plaintiff, in October, 1890, which made the subject-matter of this action. On the contrary, the town authorities allowed the land to be inclosed for more than a quarter of a century, to be used as a garden; to have a house—kitchen—built upon it, and in all respects to be treated as private property. I, therefore, find as matter of fact: First. That there was ten years' adverse, peaceable, and quiet possession of said land by the plaintiff's grantor, and twenty years' nonuse thereof by the said town and the public at large immediately preceding the execution of the deed from Mrs. M. A. Barnwell, plaintiff's grantor, to plaintiff. Second. That the town officers had, at the time of the execution of said deed, no plat on record showing

the recognized division of the town into lots and streets and alleys; nor had said officers such a plat in their possession, having lost the one they did have in 1884 or 1885. Third. That the plaintiff, after such investigation as he was enabled to make, under the circumstances, as to the title of said land, purchased the same, and put valuable improvements thereon, without any knowledge of any claim thereto by the said town or by the public at large. Fourth. That in October, 1891, after the plaintiff had commenced building upon said land, and had spent a considerable amount of money thereon, the officers of said town, the defendants herein, directed their officers to stop said work, and to remove the material therefrom, and to open the same as a public alley; and that said officers were about to execute said order, and did stop plaintiff's workmen, when this action was instituted, asking for relief.

"I conclude, as a matter of law, that the officers of said town are estopped from in any way interfering with the plaintiff in the erection of his said building; and it is so ordered, adjudged, and decreed. It is further ordered that the plaintiff have leave to apply at the foot of this judgment for any orders necessary to make it effectual."

For the purposes of appeal to the supreme court, the defendants excepted to the judgment or decree rendered and made in the above cause by the Hon. D. A. Townsend: "(1) Because the decree of the circuit judge it without evidence to support it; (2) because the findings of fact by the circuit judge are unsupported by the evidence; (3) because the findings of fact by the circuit judge are contrary to the evidence; (4) because the circuit judge erred in finding as matter of fact that there had been ten years' adverse possession by plaintiff's grantor, M. A. Barnwell, and twenty years' nonuser by the town and the public; (5) because there is no evidence that Martha A. Barnwell ever claimed by word or act any right to the alleyway designated as 'Lot F' of plaintiff's deed, whether by paper title or possession; (6) because there was no evidence that Martha A. Barnwell ever fenced in the alleyway, or that any buildings were ever on said alleyway, and the circuit judge erred in finding the contrary; (7) because there is no evidence that Martha A. Barnwell held, or claimed to hold, the said alleyway adversely, or ever exercised any act of ownership over said alleyway, or act showing an intention to hold it adversely, and his honor erred in finding that her possession was adverse; (8) because the evidence in the cause did not establish adverse possession in Martha A. Barnwell or any one else; (9) because the circuit judge erred in finding as fact that, at the time of the execution of plaintiff's deed, the town officers had no plat on record showing the recognized division of the town into lots and streets and alleys, and had no such plat in their possession; (10) because the circuit

judge erred in finding as fact that plaintiff made such investigation as he was able as to the title of said premises, and put valuable improvements thereon, without knowledge of any claim by the town or public at large; (11) because the circuit judge erred in finding as fact that plaintiff had spent a considerable amount of money upon said land; (12) because the circuit judge erred in finding as matter of law that the defendants are estopped from interfering with the plaintiff in the erection of his building on said land, and in so deciding; (13) because no acts or circumstances were testified to entitling plaintiff to equitable relief; (14) because there was an entire absence of any acts of commission or omission on the part of defendants which would work an estoppel against them; (15) because there was no evidence that plaintiff was misled by any acts, or omission to act, on the part of the defendants; (16) because the evidence showed that plaintiff made no effort to ascertain the title to the disputed premises before buying; (17) because there was no evidence that plaintiff was induced to purchase by any act or word of defendants; (18) because plaintiff could have ascertained that the premises in dispute were claimed as an alley of the town, had he chosen to investigate the title; (19) because there was no evidence of facts and circumstances to warrant the decree; (20) because, if the facts found by the circuit judge actually existed, they furnished no ground for estoppel against the defendants."

Respondent thereafter served the following notice: "Please take notice that, should the supreme court be unable to sustain the decree upon the grounds upon which it was based by the circuit judge, the respondent will ask that it be sustained upon the following grounds: (1) Because, even though the premises in dispute was a public alley, appellants had no right to enter upon same while in possession of respondent, and pull down and remove respondent's buildings thereon, until the rights of the parties had been settled by trial in due course of law; (2) because the proof shows that the premises in dispute was never a public alley."

W. J. Verdier, for appellants. Elliott & Elliott, for respondent.

POPE, J. This action has been before this court once before, and our decision on the first appeal will be found in 37 S. C. 327, and 15 S. E. 951. The cause came on for trial before his honor, Judge Townsend, at summer, 1894, term, of the court of common pleas for Beaufort county, in this state, and by his decree the plaintiff was accorded all the relief he sought. From this decree the defendants now appeal on 20 grounds. These grounds of appeal, together with the circuit decree, will be reported.

Briefly stated, the plaintiff, by his action, sought a perpetual injunction against the town council of Beaufort, its successors in

office, and agents and servants, by which they shall be restrained from any and all interference under a claim of ownership of a certain strip of land 30 feet wide lying between lots designated as "C" and "G" on the certified copy of the United States direct tax commissioners' plat of the town of Beaufort, S. C., claiming that he had bought such strip of land from Miss Martha A. Barnwell on the 4th day of August, 1890, and just after he had begun to improve the same, by attempting to build a small dwelling thereon, he was prevented from doing so by the defendants, as the town council of Beaufort, alleging as their justification for such interference that said strip of land was an alleyway of said town of Beaufort, and had been so owned by the public since prior to the year 1820.

Judge Norton, who first heard the cause, had decided in favor of the plaintiff, on the ground that Miss Martha A. Barnwell had held the land adversely to the public more than 10 years before her conveyance was made to the plaintiff, and also on the further ground that 20 years' nonuser presumes the abandonment of an easement such as a right of way. On these two points, when the cause was in this court on the first appeal, Mr. Chief Justice McIver, as the organ of the court, announced the rule thus clearly: "We think, therefore, that mere adverse possession for the statutory period of a street or alley in a town which is a public highway cannot confer a title. But, when such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public in order to prevent manifest wrong and injustice. For example, when a party, under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of the town, and expended his money in erecting buildings thereon, without interference on the part of the public, these or perhaps other circumstances, connected with adverse possession for the statutory period, may afford good ground for estoppel. Upon the same principles, we do not think mere nonuser of a street or alley of a town for the period of twenty years will amount to such an abandonment as would destroy the rights of the public. It seems to us, therefore, that the circuit judge erred in holding otherwise, and that for this reason the case must go back for a new trial, upon the principles herein announced."

It must be evident that the purpose of this court in ordering a new trial was to allow the plaintiff, if he saw proper, to raise the question of estoppel by reason of the nonaction, etc., of the town of Beaufort touching this alleyway. That the parties to the action offered no new testimony at the second hearing is a matter of no

moment except to the parties to the contention. Parties to an action in a court of justice are never forced to introduce testimony; it is a matter of their own choice, and, we may add, of their own responsibility. This being a cause on the equity side of the court, it is made our duty to canvass the facts as well as the law in response to appellants' exceptions.

The real question here is, has the plaintiff, or the grantor through whom he claims, used this strip of land 30 feet wide by the sufferance of the public for such a time and in such ways as ought to shut off the defendants from the assertion that the plaintiff ought not to be allowed to claim this alleyway as his own. If so, the defendants should be enjoined as prayed for in the complaint; if not, the complaint should be dismissed as wanting in merit.

1. Was there anything done by the public, represented in this instance by the town council of Beaufort, to induce Crocker to take title to this alleyway? First, it is admitted that the first plat of the town of Beaufort, which was duly recorded, showed that this strip of land was thereon marked as an alleyway. While this is true, it is contended that United States direct tax commissioners made a plat of this town of Beaufort during the war; that is, between the years 1861 and 1865. On this map, however, it is shown that this was an alleyway. Plaintiff suggests that one of his attorneys, when he was about to prepare the deed from Miss Barnwell to the plaintiff, applied to the town authorities for their map of the town, but it was misplaced. He then sought out Thomas Talbird, Esq., of the Beaufort bar, and found that he himself had copied a map of the town,—one in the possession of some officer of the town council of Beaufort,—and that on this copy of a copy this narrow strip of land was designated by the letter F, and he drew the deed to include this strip of land. This attorney admitted that he had seen a copy of the map of the town of Beaufort in the office of the collector at Beaufort, and he sought it; it was also out of place. Now, we are unable to see how the town of Beaufort can be held accountable, so far as its rights to this alleyway are concerned, for any copy of a copy of a map. There is not pretended to be any evidence that the copy from which Mr. Talbird made his copy was made by the town of Beaufort, or a correct map. No word was spoken nor act done which in any wise bound the town of Beaufort to an acceptance by it of the copy of a map from which Mr. Talbird made his copy. All these things being true, we are not able to see any elements of estoppel to the town of Beaufort to deny that the deed from Miss Barnwell to the plaintiff conveyed this strip of land.

2. Was there such adverse user of this strip of land by the plaintiff and his gran-

tors that the town of Beaufort should not be allowed now to assert that this strip of land is an alleyway of said town, so that the plaintiff cannot successfully hold the same as his own? (a) We cannot agree with the circuit judge that houses had been built on this land. The testimony does not so declare. (b) We cannot, that it was used as a garden. By far the clearest description of this alleyway and its use was given by the late Mr. Nathaniel Heyward. As it might have been expected by any one who was acquainted with his life, his testimony was fair and frank. Counsel for plaintiff seizes hold of an expression used by Mr. Heyward in his testimony when he referred to his having given permission to the carriage maker, Mr. Rickenbacker, to let a door from his carriage factory swing partly across said alleyway, and bases a claim that such testimony clearly shows that the alleyway was Mr. Heyward's private property. But such is not his testimony as we construe it. This witness always speaks of this alleyway as used by the public. So far as his consent to Mr. Rickenbacker's door being allowed to open on the alleyway, it was only an expression by Mr. Heyward that he himself would not object; he did not claim to bind the public. (c) The fences across the alleyway since 1867 merely indicate a privilege to the adjacent landowners, which arose, no doubt, from a desire to mitigate the terrible results of the late war, which made it quite expensive to run two fences on said alleyway. Hence one was run, and the short fence across the alleyway. (d) So far as plaintiffs' attempt to build thereon is concerned, the testimony fails to disclose any great damage to him. He says his material in all the work on it is worth \$150, but then he is careful to say that the only injury would be to the mortised work by the weather. He admits that no one objects to his removal of his lumber and other material to his Woodbine Cottage lot, adjoining the alleyway. In view of these matters and many others disclosed in the case, we hold that the circuit judge was in error, and his decree must be reversed. We can see no need for further litigation.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to the circuit court, with directions to that court to pronounce a decree dismissing the complaint.

(46 S. C. 263)

VERNER et al. v. PERRY et al.

(Supreme Court of South Carolina. Oct. 1, 1895.)

EXCEPTIONS TO MASTER'S REPORT.

1. Under Code Civ. Proc. § 294, allowing exceptions to and the review of a master's decision as on appeal under section 290, which al-

lows a party to an action to except to a decision on matter of law within 10 days after notice of the decision; and sections 344 and 345, giving a circuit judge power to review findings of fact and conclusions of law of a master,—the court cannot, after the 10 days for filing exceptions has expired, allow the filing of an additional exception.

2. A ruling of a master not before the lower court by proper exception cannot be considered on appeal.

Appeal from common pleas circuit court of Greenville county; R. O. Watts, Judge.

Action by David P. Verner and another against B. F. Perry and others. From a judgment for plaintiffs, defendant W. H. Perry appeals. Affirmed.

Perry & Heyward, for appellant W. H. Perry. Jos. A. McCullough, for respondent J. P. Latimer. L. R. Clyde, for other respondents.

POPE, J. This action was begun by the plaintiffs against the defendants on the equity side of the court of common pleas for Greenville county, in this state, and came on for trial before his honor, Judge Watts, at the fall term, 1894, of said court. The decree sustained the master's report, and was against the defendant W. H. Perry, whereupon he appealed to this court upon five grounds. He has abandoned three, leaving the following to be heard and considered by this court: "(4) That the circuit judge erred in ignoring the motion of defendant W. H. Perry for leave to file an additional exception, making specifically the point that the judgment held by the defendant W. H. Perry has priority over the mortgage held by the defendant Joseph D. Latimer. (5) That the circuit judge erred in not holding that the judgment held by the defendant W. H. Perry, having been duly entered before the mortgage held by the defendant Joseph D. Latimer was recorded, and said mortgage not having been recorded within forty days after the execution of said judgment, should have priority over said mortgage."

Let me consider the fourth exception. It seems that, before Special Master John R. Bellinger, to whom all the issues of law and fact had been submitted, the defendant J. D. Latimer introduced and proved his original mortgage, with all the entries pertaining to its registration indorsed thereon, and at the same time the defendant W. H. Perry introduced his judgment. Mr. Perry contended that his judgment had priority over this mortgage. The special master, in his report, decided in favor of the mortgage of Latimer. No question was made before the special master touching the registration of the mortgage in question. To the report of the special master, Mr. Perry filed sundry exceptions, none of which refer to the registration of this mortgage. More than 27 days had elapsed from the filing of the report of the special master to the date when the circuit judge heard the cause on exceptions to the report of the special master. However,

(45 S. C. 283)

SALINAS et al. v. C. AULTMAN & CO.
(Supreme Court of South Carolina. Oct. 1, 1895.)

RES JUDICATA—CLAIM FOR BETTERMENTS—STATUTES—NONSUIT.

1. Where, in an action to recover land, an intervenor sets up a claim for betterments made by his grantors, and a decree for plaintiff recites that the claim made for betterments by the intervenor cannot be set up in an answer but must be recovered in a direct action, such decree cannot, in a proper action by the intervenor for such betterments, be pleaded as *res judicata* of his right to claim them.

2. Rev. St. § 1957, allowing a tenant, who at the time of making the improvements believes his title to the land to be in fee, to claim betterments in answer to an action against him for the land, is merely supplemental to section 1952, allowing one, after final judgment against him for land, to recover in a separate action for betterments made to the land by himself or his grantor.

3. Where there is evidence supporting material allegations of a complaint, it is error to direct a nonsuit.

Appeal from common pleas circuit court of Abbeville county; Buchanan, Judge.

Action by A. J. Salinas & Sons against C. Aultman & Co. for betterments. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Frank B. Gary and Samuel O. Cason, for appellants. Graydon & Graydon, for respondent.

on that morning, Mr. Perry first had his attention drawn to the date of the registration of this mortgage, and he accordingly moved the circuit judge to allow him to add an exception covering this point. When the circuit judge pronounced this decree, he overruled all the exceptions to the report of the special master, and confirmed the same, but did not refer to the motion of Mr. Perry to be allowed to make an additional exception. Hence this fourth exception. We apprehend that this will prove an immaterial error on the part of the circuit judge if this court should reach the conclusion that the appellant had no right to add this exception, inasmuch as more than 10 days had elapsed after the report had been filed, and that appellant was obliged, in law, to make his exception within the said 10 days. Reference is made to sections 290, 294, 344, and 345 of the Code of Civil Procedure of this state. This court, in *McGee v. Merriman*, 20 S. E. 971, passed on sections 290 and 294, and in effect held that the exceptions then contemplated must be taken within 10 days after notice of the filing of the report of the master or special master. Let us see if the remaining sections 344 and 345 throw any light on this subject. According to the view which prudence suggests in construing these sections, so far as they contain any reference to sections 290 and 294,¹ in their application to exceptions made to the report of masters or special masters or referees, they only give to a circuit judge the power to review the findings of fact and conclusions of law as embodied in such reports, and to reverse, modify, or affirm the same, and have no bearing in fixing the time limited to making and serving the exceptions. This view of this matter has obtained at the bar for many years. Rule 30 of the circuit court lends force to this construction in a measure. Ten days being fixed as the time in which exceptions must be taken to such reports, it would seem that this ground of appeal is untenable, especially in view of the decision in *McGee v. Merriman*, *supra*. But suppose, under section 195 of the Code of Civil Procedure, it is within the discretion of the circuit judge; he has not exercised such discretion. Indeed, his decree is not consistent with any exercise of such discretion on his part. This conclusion on our part almost renders it unnecessary to examine the fifth ground of appeal. If the question submitted by appellant in this fifth ground of appeal could not come before his honor unless covered by an exception on this point to the report of the special master, it is very certain that this court cannot consider it. Let the grounds of appeal be dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

¹ Code, § 294, allows exceptions to and the review of a master's decision as on appeal under section 290, which allows a party to an action to except to a decision on matter of law within 10 days after notice of the decision.

WATTS, J. This is an action for betterments, which was heard on the circuit by Judge Buchanan and a jury at the January term of the court of common pleas for Abbeville county, 1895. For a proper understanding it is necessary to review the facts upon which the claim is founded. One F. M. Pope, being indebted to C. Aultman & Co. and others in a large amount, mortgaged a house and lot in the town of Ninety Six to one G. W. Connor on the 1st day of February, 1884. On the 7th day of December, 1886, the said Pope conveyed the premises to the said Connor. On the 26th day of October, 1887, Connor conveyed to Mrs. Elizabeth M. Pope, wife of said F. M. Pope. On the same day Mrs. Pope conveyed the premises to Mrs. Mattie S. Utsey, who went into possession, and made improvements thereon. On the 24th day of January, 1888, Mrs. Utsey mortgaged the premises to A. J. Salinas & Sons, which mortgage was sued to judgment for foreclosure at the October term of the court of common pleas for Abbeville county, 1891. On the 6th day of January, 1892, the master sold the premises under said judgment for foreclosure, and A. J. Salinas & Sons became the purchasers, and received the master's deed of conveyance. Pending the litigation, Mrs. Utsey died, in March, 1891, and her heirs at law were made parties to the action. In the meantime C. Aultman & Co. had sued to judgment their claims against the said F. M. Pope. Execution was issued and levied on the said house and lot as the property of

the said F. M. Pope. The premises were sold in September, 1889, C. Aultman & Co. becoming the purchasers, and receiving sheriff's title. After this C. Aultman & Co., alleging fraud, both actual and constructive, brought an action to set aside the deeds executed by Pope to Connor, by Connor to Mrs. Pope, and by Mrs. Pope to Mrs. Utsey. During litigation, A. J. Salinas & Sons, having the master's deed, and being in possession of said house and lot, intervened by petition, and were made parties defendant to the action. In their answer as defendants to the suit they set up title and a claim for betterments; in other words, they claimed the benefit of the improvements placed upon the premises by Mrs. Utsey during her ownership, in the event their title failed them. This litigation ended in favor of C. Aultman & Co., and the claim of A. J. Salinas & Sons for betterments was not sustained in that action. *Aultman v. Utsey*, 41 S. C. 304, 19 S. E. 617. Within 48 hours after the case of *Aultman v. Utsey*, supra, had terminated on the circuit, this action was begun. On the call of the case the defendant filed a plea to the jurisdiction of the court, on the ground that the question of betterments was *res judicata*. The court overruled the plea, and the defendant filed the following exceptions: "(1) Because it was error to overrule defendant's plea to the jurisdiction of the court, because it appears from the decree of his honor, Judge Izlar, who heard the case on circuit, and from the opinion and judgment of the supreme court, that the question of betterments had already been determined against the said A. J. Salinas & Sons. (2) Because the question was *res judicata*, and his honor erred in not so holding." The exceptions are the same in substance, and may be considered together.

The case of *Aultman v. Utsey*, 41 S. C. 403, 19 S. E. 617, was heard by Judge Izlar on the circuit. In his decree he uses the following language: "The claim set up in the answer of A. J. Salinas & Sons is not for the improvements and betterments made by them, but for those made by Mattie S. Utsey. Such claim, as I understand the statute, cannot be made in the answer of defendants. If the improvements and betterments made upon lands by those under whom the defendants claim can be recovered at all, it must be by direct action, after final judgment in favor of the plaintiffs in an action to recover the lands and tenements, as provided for in sections 1835, 1839, Gen. St." The circuit judge not only refused to pass upon the question of betterments, but he refused to consider the question, because it had been improperly presented to the court, and he indicated in what manner the question must be raised,—“by direct action, after final judgment in favor of the plaintiff in an action to recover the lands and tenements as provided in sections 1835, 1839, Gen. St.” On appeal the circuit judge was sustained. Justice McGowan, as the or-

gan of the court, said: "Exception 7 imputes error to the circuit judge in holding that A. J. Salinas & Sons were not entitled to betterments. The defendants do not claim that they placed any improvements on the house, but are claiming compensation for improvements put upon the land by Mrs. Utsey, who mortgaged it to them before they had any pretense of title to the lot. Under the circumstances, we do not think the judge committed error in refusing the claim." The exceptions are overruled.

Before the cause went to trial, defendant, C. Aultman & Co., filed a demurrer to the complaint "on the ground that the complaint does not state facts sufficient to constitute a cause of action." After argument, the circuit judge overruled the demurrer, and the defendant filed the following exceptions: "(1) Because it was error in the presiding judge to hold that the complaint states facts sufficient to constitute a cause of action, when it failed to state that the plaintiffs put any improvements or betterments on the land recovered from them. (2) Because it appears on the face of the complaint that the plaintiff did not purchase the land from any one having title to said property, but, on the contrary, purchased the same on a master's sale under a mortgage given to other parties; and it was error not to hold that the complaint did not state facts sufficient to constitute a cause of action. (3) Because the betterment law makes no provision for any one to recover betterments except a defendant who may have made improvements in good faith himself, and it was error in the presiding judge to hold that the plaintiff herein could, under any circumstances, recover betterments." As the first and third exceptions raise but one issue, they will be considered together. Does the law of betterments make provision for any person other than the defendant who makes the improvements? Section 1952, Rev. St. (section 1835, Gen. St.), is as follows: "After final judgment in favor of the plaintiff in an action to recover lands and tenements, if the defendant or those under whom he claimed purchased the lands and tenements recovered in such action, or took a lease thereof, supposing at the time of such purchase such title to good in fee, or such lease to convey and secure the title and interest therein expressed the defendant shall be entitled to recover of the plaintiff in such action the full value of all improvements made upon such land by such defendant or those under whom he claims, in the manner herein after provided." The present action is brought under this section, after a strict compliance with the requirements of the law. From the language of the section it is clear that not only a defendant who made improvements supposing that he had a good title in fee at the time of the purchase, but a party claiming under such defendant, is entitled to the protection of the betterment

law. But it is argued that the act of 1885 (19 St. p. 343; sections 1957, 1958, Rev. St.) is antagonistic to this view. Argument is unnecessary when authority can be cited. In *McKnight v. Cooper*, 27 S. C. 92, 2 S. E. 842, the court said: "The first act [Rev. St. §§ 1952-1960; Gen. St. §§ 1835-1841] provides for the recovery by the improving tenant of the value of such improvements as he or those under whom he claims may have erected, upon the condition, however, that he believed at the time of his purchase of the premises that he had obtained a good title. The second [Act 1885, p. 343; Rev. St. §§ 1957, 1858] provides for such recovery where he has erected the improvements himself, believing at the time of such erection that his title was good." The two acts are not antagonistic, the last being supplemental to the first, and providing a remedy for a different state of facts. Such is the view taken by this court in *Tumbleston v. Rumph* (S. C.) 21 S. E. 84. The court said: "Section 1957 was intended to afford relief in such cases as were not covered in section 1952 [Act 1885, p. 343], by providing that the defendant who may have made improvements or betterments on the lands sought to be recovered from him, believing, at the time he made such improvements or betterments, that his title was good in fee, should be allowed to set up in his answer a claim against the plaintiff for so much money as the land was increased in value in consequence of the improvements so made, even where neither the defendant nor those under whom he claims supposed at the time of purchase such title to be good in fee. The defendant may have believed in a certain case that at the time he made the improvements or betterments his title was good in fee. In that case he would bring his action under section 1952. Section 1957 was intended to supplement, not to supersede, the provisions of section 1952." Exceptions 1 and 3 are overruled.

An examination shows that exception 2 is based upon a misconception of the complaint, and is overruled, there being no allegation in the complaint in support of the exception.

When the plaintiff had concluded his testimony, the defendant moved for an order of nonsuit, which the circuit judge granted, "it appearing to the court that there is a total failure of testimony to sustain the case." The defendant gave notice that he would move to sustain the order of nonsuit on the following additional grounds: "(1) Because the plaintiffs failed to prove that they had any title whatever to the property upon which they claim betterments. (2) Because the plaintiffs failed to prove that at the time they bid in the land at the master's sale they supposed they were getting a title in fee to said land. (3) Because the plaintiffs failed to prove that Mrs. Utsey, from whom they claim the land, supposed at the time she erected the improvements that she

had a good title to said land. (4) Because the plaintiffs failed to prove that Mrs. Utsey ever had any title to said land. (5) Because there was an entire failure of testimony to show the value of said lands without the improvements put on them, and the order must be sustained on that ground. (6) Because the plaintiffs failed to offer any testimony to show that they ever made any improvements on said lands."

From the order of nonsuit the plaintiffs appeal to this court on the grounds: "First. Because his honor erred in granting the nonsuit on the ground that there was a total failure of evidence to sustain the plaintiffs' complaint, when it appears there was some evidence to sustain each material allegation of the complaint." This action is brought under section 1952 (1835) of the Revised Statutes, and the plaintiffs are not trying to recover for improvements placed on the land by themselves, but for improvements placed thereon by Mrs. Utsey, under whom they claim. Did Mrs. Utsey buy the land and take title "supposing at the time of such purchase such title to be good in fee," and is there any allegation in the complaint to that effect, and, if so, is there any evidence in support of it? Did Mrs. Utsey, after she purchased the land, place improvements thereon, and does the complaint so allege, setting forth their value, and is there any testimony in support? If these questions call for an affirmative answer, the case must go back to the circuit court, and it will be unnecessary to examine serialim the additional grounds of defendant in support of the order of nonsuit. The seventh paragraph of the complaint is as follows: "That at the time Mattie S. Utsey bought the property above described she supposed that she was buying a good title in fee, and paid the sum of \$3,250 in good faith." The tenth paragraph of the complaint is as follows: "That Mattie S. Utsey made improvements on said property thereafter, consisting of a dwelling house, barn, etc., of the value of \$2,000, in consequence of which improvements the said property was increased in value \$2,000 more than it would have been had no such improvement been made." These allegations are explicit, and sufficient. Looking to the evidence, we find the following in the testimony of Lewis Moore: "Did you have any connection with the buying of this Pope property for Mrs. Utsey?" "Yes, sir." "In what capacity were you acting?" "As agent of Mrs. Utsey. At that time when she bought the property I was acting as agent for the purchase of it." * * * "Did you look up the titles, and see that they were good?" "No, sir." "Why didn't you?" "Well, I thought Connor's titles were as good as any in the state. I was trusting Connor." "Was the trade completed, so far as the price was concerned, and all, between you and Mr. Connor?" "Yes, sir; it was a complete trade in every respect." * * *

"When you made this purchase for Mrs. Utsey, did you believe you were buying a good property; that the titles were to be good?" "Yes, sir; I did." "At the time you bought this property, did you think you were buying with good title?" "I did." In making this purchase, Moore was the agent of Mrs. Utsey, and his supposition or belief must be imputed to her upon the familiar maxim, "Qui facit per alium facit per se." Referring again to Moore's testimony, we find the following: "Do you know anything about these improvements that were put on there in January?" "Yes, sir. They were put on there in January after the purchase in the fall." "Did you have anything to do with it?" "Yes, sir, I superintended the building of the house for Mrs. Utsey." "What else was built besides the house?" "I am not positive about anything except the house and fencing." "Any barn?" "Well, I am not certain about that." "Do you know what the improvement costs?" "The house and fence was about \$1,600." "In '93, the last of May, say how much more valuable would this place have been by reason of these improvements than without them." "I should say from eight hundred to one thousand dollars." J. B. Syles testified that the improvements added \$800 to \$1,000 to the value of the place. All of this is testimony in support of the material allegations of the complaint, and that it is competent, pertinent, and relevant cannot be questioned. There may be conflict of testimony, and the same witness may not be wholly consistent with himself throughout his testimony; still the truth and weight of the testimony is for the jury, and the judge cannot pass upon it. In *Davis v. Railroad Co.*, 21 S. C. 101, this court held: "Where there is any competent, pertinent, and relevant testimony offered to the facts in dispute, the case passes into the hands of the jury, and beyond the judge; but where no such testimony is offered it is the province and duty of the judge to nonsuit. * * * In the absence of all testimony in support of the material allegations of the complaint, which is a question for the judge, a nonsuit is proper; but when there is any testimony directed to said allegations, the weight, truth, and sufficiency of which are to be determined, the case must go to the jury." Again, in *Willis v. Hammond*, 41 S. C. 158, 19 S. E. 310, Justice Pope, as the organ of the court, said: "It is settled law in this state that the circuit judge ought not to grant a motion for nonsuit if there is any competent testimony before the jury in support of plaintiff's tender of issues; but, on the other side, it is equally true, if no such testimony is offered, such motion should be granted. The solution of this question therefore involves a consideration of the pleadings, and the fact whether any testimony was offered by plaintiff to support the issues there attendered. Of course, it is no part of the duty of the circuit judge or of

this court, in passing upon the fact of such testimony offered, to decide the weight or sufficiency of such testimony, for that is the exclusive province of the jury." The judgment of this court is that the order of nonsuit appealed from be reversed, and that the case be remanded to the circuit court for trial.

GARY, J., disqualified, and did not hear this case.

(97 Ga. 333)

PHILLIPS v. DOWDELL et al.

(Supreme Court of Georgia. July 29, 1895.)

REVIEW ON APPEAL—GRANT OF NEW TRIAL.

There being no complaint that any error of law was committed at the trial, and the only question being whether or not, upon the merits of the case, the verdict below should be set aside, and there being ample evidence to sustain it, this court will not control the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, White county; C. J. Wellborn, Judge.

The following is the official report:

Dowdell Bros. sought to foreclose a mortgage given to them by J. P. Phillips in the interest of Phillips in a certain gold mine, to secure the promissory note of Phillips to them for \$254.48, dated February 24, 1885. Phillips pleaded: Between July 27th and November, 1885, he sold and delivered to W. T. Dowdell, for the use and benefit of Dowdell Bros., for \$427, a *fi. fa.* issued by the comptroller general against E. Fuller, tax collector of Habersham county, and his surety, for taxes due the state for 1884. This *fi. fa.* was sold to and bought by Dowdell to pay off the mortgage, for the use and benefit of Dowdell Bros., and left said Dowdell indebted to defendant some \$30, which was paid to defendant in brick. This was an absolute, unconditional sale of the *fi. fa.*, and full payment of the mortgage, and it was distinctly contracted that there was to be no recourse on this defendant. Some time after the sale and delivery of the *fi. fa.*, and about November 12, 1886, W. P. Fuss had transferred to him by the ordinary of Habersham county a *fi. fa.* in favor of said county against Fuller, tax collector, for a balance of over \$1,000, due the county for taxes for 1884. This *fi. fa.* was levied on property of Fuller, and the same was sold on the first Tuesday in July, 1887, for \$567. This sum was claimed by said Dowdell, as the owner of the *fi. fa.* sold him by this defendant, and by Fuss, transferee, as above stated, and two other small *fi. fas.* The court determined that the *fi. fa.* held by Fuss was entitled to the fund as against that held by Dowdell, as the Dowdell *fi. fa.* had not been recorded in the clerk's office in 30 days, as required by law; the Fuss *fi. fa.* having been recorded November 15, 1886, and the Dowdell *fi. fa.* December 17, 1886. Therefore the Fuss *fi. fa.* re-

ceived \$487.88 that would have been paid to the Dowdell *fi. fa.* had the latter not failed to record his *fi. fa.* as required by law. After this litigation, and about March 8, 1888, Dowdell asked defendant to make him a written transfer of the *fi. fa.*, which defendant did, and which transfer expressed the amount paid and contract made in 1885. At the time of selling the *fi. fa.* defendant believed that a delivery was sufficient to pass the title or interest defendant had therein, and Dowdell must have so believed, as he acted with it. Since said delivery and sale, defendant has not been in control of the *fi. fa.*, or claimed any interest in it, but regarded the sale as absolute and unconditional. The *fi. fa.* was sold to Dowdell Bros. at "his" own risk, in full payment of the mortgage, and was delivered to, and the contract as aforesaid made with, W. T. Dowdell, a member of said firm, who acted for the firm, being its business manager, and who also is prosecuting this case and winding up the business of the firm, the firm having dissolved, and its members having removed without the state. There was a verdict for plaintiffs for the full amount appearing due on the face of the mortgage. Phillips moved for a new trial, and, his motion being overruled, excepted. Affirmed.

The motion was upon the grounds that the verdict was contrary to law and evidence. Also, because it was contrary to the charge of the court, as follows: "That the transfer of the state *fi. fa.*, introduced in evidence by the attorney of the state, to Mrs. Ross, was legal and valid, and that the transfer by Mrs. Ross, by her agent J. P. Phillips, was valid; that when defendant paid to the state the \$427 certified on the *fi. fa.* by the comptroller, his interest in said *fi. fa.* was assignable or negotiable, and his interest was the right to reimburse himself out of the principal, E. Fuller, and to enforce a contribution from his cosecurityties; that, if the transfers were regular, still the defendant J. P. Phillips had an equity in said *fi. fa.* to enforce the same as above stated, and that he could sell his right to W. T. Dowdell for the use and benefit of 'Dowdell Bros.'" The defendant insists that under this charge the verdict should have been for one-fourth of the mortgage only. The evidence was conflicting upon the question as to how Dowdell took the transfer from Phillips, Phillips testifying that he sold the *fi. fa.* to Dowdell, to pay the mortgage, and Dowdell testifying that he took the *fi. fa.* as collateral, and nothing was ever said to him about taking it in payment. There does not appear to have been any evidence as to the other *fi. fa.* and litigation mentioned in the plea. Phillips was one of the sureties of Fuller, tax collector, and the comptroller general's *fi. fa.* against Fuller was transferred to Mrs. Ross, and then transferred by Phillips, agent for Mrs. Ross, and the sheriff, to Dowdell, without recourse. There was a receipt upon the *fi. fa.* showing

that Dowdell had obtained without recourse. There was a receipt upon the *fi. fa.* showing that Dowdell had obtained \$130.97 upon it. It appeared that Phillips had owed Dowdell for paying certain taxes. Phillips claimed in his evidence that he still owed this to Dowdell, and Dowdell claimed in his evidence that the money he received on the *fi. fa.* transferred by Phillips was applied to this last-mentioned indebtedness of Phillips, and did not pay it in full, and that Phillips was not only indebted the amount set out in the mortgage, but was also indebted to plaintiff additional amounts, etc.

J. B. Jones and C. H. Sutton, for plaintiff in error. J. B. Estes, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 329)

ELLARD v. SCOTTISH-AMERICAN
MORTG. CO., Limited.

(Supreme Court of Georgia. July 29, 1895.)

INTEREST ON OVERDUE INTEREST—VALIDITY OF
CONTRACT.

The only material question presented by the bill of exceptions being whether or not it was lawful to contract for interest upon interest overdue, and this question having been settled adversely to the plaintiff in error by the decisions of this court in various cases, including that of *Merek v. Mortgage Co.*, 7 S. E. 265, 79 Ga. 213, no reason for reversing the judgment below appears.

(Syllabus by the Court.)

Error from superior court, Habersham county; C. J. Wellborn, Judge.

Action by the Scottish-American Mortgage Company, Limited, against N. H. C. Ellard. Judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Edwards, for plaintiff in error. J. J. Bowden, L. D. Puckett, and Prior & Thompson, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 219)

HAYS v. WESTBROOK.

(Supreme Court of Georgia. May 13, 1895.)

NEW TRIAL—MOTION OUT OF TERM—NEWLY-
DISCOVERED EVIDENCE.

While motions for new trials, made out of term, upon extraordinary grounds, are not favored by the courts, under the special facts of this case the court below did not abuse its discretion in granting the motion.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by S. L. Hays, administrator, against R. N. Westbrook. Judgment for plaintiff. From an order granting a new trial, plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Wooten & Wooten, for plaintiff in error. W. T. Jones and Hall & Hammond, for defendant in error.

SIMMONS, C. J. The court below did not abuse its discretion in granting a new trial. It seems to us that the movant exercised all the diligence the law requires. Prior to the trial, inquiries were made of the executor of Lockett for such papers as might throw light upon the transactions between Lockett, Rust, and Johnson touching the property in question, and careful search was made among papers belonging to the estate, and in every other place where it was supposed such papers might be found; and the deed from Rust and Johnson to Lockett, upon which the extraordinary motion for a new trial was based, was not found until after this court had affirmed the judgment of the court below. It was found accidentally while a search for papers connected with another case was being made in a place where, up to that time, it was not supposed that any of Lockett's papers were. Until then the movant was ignorant that such a paper was in existence, or had ever been executed. Rust, the only one of the parties to the deed who was alive when the litigation arose, was an old man; his memory was poor; and, when examined as a witness at the trial, he had no recollection of such a paper. The evidence is not merely cumulative, and is such that on another trial it would probably change the result. Judgment affirmed.

(95 Ga. 773)

BECKHAM et al. v. MAPLES.

(Supreme Court of Georgia. April 15, 1895.)

EJECTMENT—TITLE TO MAINTAIN.

A son who enters into possession of land as a tenant of his father thereby admits the title of the latter; and where, subsequently to the father's death, he remains in possession in subordination to a claim of title upon the part of his mother, and occupies the premises by her permission, he thereby admits title in her. If the mother thereafter make a will devising to the son a life estate, with remainder over to his children, the remainder-men, at the termination of the life estate, may, upon the devise of their grandmother, supported by the presumption of title resulting from her possession by her son, who became at her death the life tenant, recover in ejectment their respective undivided interests against any person holding adversely to them the premises so devised.

(Syllabus by the Court.)

Error from superior court, Pike county; J. J. Hunt, Judge.

Action by C. R. Beckham and others against S. M. Maples. Judgment for defendant, and plaintiffs bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

J. S. Pope and J. M. Terrell, for plaintiffs in error. E. F. Dupree and J. F. Redding, for defendant in error.

ATKINSON, J. The plaintiff in this case brought ejectment against the defendant. No paper title was exhibited, save only the will of their grandmother, the second item of which devised as follows: "I give and bequeath to my son, William C. Beckham, for and during his life, and after his death to go to, and be equally divided among, all of his children, born and to be born, share and share alike, the lot of land whereon my said son now resides, believed to be number 255, in the 8th district of said county." These were the premises in dispute. William C. Beckham was the father of these plaintiffs, and, during his lifetime, surrendered the possession of the property in dispute to the defendant in this case. It appears from the record that the father of William C. Beckman was in possession of said property, had been in possession thereof for a great many years, and that William C. Beckham, his son, went in as a tenant of his father; that his father died while he was in possession, and thereafter he continued in possession as the tenant of his mother, who, by her will, as above stated, had devised to him a life estate, with remainder over to these plaintiffs. After the death of William C. Beckham, these plaintiffs, as remainder-men, brought an action to recover the premises, and upon proof of the facts above stated they were nonsuited by the court. To the judgment awarding a nonsuit, exception was taken, and upon writ of error thereon the case is now here for review.

We think the presiding judge misconceived the legal effect of the evidence submitted on the part of the plaintiffs. A person may recover land upon prior possession alone. Possession affords presumptive evidence of title. A tenant may not dispute his landlord's title. By his first entry in subordination to the possession and claim of title of his father, William C. Beckham admitted title in him; and after the death of his father, continuing in possession as the tenant of, and attorning to, his mother, he admitted title in her, and was estopped thereby to set up a title adverse to her claim until he had first surrendered to her, or her privies in estate, the possession of the premises. Whether he accepted the life estate conferred upon him by the will, or not, he could not convey the premises to another, to the prejudice of his landlord and her privies in estate. He could not surrender the possession to another, so as to divest the title or possession of the landlord; and any surrender of the possession by the tenant to another would be of no effect, as against the right of the landlord to re-enter. If he accepted the devise of the life estate made in his favor, as contained in the will of his mother, he could convey no greater interest than he took under the will. Under the will, he had the right to sell his life estate, and surrender the possession, and during the continuance of his life his vendee would be entitled to his possession. Upon the termination of the life estate, the right

of entry was complete in the remainder-men. They brought their action within seven years after the eldest one of the plaintiffs became of age, and were therefore not barred by the statute of limitations, conceding even that prescription would run in favor of the present possessor against the landlord of the original tenant, from whom he acquired his possession, and her privies in estate. We conclude, therefore, that the judgment of nonsuit was erroneous, and the same is accordingly reversed.

(96 Ga. 174)

McELHANEY v. CRAWFORD.

(Supreme Court of Georgia. April 29, 1895.)

APPOINTMENT OF ADMINISTRATOR—DEBTS AGAINST ESTATE.

Where, pending an action for libel, the defendant therein died intestate, the claim of the plaintiff, even if meritorious, was not such a "debt" against the estate of the decedent as would prevent his widow, as sole heir at law, from taking possession of his estate without administration.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Toombs Crawford filed a petition for the appointment of an administrator of the estate of George W. McElhaney. His widow filed a caveat, and from an order appointing the administrator brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Little & Little, for plaintiff in error. Blandford & Grimes, McNeill & Levy, and Reese Crawford, for defendant in error.

LUMPKIN, J. George W. McElhaney died intestate, leaving his widow as his sole heir at law, and there were no debts due or to become due by his estate, unless the claim presently mentioned can be properly designated as a debt. At the time of his death, an action for libel, brought against himself and another by one Crawford, was pending and undisposed of in the superior court of Muscogee county. Crawford filed a petition with the ordinary of that county, alleging the existence and pendency of the above-mentioned action, that the estate of McElhaney was unrepresented, that no one had applied for letters of administration, and praying that the clerk of the superior court be appointed administrator. The widow filed a caveat, in which she set up that she was the only heir of the deceased; that there were no debts against his estate, and therefore no necessity for any administration; and that, if any such necessity did exist, she would be entitled to be appointed administratrix. The case went to the superior court by appeal, and was there submitted to the presiding judge without a jury, there being no contest as to the facts above recited. The judge held that an administration should be granted; that the

widow be appointed administratrix, if she so desired, and, if not, that the administration be vested in the clerk of the superior court. To so much of the order as adjudicated that there should be an administration upon the estate, Mrs. McElhaney excepted.

Under section 1762 of the Code, as amended by the act of December 12, 1882 (Acts 1882-83, p. 47), the wife, if the sole heir of her deceased husband, upon the payment of his debts, if any, may take possession of his estate without administration. In view of this law, there can be no doubt that there was no legal necessity for an administration upon the estate of McElhaney, unless the claim of Crawford in his libel suit is to be regarded as a debt of the deceased. Even granting that the action was meritorious, still we do not think the claim therein set forth was, within the meaning of the statute, such a debt as would prevent the widow from taking possession of the estate without administration. It is true that in the case of Westmoreland v. Powell, 59 Ga. 256, this court held that where one committed an actionable tort upon the person of another, and thereby became liable and bound by law to pay an amount of money, certain or uncertain, the latter was so far a "creditor" of the former as to be protected under the law declaring void as against creditors all fraudulent conveyances made by insolvent debtors. But in Gamble v. Railroad Co., 80 Ga. 601, 7 S. E. 315, this court said it was not the purpose of the case just cited "to hold that torts would make debts, save so far as to bring the injured party within the protection of the statutes for the prevention of conveyances and transfers of their property by debtors in fraud of their creditors"; and that "the principle of equitable construction would justify that decision without any strain whatever of the words 'debt,' 'debtor,' or 'creditor.'" It thus appears that this court has heretofore manifested an indisposition to extend the doctrine of the Westmoreland v. Powell case any further than as indicated in the case last cited, in which it was held that a claim founded in tort, and not reduced to judgment, is in no proper sense such a debt of the person committing the tort as can be reached by garnishment. It is stated in 5 Am. & Eng. Enc. Law, pp. 148, 149, that debt has been held not to include a liability in tort. See the authorities there cited, among them 3 Bl. Comm. 154, to the effect that "a debt imports a sum of money arising upon a contract, express or implied, and not a mere claim for damages." The act of 1889 (Acts 1889, p. 73), amendatory of section 2967 of the Code, declaring that certain actions ex delicto should not be abated by the death of either party, and the decision of this court in Johnson v. Bradstreet Co., 87 Ga. 79, 13 S. E. 250, holding that this act was applicable to actions for libel, were cited to show that Crawford had a cause of action which survived the death of McElhaney, and consequently had

a right to proceed therewith against the defendant's personal representative; and accordingly it was strongly urged that Crawford could insist upon some proper person being appointed administrator of the deceased, for otherwise he (Crawford) would be practically without remedy. This contention is answered by the decision of this court in *Johnson v. Champion*, 88 Ga. 527, 15 S. E. 15, in which it was held that where a widow, under the provisions of the act first above cited, became entitled to take possession of and hold the estate of her deceased husband without taking out letters of administration, she became his "personal representative." The doctrine of this case is fully recognized in *Towns v. Mathews*, 91 Ga. 546, 17 S. E. 955. No reason, therefore, occurs to us why Crawford may not proceed with his action after taking the proper steps to make Mrs. McElhanev a party defendant as the legal representative of her deceased husband. Judgment reversed.

(96 Ga. 190)

CITY OF ATLANTA v. McDANIEL et al.
(Supreme Court of Georgia. May 13, 1895.)

INTERPLEADER—WHEN ALLOWED—INJUNCTION.

1. Whenever a person is possessed of property or funds, or owes a debt or duty to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead. Code, § 3234.

2. In view of the above section of the Code, and under the facts disclosed by the record, it was error to deny the petition for injunction and interpleader.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Petition by the city of Atlanta against H. T. McDaniel and others to compel an interpleader. Application denied, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

The following is the official report:

The city of Atlanta filed its petition against McDaniel and Jenkins, praying that a suit brought by McDaniel against the city be enjoined, and that McDaniel and Jenkins be compelled to interplead as to their claims to a certain amount in the hands of the city. The judge below denied the interpleader and injunction asked, and to this judgment the city excepted.

The petition alleged: In February, 1892, the city advertised for plans for building a bridge, proposing to pay \$500 for the plans accepted. In November, 1893, the plans of McDaniel were accepted conditionally, the city agreeing to pay McDaniel \$250, and to pay the remaining \$250 when the plans, etc., were found to be satisfactory to the bridge committee and city engineer. The latter declined to approve the plans, etc., and for this reason there was for a long time a contro-

versy in the city council as to whether McDaniel was entitled to the remaining \$250. McDaniel employed Jenkins as his attorney at law, and as such Jenkins appeared repeatedly before the council, the aldermanic board, and committees of council. Finally, in June, 1894, the city decided to pay the \$250, but did not then pay it to Jenkins as McDaniel's attorney upon Jenkins' demand, because on June 18, 1894, the city comptroller was notified by McDaniel that Jenkins no longer represented McDaniel. Afterwards the city paid McDaniel \$170, but refuses to pay the balance of \$80, because of a notice from Jenkins that the claim should be paid to him as McDaniel's attorney, and, if not so paid, he would hold the city liable to him for \$83.33, the amount of his fees for services rendered in collecting the claim; that he claimed a lien for his fees; and that McDaniel was insolvent. So the city felt it was its duty to withhold the \$80, until the question should be adjudicated, so as to protect it from having to pay out the money twice. The \$80 is due either to Jenkins or McDaniel, or to them jointly, and the city is ready and willing to pay it, but cannot determine without hazard to itself to whom it ought to pay, till there is a proper adjudication of the matter by a court of competent jurisdiction. Jenkins still demands payment to him, and threatens the city with suit; and McDaniel has brought suit for the \$80 against the city in a magistrate's court, where the city has answered, setting up the facts as above, and the case has been set for a hearing. Jenkins has not been made a party to the suit, and it is doubtful whether he can be, so as to prevent a judgment in favor of McDaniel, and whether that court can render a judgment which will protect the city from having to pay the amount twice; and the city alleges that that court has no jurisdiction to properly adjudicate the matter, so as to protect the city and all parties at interest. The city is not colluding with either of said claimants to the fund, and only desires to pay it to the one entitled.

The nature of the answers of McDaniel and Jenkins will be sufficiently indicated by the report of the evidence. At the hearing the mayor testified: It is not true that the city is conniving or confederating with Jenkins, or trying in any way to force McDaniel to settle with Jenkins; but the petition was filed in good faith to protect the rights of the city. The city attorney testified: As such, he has been familiar with the matter in all its stages. He did suggest to McDaniel to bring suit in the justice's court, but this suggestion was made in the utmost good faith, and with the purpose on deponent's part to try to have the pleading in the justice's court framed, by the consent of the city and McDaniel and Jenkins, so that the justice might determine to which of these two the city was indebted, or, if to both, in what proportion. This will

fully appear by reference to the answer of the city in the justice's court suit. He was afterwards informed by Jenkins that Jenkins did not believe it legally possible for the justice's court to exercise the jurisdiction and power contemplated by said answer, and that he (Jenkins) was so advised by eminent counsel, and that interpleader on the application of the city was the proper remedy. Feeling that this was true, unless there was active co-operation of all the parties in good faith, deponent presented the application for interpleader, which was in the main prepared, as he is informed, by Jenkins. It is wholly immaterial to the city and to deponent to which of the parties claiming the fund it should be awarded, the whole purpose of the city and of deponent being to protect the city from loss. The assistant city attorney testified: "The amendment to the bill of interpleader, waiving discovery, etc., was signed by me some few days after it was drawn. It was at least ten days or two weeks before September 15, 1894, that Jenkins handed it to me in my office, and I signed it. [No such amendment appears in the record.] It was admitted that the petition correctly stated the facts as to the litigation pending before the justice of the peace." For McDaniel, Miller testified: Jenkins told him shortly after he was employed by McDaniel that his contract with McDaniel was to collect the money on a fee of 10 per cent. of the amount recovered. After the aldermanic board had defeated McDaniel's claim, Jenkins told deponent that after that action there was no chance to get the money without suit, and he would have to bring suit for it. McDaniel testified: He does not deem it necessary to give any other reply to the allegations in the answer of Jenkins as to debts of this deponent than to say that they are to a large extent false, and are maliciously dragged into the case. It is true he desired to know and inquired what Jenkins was going to charge him. He had tried to get rid of Jenkins, and had reason to believe that Jenkins was dissatisfied because of this. He became convinced that Jenkins would not respect his contract, and was fearful that Jenkins would make an unreasonable charge in violation of his contract, and he simply wanted to know whether Jenkins was going to break his contract, but could never definitely ascertain until Jenkins notified the city that he claimed one-third. McDaniel also introduced a letter from Jenkins to himself dated June 15, 1894: "When the \$250 is paid me as your attorney, I will deduct the amount of my fee therefrom, and the remainder will be subject to your order. This is all the response I have to make to your note of this date." For Jenkins, Chisholm testified: "I was friendly to both Jenkins and McDaniel, and, when I heard of the controversy, undertook to bring about an adjust-

ment of the matter. I saw McDaniel, and he asked me to see Jenkins about it. He stated to me that he had made no agreement with Jenkins as to the amount of fees; that Jenkins intended to charge him one-third of the \$250; and that he thought that was too much. This was between the 18th and 23d of June, 1894. A certificate from the tax receiver showed that McDaniel returned no property for taxation for 1894." Jenkins testified: "The statement by Miller that I told him I was to collect the money on a fee of ten per cent. is false. Some time after the controversy arose as to the case, and after June 16th, Miller asked me what my fees would be, and I told him one-third of the claim. He seemed to think it too much, and said McDaniel thought so too. He said he thought \$25 would be about right. I replied that if McDaniel had paid me \$25 in cash at the outset, without reference to whether the claim was collected or not, \$25 might be considered reasonable, but that, as my fees were conditional, I did not think one-third an unreasonable charge. I did not tell Miller that there was no chance to get the money without suit. I do not remember telling him anything about it, though he may have heard me and McDaniel speak despondingly of the matter; and I may have told Miller that, if I did not succeed in getting it through without that, I would bring suit, for that was both my intention and that of McDaniel. I bona fide claim that McDaniel owes me \$83.33 for fees in the collection of the \$250. I bona fide claim an attorney's lien for that amount, and that it is the duty of the city to pay the \$250 to me as attorney for McDaniel. McDaniel has no property in Fulton county subject to levy, and, after diligent inquiry, I have found him to be insolvent; and it was a wrong upon me to have paid the \$170 already paid to McDaniel." Ragsdale testified: "I was in the office with Jenkins between April 5, 1894, and June 20, 1894. McDaniel called a number of times in regard to his case. McDaniel asked me one time what I thought Jenkins would charge him. I told him I had no idea, and then, as a jest, said not more than \$50 or \$75. This was quite a long while after Jenkins was employed. I copied a great number of papers for Jenkins in regard to the case, and know that Jenkins did a great deal of hard work in the case, as McDaniel was constantly advising with him. About the latter part of June, Jenkins sent me over to get some papers and a letter from McDaniel, and McDaniel said he did not have the papers, and that he had never written Jenkins any letter. Jenkins sent me over to tell McDaniel what the bill was, and it was \$83.33. McDaniel never intimated to me that he had an agreement with Jenkins about fees, though he claimed that the fee charged by Jenkins was too much, and said he could have got-

ten other attorneys for less. I heard both of them mention the fees at different times, and from this am satisfied there was no agreement between them as to fees. Miller, who was at McDaniel's place of business frequently, and associated with him, asked me a number of times how much I thought Jenkins would charge, and I replied I did not know, but guessed it would not be over \$50 or \$75; and he said he thought that too much. These conversations were had during May." Letters were introduced by Jenkins, written by McDaniel to him at various dates from April 9, 1894, which tended to show that Jenkins was employed by McDaniel as McDaniel's attorney in pressing the claim against the city; that Jenkins did work in the matter; that there was no agreement as to fees; and that McDaniel intended to resist Jenkins' claim to fees to the extent claimed by Jenkins, and denied that Jenkins was entitled to an attorney's lien for fees.

J. A. Anderson and F. Colville, for plaintiff in error. E. M. & G. F. Mitchell and J. C. Jenkins, for defendants in error.

LUMPKIN, J. As the first headnote is a literal copy of section 3234 of the Code, its correctness as a legal proposition can hardly be questioned. Whether or not it is applicable in the present case depends, of course, upon the facts, which appear in the official report. No one, we think, after reading with any degree of care the reporter's statement, can have much, if any, doubt that, if there ever was a case in which it was uncertain as to who was entitled to a fund in the hands of an innocent stakeholder, this is undoubtedly a case of that kind. The city of Atlanta owed at least a portion of the money it held to one of two persons laying claim to the same; and we think it clearly appears that these adverse claims were of such a character as to render it at least doubtful who was best entitled to receive the fund in controversy. It seems evident that Jenkins had a lien upon this fund because of professional services rendered. The precise amount to which he was entitled was, however, under the conflict presented by the evidence, purely a question for a jury. The city could not safely, therefore, pay all the money held up to McDaniel; nor could it safely pay to Jenkins a sum greater than he was rightfully entitled to receive. Under these circumstances, we cannot hold that it was incumbent upon the city, at its own risk, to undertake to adjust the conflicting claims between these contending parties. In other words, we think the above-cited section of the Code was intended for just exactly such a case as this.

The interpleader ought to have been allowed, and the respective rights of all parties thus definitely settled by one verdict and judgment. Judgment reversed.

(96 Ga. 227)

STANSELL v. GEORGIA LOAN & TRUST CO.

(Supreme Court of Georgia. May 13, 1895.)

CONFLICT OF LAWS—USURIOUS CONTRACTS.

1. Under the decision of this court in the case of *Jackson v. Mortgage Co.*, 15 S. E. 812, 88 Ga. 756, the notes sued on in this case, considered in connection with the deed given to secure the same, the other documents in evidence, and all the facts proved, were Georgia contracts; and the question whether or not these notes were affected with usury was properly determined with reference to the laws of this state.

2. According to the decision in *Hughes v. Griswold*, 9 S. E. 1092, 82 Ga. 299, and in view of the undisputed facts disclosed by the record, the jury were amply warranted in finding that the notes sued upon were free from usury, and the court committed no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Brooks county; A. H. Hansel, Judge.

Action by the Georgia Loan & Trust Company against R. L. Stansell. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

S. T. Kingsbery, Bennett & Bennett, J. G. McCall, and W. C. McCall, for plaintiff in error. E. P. S. Denmark and Anderson & Anderson, for defendant in error.

LUMPKIN, J. The Georgia Loan & Trust Company sued Stansell upon two promissory notes, each for \$600 principal, with interest from their date at the rate of 8 per cent. per annum, payable semiannually, and due December 1, 1893. They stipulated that both principal and interest should be payable at a named bank in New York City, and that, if default should be made in the payment of interest, the principal should at once become due. These notes were made at Quitman, Brooks county, Ga., and on their face were payable to the Georgia Loan & Trust Company, of Americus, Ga. Their payment was secured by a deed to certain land in Brooks county, and purported to have been executed under section 1969 et seq. of the Code. Stansell, the maker of the notes, had previously made out a written application, addressed to one Humphreys, of Quitman, for the purpose of obtaining a loan of money, and in that application tendered, as security for the loan desired, the lands embraced in the deed above mentioned. He made default in the payment of interest, and accordingly the action was brought for the entire amount of principal and interest accrued up to the time of filing the declaration. Although, as already stated, the notes were made payable to the Georgia Loan & Trust Company, it distinctly appeared by the uncontradicted testimony that this company had really no interest whatever in making the loan, did not actually lend the money, and that the notes were made thus payable simply as a matter of convenience in obtaining the loan from

other parties; that the money was really loaned by a company in Connecticut, to whom the Georgia Loan & Trust Company indorsed the notes, but, after default was made by Stansell, the latter company paid off the actual lender in full, and thus became, for the first time, the real owner of the notes, and therefore brought suit upon them in its own name and right. There was a verdict for the plaintiff, and the defendant excepted to the overruling of his motion for a new trial. This motion contained numerous grounds, but the case, upon its substantial merits, is controlled by the propositions announced in the headnotes.

1. It will be seen from the foregoing condensed statement of the facts that this case is in all material particulars very similar indeed to that of *Jackson v. Mortgage Co.*, 38 Ga. 756, 15 S. E. 812. In that case it was decided that notes executed and delivered under like circumstances were properly treated as Georgia contracts, and that the question whether or not such notes were infected with usury was rightly determined with reference to the laws of this state. Adhering to the doctrine of that decision, we therefore hold in the present case that the mere fact that the notes upon which Stansell was sued were made payable in the city of New York did not, in view of all the other facts shown, make them New York contracts, and therefore, under the laws of that state, usurious upon their face.

2. In its other elements, the case at bar very closely resembles, and is controlled by, that of *Hughes v. Griswold*, 82 Ga. 299, 9 S. E. 1092. In that case the note sued upon was made payable to Tallman, one of the "middlemen" engaged in procuring the loan for Griswold, the borrower. It was there held that, even though the firm of which Tallman was a member advanced its own money in turning over the net proceeds of the loan to the borrower, this fact did not infect the loan with usury, although Tallman's firm received a portion of the commissions paid by the borrower for negotiating the loan, it appearing that the substitution of this firm's money in place of that of the actual lender was only a means of exchange, resorted to for convenience merely. Substantially the same state of facts was shown in the case now before us by the testimony of Coleman, the treasurer of the Georgia Loan & Trust Company, which was not disputed by any witness.

While there may be evidence in the record sufficient to raise a suspicion of usury in the transaction between this company and the defendant, Stansell, yet the jury were amply warranted in finding that the notes sued upon were entirely free from usury. Indeed, it is exceedingly doubtful if any other finding on this question could have been allowed to stand. Certainly the court committed no error in refusing to grant a new trial. Judgment affirmed.

WARD et al. v. FRICK CO.

(Supreme Court of Georgia. June 10, 1895.)

PLEA—WAIVER OF DEFECTS—AMENDMENT.

It being, under the pleading act of 1893, the duty of the judge of the superior court at each regular term to call all cases on the appearance docket, and hear and determine all objections made to the sufficiency of petitions and pleas, it is incumbent upon plaintiffs to make at that term their exceptions to pleas filed. Consequently, where, to an action upon an unconditional contract in writing, a plea was filed at the first term, which set forth a good defense, but was not sworn to by the defendants, and no objection was then made to it because of this defect, the plaintiff will be held to have waived the same so far as that term is concerned; and if, at a subsequent term, he moves to strike the plea because of such defect, the court should then allow the defendants to complete the plea by a proper verification.

(Syllabus by the Court.)

Error from superior court, Coffee county; J. L. Sweat, Judge.

Action by the Frick Company against C. A. Ward, Jr., and others. Judgment for plaintiff, and defendants bring error. Reversed.

Ward & Dart, J. M. Denton, and E. M. Mitchell, for plaintiffs in error. G. J. Holton & Son, for defendant in error.

ATKINSON, J. The pleading act of 1893 (Acts 1893, p. 56) is highly remedial in its purposes. It was not designed to advance the interests of plaintiffs alone, but its purpose, while simplifying procedure, was to make more speedy the trial of civil cases by rendering more certain the issues to be tried. It therefore requires that all exceptions to declarations and pleas shall be heard and determined at the first term, and before they can be heard they must at that term first be taken. If the declaration of the plaintiff is insufficient in law, or if, for any reason, the same be not sufficiently full to enable the defendant to plead thereto, he shall make exception at the first term, and, failing in this, will be held to have waived any objection to the declaration curable by amendment. Inasmuch as all exceptions to pleas are likewise required to be heard and determined at the first term, it is the duty of the defendant at that term to make his appearance, and file such pleas as he may deem proper to his defense. If the plaintiff does not at that term except to the sufficiency of such pleas, he will be held to have waived any objection thereto which may be cured by subsequent amendment. For this reason, when a defendant was sued upon a promissory note, unconditional in its terms, appeared, and at the first term filed a substantial defense to the merits of the plaintiff's cause of action, but omitted to swear to the same, no objection having been filed to this plea at the first term, the plaintiff will be held to have waived this defect; and at a subsequent term of the court, when the cause was called

In its order, it was proper that the court should allow the defendant then to make oath thereto. The present case, illustrates the wisdom of the principle upon which the statute under review is predicated. It prevents either party being taken by surprise, and places the responsibility upon the respective parties of taking at the first term such exceptions to the pleadings of the other as will entitle them to the complete remedial operation of this statute. Let the judgment of the court below be reversed.

(97 Ga. 314)

GEORGIA RAILROAD & BANKING CO. v. BROOKS.

(Supreme Court of Georgia. Aug. 16, 1895.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

The evidence was conflicting, but, being sufficient to sustain the verdict rendered in favor of the plaintiff, and the same having been approved by the trial judge, this court will not overrule his discretion in denying a new trial. (Syllabus by the Court.)

Error from superior court, Oglethorpe county; Seaborn Reese, Judge.

Action by John R. Brooks against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Brooks sued the railroad company for a personal injury received by him while in its employment as a train hand, and obtained a verdict for \$1,600. The company moved for a new trial on the grounds that the verdict was contrary to law and evidence, and the motion was overruled. The injury occurred by plaintiff's arm being caught between the deadblocks of two freight cars which he was endeavoring to couple by order of the conductor of the train. The negligence charged against the company was in carelessly running the train back to the standing car with too great speed. Plaintiff testified: "When they came back, I signaled them down. He was running at such a rate I saw it would break things up. I went to the cab, and placed my link, and stepped out, and gave him a signal to come back slowly. There was a negro above me, giving the same signal that I was giving, to the fireman. I went in to make the coupling. The train was coming so fast I could not tell its speed until it was too late. It was coming so fast I could not tell how fast it was coming. I was about half a car length from the cab when I signaled the car to come back. The car was about a car length [34 feet] from me. I had stopped the car in about a car and a half length of the cab. I then walked back at about three miles an hour, and just as I got to the cab the car was on me. After signaling the car to come back slowly from that distance, I went in to make the coupling. I had just walked in when the car caught me. I was giving signals until

I saw it was time for me to go in and make the coupling. It was dark [the night of December 20, 1892], and I was giving signal with a lamp. I could not tell the speed at which the car was coming, because it was dark. I attempted to make the coupling with my hand. I caught hold of the link to guide it, to make the coupling. I had been coupling cars there for four months. Had coupled them with my hand. Had been coupling cars all the time a similar way to the method I was using when I was hurt. I had been working under Callahan [the conductor] a little over a month. He had observed me making couplings in that manner. I make them all like that one. I was furnished with no other method, nor given any other instructions by Callahan or any other officer of the railroad, as to coupling cars. I signaled them back slowly from a dead standstill. I do not know where the conductor was the instant I was hurt. When I made these signals, the other train hand, John Smith, took them up, and repeated them to the fireman. The train was standing on the main track. I had uncoupled the locomotive and freight cars from the cab. The locomotive with the freight cars attached had gone down on the siding, and got the car and come back on the main line to recouple to the cab. As it was coming back to do that, I saw it was coming too fast—saw it—I was in danger. I thought of smashing things up. I commenced waving him down. He would not have stopped if I had not waved him down. He would not have stopped at all unless he received a signal. It was his duty to come on back until he received a signal. So he was acting in the discharge of his duties; and on getting the signal from me, he acted as he should have done. I cannot tell how fast it was coming. It was coming mighty fast. I could ascertain it was coming back fast,—too fast to couple to the cab. After hitting the train to a standstill, I went to the cab bumper, and fixed the link, so it was hanging there ready for me to put it in the other bumper. I then set the pin in the freight-car bumper. After doing that, I walked back about a car length, and gave the signal for them to come back slowly, being then on the fireman's side of the track. I kept on giving the signal until the car got up right for me to walk in, and I walked in. The car was then about five or six feet from me. I just stepped in and got ready to make the coupling. I was then close enough to the cab to catch hold of the link by stretching out sidewise. When I went to catch hold of the link, I had my back to the cab and was facing the car moving toward me. I took up the link, and held it there, and let it slip into the bumper of the car as it came up, and that was the time my hand got caught, as the bumpers got together. The bumper is the thing in which the link and pin go. The deadblocks are two pieces of casting just above and on each side of the bumper, placed there so that if the bumper should

break, the cars would not come together. The deadblocks strike together always. There were deadblocks on each car. They are there so that, if the train come back too rapidly, they will strike together, and your body would not be mashed. I did not use a coupling knife. Do not know whether or not any coupling knives were on the train. Never had been instructed to use them nor seen others use them. I did not discover the speed of the train until it was right on me. I knew it was coming back, but expected it to come back slowly. I did not see it because it was so dark. I and the others had lanterns. They gave a pretty good light through a radius of ten feet. I took my arm over these deadblocks to make the coupling. I had it over the deadblock. I cannot tell how my arm was caught between them. If I could have seen the fast moving train, I would not have gone in there." Plaintiff further testified that his arm was badly hurt. It gave him considerable pain. He never slept for three nights after the injury. He seems to have had proper medical attention. He incurred \$45 on this account, and some further expense for attention. He was 21 years old at the time of the injury, and in good health. At the trial, two years afterwards, he could not bend his arm. Could use it a little, but had no grip in his hand. He was receiving from the railroad company \$26 per month, subject to deduction for time lost. He has, since July 14, 1893, been working for \$24 a month in a position requiring no special physical strength, walking and riding over fields to have work done by laborers, etc. The defendant introduced the conductor, engineer, fireman, and brakeman of the train in question. Their testimony was strongly opposed to that of plaintiff; it appearing, among other things, that the train did not come back rapidly, but very slowly, on signals given by plaintiff, and repeated by the brakeman and conductor to the fireman, who communicated them to the engineer; that it was a rule of the company that coupling knives were to be used in coupling cars, and there were two of them on this train, in the baggage car, and accessible to plaintiff, who was instructed about using them when first employed.

J. B. & B. Cumming and M. P. Reese, for plaintiff in error. W. M. Howard and D. W. Meadow, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(96 Ga. 810)

ALLEY v. HALCOMBE.

(Supreme Court of Georgia. July 29, 1895.)

JUDGMENT OF NONSUIT—REINSTATEMENT.

The judgment denying a rule absolute upon the mortgage foreclosure was, in effect, a judgment of nonsuit; and it was too late, after the expiration of the term at which it

was rendered, to move to reinstate the plaintiff's case because of error committed in the rendition of that judgment. The plaintiff should either have moved to reinstate during the term, or have filed a bill of exceptions within the time prescribed by law.

(Syllabus by the Court.)

Error from superior court, White county; C. J. Wellborn, Judge.

Action by W. C. Alley against Green B. Halcombe. Judgment of nonsuit, and plaintiff brings error. Affirmed.

W. T. Crane, J. W. H. Underwood, and H. H. Dean, for plaintiff in error. J. B. Estes and Perry & Craig, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 328)

CLAYTON et al. v. WEST.

(Supreme Court of Georgia. July 29, 1895.)

RES JUDICATA—NEW TRIAL.

1. One who was a stranger to a proceeding to establish a copy of a lost deed, and who neither claims under the grantee therein nor is in privity with him, is not estopped from attacking the correctness of the copy established.

2. It appearing from the evidence in the record, taken all together, that the plaintiff below was not a party to the proceeding to establish the lost copy in question, the court erred in rejecting evidence offered by him to show that the copy was not in fact correct, and properly corrected this error by granting a new trial.

(Syllabus by the Court.)

Error from superior court, White county; C. J. Wellborn, Judge.

Action by J. F. West against C. M. Clayton and others. Verdict for defendants. From an order granting a new trial, defendants bring error. Affirmed.

The following is the official report:

West brought his petition against Garrard & Clayton for the recovery of the southern portion of lot No. 165 in the Second district of White county, "containing five acres, more or less, being a mill shoal, dam, pond, and improvements thereto; said land, mill shoal, dam, pond, and improvements lying on Whitecreek, which runs through said lot, and known as the 'Mat House Mill property.'" Plaintiff claimed under deed from Mat House to S. D. Poor and deed from S. D. Poor to plaintiff. The trial of the case resulted in a verdict for plaintiff. Motion for new trial was made, which was granted. Upon the second trial plaintiff amended his petition, and alleged that Poor was in possession of the premises openly, etc., from November 28, 1871, under warranty deed, until December 28, 1888. Said defendants, together with Miller and Adams, appeared as defendants, and by way of answer set up that they were the owners of a right to operate a saw mill on the mill shoals (except the grist mill), with good and sufficient room therefor, in fee simple, until they should abandon the same, and take out their machinery and move it; that this was evidenced

by a deed to them and their heirs, dated December 31, 1885; and that they had been in actual, etc., possession, claiming under said deed, ever since the date thereof, which deed and possession created in them a perfect title to the property, subject to the conditions in said deed. There was a verdict generally for the defendants. The evidence was substantially the same as that introduced on the first trial. Plaintiff moved for a new trial. During the argument of the motion, counsel disagreed as to the effect of the verdict; movant's counsel contending that it would defeat plaintiff from ever recovering the premises, even if defendants should abandon the premises and cause their deed to terminate by its own terms. To put any question on this point at rest, defendants entered upon the motion for new trial a disclaimer writing off all right in the premises sued for "except as to the right, title, and interest which they have and own under the deed made to them by S. D. Poor, their vendor, and claim nothing under said verdict, except such right, title, franchise, interest, possession, and claim as is conveyed to them by said deed." The motion for new trial was granted, to which ruling defendants except. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the verdict was contrary to the issues made by the pleadings and proof. Further, because the verdict was contrary to the following charge: "I charge you that if the owner of property stands mute, and sees an innocent party buy his land, and says nothing about it, he is estopped from claiming it. So, in this case, if these defendants knew that Poor was about to sell their property to West, it was their claim." Because the court erred in concluding the above charge as follows: "But I charge you that the law would not require that these defendants would believe, in the absence of anything suspicious, that Mr. Poor was a criminal, and would sell the same land twice." Alleged to be error in requiring the jury to believe that Poor was a criminal if he made two deeds, or inquiring into his intentions for any purpose. Error in refusing to allow plaintiff to attack the copy deed of defendants, exhibited in the superior court of White county. Plaintiff proposed to show by the party who drafted it that the deed established was not a correct copy of the original, as the original was a mere license to operate the mill for a limited time, and was not a deed in fee simple, "and heirs and assigns." The deed referred to in the last ground appears to have been an established copy of the deed from Poor to defendants, giving them the right to operate a sawmill on the mill shoal on the lot in question, "with good and sufficient room therefor, in fee simple to them and assigns, until they should abandon the same, and take out their machinery and move it." Defendants introduced also the

showing a verdict and decree establishing this deed. Attached to the answer of the defendant Poor in this proceeding was a plea of West, setting up that he was the present owner of the property, and praying that the court refuse to establish the deed. This plea was signed by attorneys who were also attorneys for Poor, and appears to have been stricken, or to have pen lines run through the lines of the plea. The deed was dated December 31, 1885, and the established deed was recorded October 8, 1894. The deed from Poor to plaintiff was dated December 25, 1888, and recorded January 19, 1889. It does not appear whether the original deed from Poor to defendants has been recorded. It further appeared that defendants were in possession of the shoal and sawmill from the time the deed was made to them up to the time of the trial; that plaintiff knew, when he bought from Poor, that they were in possession, but did not know what their rights were, and did not ask them anything about what right they had, nor did defendants tell him; that defendant Clayton and plaintiff had a conversation, in which plaintiff told Clayton he had bought "this property" from Poor, and was going to draw the papers, to which Clayton replied: "All right, he is a good man to get along with. I have always found him so, and I guess we can get along with you as well as with Poor." Clayton supposed plaintiff was buying just what Poor had. Plaintiff testified, among other things, that the mill shoal is worth more than the land, and he bought on that account, and had no idea, when he bought, that any one had any claim; that he saw defendants' sawmill there, but supposed it was like all sawmills, just sawing up timber for a while, but heard afterwards that defendants claimed some sort of right there; that he was present when the suit to establish the copy deed was tried, and did not know whether he ought to be a party or not; that he asked the attorneys above mentioned, and they told him if he were not a party he had nothing to do with it; that he did not employ them, but told them if he ought to be a party he would employ them; that this was some time after he had bought and gone into possession of the farming part of the lot; that he is in possession of the grist mill on the same shoals, and he and defendants used the same water race; that he did not think he was any party to the setting up of the deed, and did not authorize his name used, and knows absolutely nothing about the plea in his name to said proceedings, did not authorize it, did not have attorneys employed, never heard of it before introduced in evidence, and took no part in the trial whatever.

J. W. H. Underwood and H. H. Dean, for plaintiffs in error. W. T. Crane and J. B. Jones, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 339)

MANN v. VAN DYKE.

(Supreme Court of Georgia. July 29, 1895.)

GRANT OF NEW TRIAL—REVIEW ON APPEAL.

This case falls within the oft-repeated rule laid down by this court, that the first grant of a new trial on general grounds will not be reversed.

(Syllabus by the Court.)

Error from city court, Floyd county; W. T. Turnbull, Judge.

Action by Jesse Mann against R. D. Van Dyke. Verdict for plaintiff. From an order granting a new trial, he brings error. Affirmed.

H. M. Wright and Dean & Dean, for plaintiff in error. McHenry, Nunnally & Neel, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 811)

BLACK et al. v. McAFEE.

(Supreme Court of Georgia. July 29, 1895.)

DORMANT JUDGMENT—RECEIPT FOR COSTS.

A fi. fa. issued from a justice's court October 26, 1885, signed by "H. C. Kellogg, N. P. & J. P.," and having upon it a receipt for costs dated March 3, 1887, signed by "H. C. Kellogg," but having upon it no other entry of any kind until December 5, 1893, was dormant upon its face. In order to save it from dormancy, it should affirmatively appear that H. C. Kellogg, at the time of signing the entry acknowledging receipt of the costs, was still in office; and, as he did not sign this entry officially, this did not so appear, but the presumption is to the contrary. See *Short v. State*, 4 S. E. 852, 79 Ga. 550.

(Syllabus by the Court.)

Error from superior court, Cherokee county; J. L. Hardeman, Judge.

Action by L. Black & Son against J. M. McAfee. Judgment for defendant, and plaintiffs bring error. Affirmed.

E. Faw, for plaintiffs in error. G. R. Brown, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 312)

MORRIS et al. v. GEORGIA RAILROAD & BANKING CO.

(Supreme Court of Georgia. Aug. 16, 1895.)

INJURY TO PERSON ON TRACK—QUESTION FOR JURY.

There was evidence upon the question of the defendant's negligence from which the jury might have found it was at fault, and, though the evidence suggests negligence upon the part of the person injured, inasmuch as it does not require a finding that, if negligent at all, his negligence amounted to the absence of ordinary care, the judge should have submitted the case to a jury, instead of granting a nonsuit. Lumpkin, J., dissenting.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Actions by T. J. Morris and S. A. Morris against the Georgia Railroad & Banking Company. The actions were tried together, and a nonsuit was granted, and plaintiffs bring error. Reversed.

The following is the official report.

Suits were brought against the railroad company by Thomas J. Morris for damages resulting from personal injuries sustained by him, and by his father for the loss of his services. The cases were tried together, and a nonsuit was granted. The evidence showed, in brief, the following: Thomas J. Morris was 18 years of age at the time he was injured. He resided in Atlanta, and was attending school at Decatur. He held a monthly school ticket, issued by the railroad company, on which he daily rode to and from Edgewood station to Decatur. At the time of the injury he had been going to school in this manner for three months or more. He was struck while on the track at Edgewood, between 20 and 30 steps from the station, by the engine of the train which he was about to take. His home was on the left side of the railroad track going east, and the station at Edgewood was on the right side of the track. The time was about 8 o'clock in the morning in January, and the ground was muddy, and partly covered with ice. Plaintiff and other pupils of the school were in the habit of going upon the right of way of the railroad at some distance from the station, and walking on the right of way or tracks until they reached the station. On the morning in question plaintiff had walked on the right of way, but not on the tracks, for 400 or 500 yards. He stepped upon the track 40 or 50 feet from the place where he was struck, in order to avoid the mud. The testimony, as far as it goes, indicates that no bell was rung nor other signal given of the approach of the train. Witnesses who saw the train approaching estimated the speed at 20 or 25 miles an hour. Parallel to the track of defendant's railroad at this place is a track of the Seaboard Air-Line Railway, and on the morning in question a train of this road was running towards Atlanta, and seems to have passed Edgewood station just before plaintiff was struck. It is claimed that plaintiff's attention was attracted by this train; that he was approaching the station in the customary and proper manner, and had all the rights of a passenger; that persons were allowed by defendant to be on the track at this point for the purpose of approaching the station; that it was its duty to run its cars with great care and caution. In the course of the testimony of Thomas Morris he testified that, among other school boys and girls that went down in the morning was a Miss Johnson, who came up the path steps upon the embankment leading to the railroad track on the right side going to Decatur, about 80 feet from the station, and after she got to the steps she walked on the track to the station.

This testimony was ruled out on defendant's objection, and plaintiffs assign this ruling as error.

J. W. Cox and Glenn, Slaton & Phillips, for plaintiffs in error. Jos. B. Cumming and Hillyer, Alexander & Lambdin, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, J., dissenting.

(96 Ga. 775)

DANIEL v. COLUMBUS FERTILIZER CO.
et al.

(Supreme Court of Georgia. May 13, 1895.)

MARSHALING ASSETS.

The facts alleged in the plaintiff's petition to marshal the assets of the estate of his intestate showed sufficient doubt and uncertainty as to the legal priority of the several claims against the estate, and enough complication in its affairs, to make the filing of the petition proper. This being so, it was not without equity, and it was error to dismiss it upon demurrer.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by J. H. Daniel, administrator of Job Read, against the Columbus Fertilizer Company and others. Bill dismissed, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

The following is the official report:

To the petition of Daniel, administrator of Job Read, against the Columbus Fertilizer Company, the People's National Bank, et al., a demurrer was interposed by said fertilizer company and said bank on the ground of want of equity therein. There was no plea or answer by any defendant, and there was no appearance by any other defendant. The plaintiff in the petition had asked for injunction against creditors of Read until the estate could be marshaled under the petition. The application for injunction coming on to be heard during the return term of the petition, the demurrer was sustained and permanent injunction refused, the order sustaining the demurrer and refusing the permanent injunction having contained in it the statement: "The Columbus Fertilizer Company, one of the respondents in said petition, in open court, disclaiming any claim of a trust debt against the estate of Job Read." Plaintiff excepted and alleges: That the court erred in sustaining the demurrer; in refusing to grant the injunction. That there being no answer to the case, and no affidavits or other evidence introduced, but the case being tried on demurrer alone, and the allegations of the petition were to be taken as true, the court erred in incorporating in the order the words above quoted.

Further, that there being no answer and no evidence, and the case being tried strictly on the demurrer, it was error to admit said disclaimer, so as to mulct plaintiff in costs provided the supreme court should be of the opinion that there was equity in plaintiff's petition, as to the allegation about the claim of a trust debt by said fertilizer company, and should be of the opinion that there was no equity in the other allegations of the petition. Further, because the court erred in granting a judgment for costs against plaintiff.

The petition alleged: Job Read, late of Marion county, died intestate. Petitioner was duly appointed and qualified as his administrator, and files this petition in equity to marshal the assets of the estate. After the court had set apart to the widow her year's support and dower, and petitioner procured an order of the court of ordinary of Marion county, he sold, and converted into money, all the remaining portion of the estate; and from the money he has been able to realize, and the number of debts against the estate of which he has been informed, he alleges the estate is insolvent. The entire assets of the estate now on hand consist of \$2,258.43 cash. He has been notified of the following creditors of the estate: People's National Bank, creditor by note, \$279. Columbus Fertilizer Company, creditor by note for 1,500 pounds middling lint cotton, at 7½ cents per pound, as to which petitioner learns that, inasmuch as said note made certain specifications about the intestate's holding the crop of the year said note was given, in trust for the payment of said note, until it was paid, or words of like purport, the crop of the year the note was given, when sold by the administrator of Read, created a trust fund bound for the payment of the note, with the additional fact, as they claim, that the note was given for guano to make said crop. Petitioner does not admit a trust obligation. J. H. Daniel is a creditor by note for \$335; by account, \$15.85; and, by judgment obtained since the death of intestate, for \$300, for rent or use of farm, which farm had been owned by intestate and J. H. Daniel as tenants in common, "or rent," etc. Whether this debt and judgment constitute any preferred lien on the crops of the year of the death of intestate, or whether it is a rent debt, petitioner asks the direction of the court, as he also does as to the claim of the fertilizer company above mentioned. The petition then mentioned various other creditors by note or account, giving names and amounts; also, three persons, account creditors for labor, for amounts stated. Petitioner asks the direction of the court as to whether these three last parties have any priority of lien for said labor claims, the labor having been rendered on the farm of intestate, as he understands they claim, the year of intestate's death. Petitioner has been notified that Mrs. Emily

Reid claims \$280.38 principal, besides interest for a like or large amount. As petitioner understands it, she makes her claim somewhat as follows: That Glass Caston died about 1874 or 1875, and about 1875 Job Read was duly qualified as administrator of Caston; that Caston left Mrs. Emily Reid and some 10 or 12 others as his heirs; that Read, as his administrator, settled with all of these heirs, except two or three; that all the other heirs of Caston have moved away for a good many years, and she has not heard from them in some — years, and presumes they are all dead, and that all of said amounts, together with the interest thereon since it came into the hands of Read as administrator of Caston, is a debt of Mrs. Reid, in the nature of a trust debt against Job Read's estate; and that she is entitled to a priority as such, for a trust claim, for the full amount of the principal and interest. This is substantially the claim that she presents, or bases her debt on. Petitioner understands that she is about 55 years old. Job Read died in 1892, and, if he had had the fund in hand from the Caston estate, he had it 10 or 15 years, or may be longer. Petitioner is advised and believes that these heirs of Caston who had not been settled with had attained their majority before leaving the state, some 15 or 20 years ago. Mrs. Reid claims that they are dead, and that she is their heir at law. Petitioner asks for strict proof on these matters. She has applied for letters of administration on their estate, and letters were granted about the time this petition was filed. Petitioner does not admit said indebtedness, but asks direction of the court if it is not stale and barred by the statute of limitations; and what, if any, priority, should it be considered as a subsisting debt, it should have; and, if the debt is to be paid, to whom paid. He does not admit any of the above-mentioned debts, nor any of the priorities claimed, but asks that each creditor substantiate his claim by strict proof, to substantiate his priority. If there are other creditors, petitioner does not know it. In consequence of the insolvency of the estate of Read, and of priorities claimed by some of the creditors as above mentioned, and of the nature and consequence and character of the claims of Mrs. Reid, J. H. Daniel, and others, he feels that it is hazardous to undertake the further administration of the estate and the disbursement of said fund without direction from the court of equity, and therefore files this petition to marshal the assets, and asks the direction of the court in the premises, and the appointment of a master in chancery to pass on said claims. It has been more than six months since he qualified as administrator, and, as the creditors want their money, they could sue him for it, which would not only multiply costs against the estate, but defeat the proper disbursement of the funds, without establishing the priorities according to law,

or otherwise make petitioner responsible for the payment of more debts than he has funds or property of the estate with which to pay. And, pending the proper adjudication of the same, he prayed for an injunction restraining each of the named creditors of Read, and all other creditors of Read, if there should be any, from instituting any suit for the recovery of their claims against the estate; that they be made parties defendant to this petition, and adjudicate all their rights against the estate thereunder; that they be perpetually enjoined from instituting any suit against petitioner for said claims,—for process, and general relief. Discovery was waived. The fertilizer company, the bank, Mrs. Reid, and most of the other creditors named, were served with the petition.

By amendment, petitioner alleged: The consideration of the \$300 judgment of Daniel was: At the death of Read, he owed Daniel two promissory notes; each for \$1,100; each dated March 10, 1891; one due November 1, 1891; and the other, November 1, 1892. The consideration thereof was an undivided half interest in certain land described, two mules, and certain other personalty mentioned. At the time of the purchase, Daniel gave Read his bond to make titles to the land upon the payment of the two notes by Read. After the purchase of said property, Read went into possession of it, and had the profits thereof for 1891 and 1892, and until Read's death, worth annually some \$250, and paid no part of either of the notes, although one of them became due nearly nine months before his death, and the other became due November 1, 1892,—a short time after his death. When petitioner became the administrator, he found these notes,—one past due, and the other nearly due,—and no sufficient assets on hand to meet the other liabilities of the estate, to say nothing of these notes; and as Daniel was asking for payment of them, or a surrender of said land and personalty, with reasonable rent for 1891 and 1892, petitioner thought that inasmuch as between the time of the sale, in March, 1891, and the time he became administrator, said property had declined a great deal, if he would be allowed, under the law, to surrender the property upon the cancellation of the notes, and the payment of reasonable rents for the property, the estate of Read would be the gainer several hundred dollars. So he submitted the matter to arbitrators on October 3, 1892, and they found that said property was not worth, by several hundred dollars, as much as said purchase-money notes called for, and further found that Read and his estate had had the use and profits of all of said property for 1891 and 1892, and had paid nothing whatever for the same, by way of purchase money or rents; and as Daniel offered to cancel the sale and return the notes on the payment of reasonable rent, and re-

turn of the property he sold to Read, they thought it to the interest of Read's estate to accept the offer, pay a reasonable rent for 1891 and 1892, and that the estate would be the gainer thereby of a hundred or two dollars, or more. Upon this finding the arbitrators awarded that Daniel turn over to petitioner, as administrator, the two notes; that petitioner, as administrator, return to Daniel the bond for titles, and said property; and that Daniel recover of petitioner, as administrator, \$300 for rent of the property for 1891 and 1892, to be recovered out of any property belonging to the estate of Read, and especially out of the crops of the estate for 1892,—the trade to be canceled, and the title to the property to revert in Daniel. The arbitration and award have been spread upon the minutes, and become the judgment, of Marion superior court. Copies thereof, of the notes, and of the bond for titles, are attached as exhibits. Petitioner has been notified by one of the large creditors that it will not abide by the arbitration and award, and it threatens to attack the same for the purpose of setting it aside, to wit, the Columbus Fertilizer Company; and several of the creditors dispute the priority of the claim of Daniel, awarded to him by the arbitration, and other creditors dispute the priority of other claims; and petitioner does not know how he should pay them, or in what order. The arbitration and award are for the best interest of the estate, and save for the creditors about \$500. Said notes amounted (principal and interest) to \$2,270, and the property for which they were given was appraised at \$1,475, and the award for rent was \$300, which makes a clear net gain to the estate, by the arbitration and award, of \$495. Petitioner does not believe the land would have sold for the amount appraised, judging by other sales made. The arbitration and award were had by the authority of the ordinary of Marion county, where the estate was being administered. Daniel claims a priority for said \$300 above other liquidated demands; said the award placed the claim on the dignity of rent, and therefore gave it priority, and that the award gave him a special lien on the crop of 1892, raised on said land. The crop of 1892, raised on said land, netted the estate of Read some \$500 to \$700. At the time of the arbitration the crops had been made, but only partly gathered. Read died about July 25, 1892. At the time of the arbitration and award, petitioner hoped and believed the estate was solvent, but now finds it insolvent, but that

no creditor will be the loser by the award, but rather the gainer, except Daniel, as to the collection of his notes. He prayed for direction as to the award in favor of Daniel for \$300,—whether it should stand in the priority of a rent claim, whether it should have a special lien upon the fund raised from the crop of the land for 1892, in preference to the other liquidated demands; and, in "hearing" of all the equities in said matter, petitioner does not feel that it will be safe for him to pay claims without the direction of the court, and, the same now being in judgment, Daniel could have a levy made at any time. Said claim being objected to, by some of the creditors, as a preferred debt, and Daniel claiming that it is, and having been after petitioner to pay it as such, although he is petitioner's father, petitioner has declined to pay it until he can get the direction of the court in the premises, as he does not know whether he will be protected in so doing, or not; and hence feels constrained, as a necessary part of the administration of the estate, to ask the court for direction in the matter. Without the aid of a court of equity to settle the conflicting liens and priorities, and to adjudicate said claims, some of which he knows nothing about, he would take great risk in administering and paying out the money, which he is ready to pay out at any time the court may decree, and to whom paid. He has been anxious to hasten the administration, but not knowing whether he would have enough money to pay the debts, and before he could get the money of the estate in hand and paid out, the status of the debts, and the ability of the estate to pay the same, the 12 months had expired, and parties were threatening to sue him on the debt. One cause of delay was the widow's dower, as he could not reasonably tell what that would lessen the sale of the property of the estate. There are some sixteen creditors, several of them by account; and, should they all sue, the expenses would be great, of costs and attorney's fees to make proper pleas to protect petitioner. Some of the creditors have already indicated their intention to sue petitioner, and he fears others will. So he feels that a court of equity is his only safe protection, to have all of the claims adjudicated in said suit, and that all creditors be restrained until the same can thus be adjudicated.

J. A. Ausley, Sr., for plaintiff in error. J. H. Lumpkin, for defendant in error.

PER OURIAM. Judgment reversed.

(96 Ga. 308)

GILREATH v. STATE.

(Supreme Court of Georgia. May 15, 1895.)

CRIMINAL TRESPASS—INDICTMENT.

1. In a prosecution for a criminal trespass, under paragraph 2 of section 4440 of the Code, it is necessary that the value of the articles taken and carried away should be averred in the indictment, and also that the same should be proved on the trial.

2. Where a fence, the joint property of adjacent landowners, is located on the dividing line between their respective premises, the unlawful removal of such fence by one of the proprietors, or his agent, while a trespass for which a civil action will lie, is not an indictable trespass, under the above-cited section of the Code.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Akin, Judge.

Holton Gilreath was convicted of criminal trespass, and brings error. Reversed.

The following is the official report:

Holton Gilreath was tried upon an indictment charging him and Caleb and Will Gilreath with the offense of trespass, for that they on January 18, 1894, in Bartow county, unlawfully, etc., took and carried away from the lands of A. M. Gaines certain rails, the property of A. M. Gaines, without his consent. The Gilreath family and Gaines are adjacent landowners. A settlement road once divided their lands. The state's evidence showed that it was agreed between Gilreath and Glasgow, who then owned the Gaines place, in 1872, that the fence of each owner should be moved to the center of the road on the original land line dividing said farms, and that this fence should be a joint fence, the agreed line between the two farms, and the east half should be kept up by the Gilreaths, and the west half, from the creek, by Glasgow; that Moore and Gaines bought out Glasgow, and subsequently Gaines succeeded to the ownership of the whole farm; that the agreement as to the fence being the dividing line, and the contract as to keeping up the west half thereof, were also made by Gilreath with Moore and Gaines when they went into possession under Glasgow; and that Gaines had, at different times, repaired this fence. The state's evidence further showed that the fence was on Gaines' land; that it was on the original land line, was the agreed line, and acquiesced in by the adjacent owners from 1872 to the time of the alleged trespass. The evidence for the defendant showed to the contrary. It was conceded that defendant took the rails from said fence under direction from his parents, the owners of said Gilreath land. The evidence for defendant showed that, when the fence was put up by the agreement, it was not on the original land line; that a survey made by the county surveyor after the indictment showed the fence to be over on the Gilreath side, according to the original land line; that no agreement was made with Moore and Gaines, or either of them, at any

time, about keeping up this fence, except for one year; that the place from which the rails were taken had been often repaired by defendant and his brothers since Gaines owned the adjoining land, and on one occasion, after the creek washed away a few panels of this fence, they had rebuilt it; that at the time the rails were taken away the defendant and the prosecutor, Gaines, lived in a stock-law district; and that defendant went, in the daytime, and tore the fence down, and carried away the rails, and prosecutor notified him the rails were his, and on his land, and not to move them. There was a verdict of guilty, and, defendant's motion for a new trial being overruled, he excepted. The motion was upon the general grounds; also, because the court refused to charge the following written requests of defendant: "Unless the proof shows that the rails claimed to have been taken were of some proven value, you must acquit." "If you believe from the evidence that the rails taken were the joint property of the prosecutor and the defendant's family, and not the sole and exclusive property of Gaines, you must acquit." "The indictment charges that the rails were the property of Gaines. If the proof shows that the rails were not the property of Gaines, but was the common property of Gaines and Gilreath, then you must find this defendant not guilty." "If you find from the evidence that the rails taken were not in the exclusive possession of Gaines, but were on a common dividing line, and were in the joint possession of Gaines' and Gilreath's family, then you must find this defendant not guilty." "Trespass is the invasion of the rights of another, and no man can trespass upon his own property, which he is in possession of either alone, or jointly with another." "One who is indicted for trespass cannot be convicted if the testimony shows he is guilty of simple larceny of the article about which the trespass is claimed."

J. W. Harris, Jr., for plaintiff in error.
A. W. Flite, Sol. Gen., for the State.

ATKINSON, J. To charge the commission of an indictable trespass, it is ordinarily not necessary to allege the value of the property injured or converted thereby. If the trespass itself amount to a larceny, then, as one of the constituents of the offense, it is essential that the value be alleged. If the animus furandi be wanting, however, and the taking merely wrongful, it is unnecessary to allege the value, unless that enters as an element in the definition of the offense. An illustration of this is furnished in the section of the Code we now have under review, viz. section 4440. Paragraphs 1, 3, and 4 of that section prescribe that the several acts therein enumerated shall constitute an indictable trespass without alleging the value of the article injured, or the extent of the damage to the owner. Paragraph 2 of that section,

while defining a trespass, creates, in effect, a species of larceny, which is a kind of accession to the common-law definition of that offense, and, without constituting the taking and carrying away of the articles therein enumerated a specific larceny, denominates the taking and carrying away of such articles from the lands of another as an indictable trespass; requiring, as a condition, only that the article should be of some value. We therefore reach the conclusion that the value is necessary to be stated and proven, as one of the constituents of the offense. It is easy to imagine how timber, wood, rails, fruit, vegetables, corn, and even cotton,—the very articles enumerated,—because of some peculiar condition or characteristic of the article, might be wholly without value to the owner, and without any market value whatever; and the legislature did not intend to make that an indictable trespass which one might commit upon the land of another by detaching and carrying away therefrom these enumerated articles, unless they be of some such value as to injure the owner. In the definition itself of this offense, a value is stated as one of its constituent elements. As will be seen from the report, the defendant was indicted, jointly with certain other persons, for the offense of willfully taking and carrying away from the lands of the prosecutor certain rails, the property of the prosecutor, without the consent of the prosecutor. It appears that the prosecutor and the father of this defendant owned adjoining tracts of land; that they had agreed upon a dividing line between them, and upon this dividing line had constructed a rail fence. This fence was the joint property of the parent of this defendant (by whose authority he removed the rails) and of the prosecutor. We think, in order to constitute an indictable trespass, the alleged owner of the property must have the absolute individual title thereto, or there must be some special title in him, through and by which he is authorized to hold the exclusive possession of the property. Each of these coterminus proprietors was entitled to the full and ample use of this joint property, and, when one of them took and carried away a portion of it, it could not be ascertained legally that he took and carried away property other than his own; and therefore it cannot be said to have been taken and carried away without the consent of the owner. We think this case is controlled by the principle declared in *Padgett v. State*, 81 Ga. 466, 8 S. E. 445; and, while this defendant and his parent may be answerable civilly for any damage which may result to the prosecutor for a breach of covenant to maintain the joint fence, we do not think that the defendant was subject to indictment under this section of the Code. This construction of statutes prohibiting trespasses of like character seems to have obtained in other states where similar laws prevail. *Drees v. State*, 37 Ark. 122; *Freem. Coten*. § 97a.

The two propositions here ruled control the questions made in the court below, and it is unnecessary to consider any others which may occur in the record. Let the judgment of the court below be reversed.

(97 Ga. 334)

CANFIELD v. JONES.

(Supreme Court of Georgia. July 29, 1895.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

Even if the ground of the motion for a new trial as to newly-discovered evidence was otherwise meritorious, it seems clear that this evidence might, by proper diligence, easily have been discovered before the trial; there was sufficient evidence to support the verdict; it was approved by the judge below; and there was no error at the trial. This court, therefore, cannot do otherwise than adhere to the long-established rule that in such cases the judgment below must be affirmed.

(Syllabus by the Court.)

Error from superior court, Forsyth county; G. F. Gober, Judge.

Action by H. J. Canfield against W. C. Jones. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Canfield sued Jones on two promissory notes,—one dated June 11, 1887, and due October 1, 1887, for \$125 principal, the consideration of which was stated to be a brown horse mule, with a certain brand; the other note was dated May 16, 1887, due October 1, 1887, and was for \$85 principal. Jones pleaded that he had paid the notes to a son of plaintiff, about the date the notes matured, in McClellon county, Tex., by express direction of plaintiff, plaintiff's son promising to deliver the notes as soon as his father should return home from a journey. There was a verdict for defendant, and, plaintiff's motion for a new trial being overruled, he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in admitting a letter from B. Z. Herndon to defendant, over objection of plaintiff's counsel. It was not stated in this ground what objection was made to this evidence. Also, because of newly-discovered evidence. In support of this ground, movant produced the affidavit of W. S. Bagley, justice of the peace, to the following effect: Shortly after defendant came back from Texas, affiant received a letter from plaintiff of McGregor, Tex., who stated that he had two notes upon defendant, one for \$80 or \$85, and one for over \$100, and asked him to see defendant, and see if he could collect the money. Affiant saw defendant, and defendant said the debts were just and honest, and that he would pay them when he got able. These facts were not communicated to plaintiff nor his counsel until after the trial. Also, the affidavit of plaintiff's counsel as to their ignorance of the facts to which Bagley would testify, and that they had no reason to suppose he knew any-

thing about the case. There was no affidavit of plaintiff. The letter of Herndon to plaintiff was as follows: "Dalton, Ga., Jan. 25th, 1894. Mr. W. C. Jones, Vickry's Creek, Ga. Dear Sir: I write you to advise that it might be better for you to settle the case brought against you by Col. Patterson and myself for Mr. Canfield. He will take out a warrant for you on account of the manner in which he says you took the property out of Texas. The statute of limitations does not run in your favor where you have left the state. It does not make any difference how long you have been out of the state. You understand how the property was brought out of the state of Texas. Now, I would not hurt a hair of your head, and want you to go at once to Mr. Patterson, and settle up this matter without any trouble. If you are entitled to any credits, you shall have them. They say that you, in the absence of Mr. Canfield, went to his son, and told him that you had sold the mules, and, as soon as he counter-branded them, that you would be back and pay for them; but in fact you had not then sold the mules at all, and so on. I will ask that these gentlemen come out here, and have this matter put through at once; but, as I just stated, I never like to give anybody trouble, and want you to fix up this matter at once, and save yourself and family trouble. Write me immediately what you wish me to do. We can fix it up ourselves without anybody in your settlement having anything to do with it. You must act promptly if you want me to stop this thing. Yours truly, B. Z. Herndon." The original bill of exceptions, certified October 2, 1894, did not specify what portions of the record were material; and the certificate of the judge thereto was in the form used before the passage of the act of 1889. It appears that the "amendment" to the bill of exceptions making specification was certified by the judge below on February 20, 1895, after the record and original bill of exceptions had been transmitted to this court. The judge below certified that the certificate to the original bill of exceptions was signed as presented by plaintiff.

H. P. & W. L. Bell, for plaintiff in error.
H. L. Patterson, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 120)

WOOD v. CINCINNATI SAFE & LOCK CO.
(Supreme Court of Georgia. April 15, 1895.)

ACTION ON CONTRACT—FRAUDULENT REPRESENTATIONS.

1. Where a party has been induced to enter into and sign a written contract by false and fraudulent representations as to its contents made by the opposite party, which were intended to deceive and did deceive the party signing, the latter may set up this fraud as a defense to an action against him upon the contract.

2. Under the ruling above announced, it was error to strike the plea filed by the defendant in the present case.

(Syllabus by the Court.)

Error from superior court, Spalding county; J. J. Hunt, Judge.

Action by the Cincinnati Safe & Lock Company against George W. Wood. Judgment for plaintiff, and defendant brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

R. T. Daniel, for plaintiff in error. J. S. Boynton, for defendant in error.

ATKINSON, J. The plaintiff brought suit against the defendant upon a written order for an iron safe, a copy of which order is as follows, to wit: "Town of Sunny Side, County of Spalding, State of Georgia. The Cincinnati Safe & Lock Co. 6-10-1891. Please ship, to arrive September 1, 1891, one of your No. 20 Fire and Burglar Proof safes, as per your illustrated catalogues,—safe is to measure inside 23¼ inches high, 17¼ inches wide, and 14 inches deep; outside door to have combination lock, patent inside boltwork, and movable cap,—for which I agree to pay to your order the sum of two hundred dollars, as follows: Cash, \$25.00; balance in 4 notes at one month between times. Safe delivered on board cars at Cincinnati. Name painted on safe, 'George W. Wood.' Remember Burglar in top 'detachable.' It is agreed that all deferred payments shall be settled for by note drawing eight per cent. interest; after maturity, ten per cent. Notes to be signed and forwarded to said company within five days after arrival of safe at our nearest railroad station. In default of settlement, the whole amount becomes due and payable at once in cash. It is further agreed that the title of said safe shall not pass until said safe is paid for in full, and shall remain your property until that time. In default of payment, you or your agent may take possession of and remove said safe without legal process. It is distinctly understood and agreed that this order shall not be countermanded by the maker or makers of same, and also that I represent myself to be good and legally responsible for goods above ordered. Nothing but shipment or delivery constitute an acceptance of this order by the Cincinnati Safe & Lock Co. This contract covers all agreements made between the parties hereto. [Signed] Geo. W. Wood. \$200.00."

The defendant filed the plea of the general issue, and, in addition thereto, a special plea, of which the following is a copy: "And, for further plea, defendant says that the contract sued on was procured from the defendant by fraud, and should not be enforced by the court, neither should this defendant be held liable on the same; for defendant sheweth that the agent of the plaintiffs who procured said contract came to defendant's store on the 10th day of June, 1891, and tried to sell

defendant a safe. Defendant declined to buy a safe. Said agent remained in the store of defendant for a long while, endeavoring to get defendant's order for a safe, but defendant repeatedly and persistently refused to buy a safe. Finally, said agent said to defendant: 'I am going to take your order for a safe, and, if I don't hear from you before September 1st, we will ship it. Now, any time before that date, if you find you don't want it, write us, and we will not ship it.' To this defendant replied, 'All right.' In a few minutes said agent went back to defendant's desk, and began writing. Said agent asked defendant 'what time the train went up.' Defendant told him, and said agent asked defendant for a ticket. Defendant is the railroad agent. Defendant sold said agent a ticket, and said agent continued to write, defendant returning to the front of the store. In a few minutes the train arrived, when said agent called defendant, and said, 'Please sign this,' holding to defendant a paper. Defendant said: 'What is it? Let me read it.' Said agent replied: 'It is only an agreement that, if you take the safe, it is to be ours until paid for. You haven't time to read it. I will send you a duplicate to-morrow. I have told you all that is in it. Sign it. I have to catch that train.' Relying upon the representations of what the said agent of said plaintiffs said and represented, defendant signed said paper. Defendant further says that said agent did not send him a copy of said paper as agreed. Defendant, some time after said date, had, long before the 1st day of September, written plaintiffs 'not to ship the safe until they heard from him, under the agreement made with said agent.' Defendant says he had no opportunity to read said paper; that said agent would not allow him to read the same; that said agent, by his conduct and manner, acted and practiced a fraud on the defendant in procuring his signature to said contract, and the same is not therefore binding on him; that, in pursuance to said agreement made with said agent, he wrote and notified said plaintiffs that he did not want said safe, and so notified them before they shipped the same, and said safe had never been accepted or received by the defendant, and he should not be held to pay for the same. But for the fraud practiced by said agent, this defendant would not have signed said contract, and said contract does not represent the agreement between said agent and this defendant. And, with this, defendant puts himself on his country." Upon motion of the plaintiff's counsel, the court ordered that "so much of the defendant's plea as seeks to set up a parol agreement that defendant had a right to and did countermand the order for the safe sued for be stricken, upon the ground that the same is an effort to change and add to a written contract verbal stipulations different and in conflict with the written contract, the same being, in effect, to strike all pleas ex-

cept the general issue." Having stricken the defendant's special plea, the court directed a verdict for the plaintiff. The defendant moved for a new trial (1) upon the general grounds; (2) upon the further ground that the court erred in striking the defendant's pleas; and (3) that the court also erred in directing a verdict.

It is necessary to a determination of this case that we consider only one of the alleged errors. If the court erred in striking the plea, the defendant is entitled to a new trial. If the judgment of the court was correct in striking the plea, he committed no error in directing a verdict.

Whatever may be the rights of third persons, it is a rule of law of universal acceptance that, as between the original parties thereto, fraud in its procurement voids a contract, and this upon the theory that, the consent of the parties being necessary to the binding force of a contract, if one, apparently consenting by the execution of a written contract, can show that he did not in fact consent to its terms as therein expressed, but that his apparent consent was induced by false and fraudulent practices, by means of which he was overreached by the other party, and, without negligence upon his own part, really deceived as to the terms of the contract, he would be entitled to be relieved from its apparent obligations. A negligent omission to inform himself as to the truth of the representations when he had an opportunity so to do, or might, by the exercise of reasonable diligence, have done, would amount to a waiver upon his part, and he would thereafter be estopped to impeach the contract upon grounds against which the exercise of reasonable care would, in the first instance, have protected him. Fraud is exceedingly subtle in its nature. There are infinite means by which it can be accomplished. In its conception human ingenuity is limitless in its capabilities. It is therefore impossible to state any general rule by which particular frauds are to be identified. Classification is almost, if not quite, impossible. It may be perpetrated by willful misrepresentations made by one person to another with a design to mislead, and which do actually mislead, another. It may be perpetrated by signs and tricks, and even silence may in some instances amount to fraud. Judicial veneration for the rule of evidence which pronounces a written contract the highest and best evidence of the agreement between the parties, and denies to either the privilege of adding to or taking from such contract by the introduction of parol evidence, cannot successfully protect such a contract when it is assailed upon the ground of fraud in its procurement. The purpose of the parol evidence in such cases is not to add to, take from, or vary the terms of a valid written agreement, but its primary object is to disprove the existence of the agreement. According to the plea of this defendant in the

present case, the agent of the plaintiff perpetrated upon him a gross, willful, and glaring fraud. He was induced to sign this paper upon a willful misrepresentation by this agent as to its contents, and under such circumstances that he did not have the opportunity of informing himself by a personal inspection thereof as to the real contents of the paper. The defendant was the depot agent, at work in his office. The negotiations looking towards the making of the sale of the safe were in progress. It had been expressly stipulated by the agent that, in the event the defendant bought, he would not be required to take the safe if by a given time he should conclude that he did not desire it. The agent of the plaintiff had bought his ticket to leave upon an approaching train; did not call upon the defendant to sign the paper until the train had about arrived upon which he (the agent) was to depart. To the remonstrance of the defendant against so hastily signing the paper, the agent of the plaintiff responded by saying, "There is nothing in it except the reservation of title in us until the safe is paid for." Whatever suspicions might have existed in the mind of the defendant in regard to the matter were allayed by this candid and apparently spontaneous statement upon the part of the agent as to what the paper contained. It was a stipulation which was of vital consequence to this defendant, intentionally omitted by the agent of the plaintiff, and, according to the record, with a purpose to perpetrate a fraud. According to the contract, as originally agreed upon before the time for its delivery, the defendant notified the plaintiff that he did not desire the safe. The plaintiff, nevertheless, shipped it, and he declined to receive it. If his plea be true, the written contract to which his signature was fraudulently procured to be attached does not represent the true contract between himself and the plaintiff, and we think this defendant shows himself free from substantial fault in this matter. We cannot understand how or wherein he has been guilty of any such negligence as would estop him from setting up, in reply to the suit of this plaintiff, the fraud of this agent in the procurement of this contract. For a further discussion of the principles here involved, see *Chapman v. Guano Co.*, 91 Ga. 821, 18 S. E. 41, and cases cited. We think, therefore, the court erred in striking the defendant's plea; and the judgment must, accordingly, be reversed.

(97 Ga. 339)

BURT v. BROOM et al.

(Supreme Court of Georgia. July 29, 1895.)

NEW TRIAL—DISCRETION OF COURT.

The first general grant of a new trial will be affirmed by this court as a matter of course, unless it is manifest beyond doubt that the trial judge erred in setting the verdict aside. There is nothing in this case to take it out of the rule on this subject, which in many and

various forms has been so repeatedly announced.

(Syllabus by the Court.)

Error from superior court, Hancock county; W. F. Jenkins, Judge.

Action by F. W. Burt against A. S. Broom and others. To a judgment granting a new trial after verdict for plaintiff, the latter brings error. Affirmed.

R. B. Harley and J. T. Jordan, for plaintiff in error. R. H. Lewis and T. L. Reese, for defendants in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 282)

JOHNSON v. DAVIS et al.

(Supreme Court of Georgia. Aug. 12, 1895.)

EVIDENCE—ADMISSIONS—USURY—EXECUTION—HOMESTEAD.

1. An admission that notes were executed and a mortgage given to secure a pre-existing usurious debt, is not necessarily an admission that the notes and mortgage, or any of them, appeared on their face to be usurious.

2. Unless the usury appeared on the face of the papers, it was too late for the debtor, after a judgment of foreclosure, to attack, as being void because of usury in the debt secured by the mortgage, a waiver of homestead, duly made therein; and therefore a homestead applied for and set apart after the judgment of foreclosure was not good against such a waiver. *Cleghorn v. Greeson*, 77 Ga. 343; *McLaws v. Moore*, 9 S. E. 615, 83 Ga. 177; *Stewart v. Stisher*, 9 S. E. 1041, 83 Ga. 297; *Barfield v. Jefferson*, 11 S. E. 149, 84 Ga. 609.

3. There being nothing in the record affirmatively showing that the plaintiff's waiver of homestead was invalid, the sheriff's sale under the mortgage *fi. fa.* was valid, and divested the plaintiff of his title to the homestead property. Accordingly he was not entitled to recover, and there was no error, upon the agreed statement of facts, in directing a verdict for the defendants.

(Syllabus by the Court.)

Error from superior court, Worth county; B. B. Bower, Judge.

Action by William Johnson against D. H. Davis and others. Defendants had judgment, and plaintiff brings error. Affirmed.

The following is the official report:

Johnson brought his petition against Davis et al., the object of which was to recover possession of land in Worth county. On the admitted facts, the court directed a verdict for the defendants, and overruled plaintiff's motion for a new trial. It appears that, in 1881, Johnson made notes and a mortgage to Greenfield to secure a usurious debt, with a waiver of homestead; the mortgage covering the land in dispute. Subsequently, Greenfield obtained judgment on this debt, Johnson making no defense to the suit foreclosure on which the judgment was obtained. Several years after the date of the judgment, the execution issued thereon was levied on said land by the sheriff of Worth county,

where the judgment was obtained, and where Johnson lived at the time of the suit against him. He had subsequently removed to Dooly county, and, about the time of the levy, he applied to the ordinary of that county for the setting apart to him and his wife of a homestead in said land. The land was regularly advertised, and sold by the sheriff, under said execution, on the first Tuesday in November, 1893; and defendants bought it, and received the sheriff's deed therefor. The homestead was duly granted and set apart a few days after the sale. Defendants had no notice of the pending application for homestead, other than the mere fact of the proceeding itself would give by reason of its pendency, no personal notice of the proceeding having been given them. They have been in possession of the land since the sale, and no notice was given at the sale of the pendency of the application for homestead. The sheriff sold the entire fee.

Jones & Bacon, for plaintiff in error. T. R. Perry, J. W. Walters, and Harrison & Peoples, for defendants in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 299)

GEORGIA RAILROAD & BANKING CO. v. COSBY.

(Supreme Court of Georgia. July 29, 1895.)

INJURY TO EMPLOYEE—EVIDENCE OF NEGLIGENCE—FELLOW SERVANTS.

1. It appearing from the evidence that the plaintiff was not guilty of any negligence, and there being some evidence to warrant a finding of negligence on the part of the defendant, which it had the opportunity to rebut, but failed to do, this court will not set aside the verdict in the plaintiff's favor, after its approval by the trial judge.

2. There was no error in refusing to charge that, if the sole cause of the injury to the plaintiff was the negligence of his fellow servant, the former was not entitled to recover.

(Syllabus by the Court.)

Error from superior court, Taliaferro county; Seaborn Reese, Judge.

Action by G. H. Cosby against the Georgia Railroad & Banking Company for personal injuries. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

Cosby sued the railroad company for an injury received by him while in its employment as a track hand, by the negligence of a coemployee. He obtained a verdict, and

defendant moved for a new trial. The grounds of the motion are that the verdict is contrary to law and evidence, and to so much of the charge of the court as instructed the jury that plaintiff, when he went to work for defendant, assumed the ordinary risks incident to the business engaged in by him; also that the court refused to charge that, if the sole cause of the injury was the negligence of a fellow servant, plaintiff could not recover. Plaintiff's testimony shows, in brief, that he and Durham were ordered to repair a place in the railroad track, and in the course of the work plaintiff got a spike and cleaver, and Durham got a hammer with which to strike the cleaver for the purpose of tapping the spike on all four sides, and then breaking it in two. The time was February 16, 1891. Plaintiff laid the spike on the track, and marked it on two sides; then turned it on the third side, and started to mark it there, saying to Durham; "You tap this thing very lightly. It is very cold, and I don't want either of us to get hurt." Plaintiff could not watch Durham and the spike too. When Durham struck the spike, it flew up, and struck plaintiff in the eye, gouging it nearly out, cutting his head to the bone, and knocking him to the ground. He was holding the chisel, and Durham was to tap the spike on all four sides, and then it was to be broken. They had tapped it on three sides when it broke. Durham must have struck a heavy blow. That was the usual way of cutting the pin. The hammer was a good, big, iron sledge hammer. Plaintiff did not know how heavy it was. It had been used by Durham that morning for the same purpose, plaintiff holding the cleaver. He knew what sort of hammer it was. He did not see Durham when the latter struck the last blow; was looking at the work. The wound bled half a pint or more. He arose as soon as he could, bathed the wound with water, put a cloth upon it, and afterwards had it attended by a doctor. He worked for the company until May, 1891, then ran as train hand for six months, came back and worked until the fall of 1892, and then quit on account of the condition of his eye, which would not stand the heat, etc.

Jos. B. & Bryan Cumming and M. P. Reese, for plaintiff in error. Colley & Sims, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 336)

FORTSON et al. v. MIKELL.

(Supreme Court of Georgia. Aug. 12, 1895.)

TRIAL—INSTRUCTIONS—NECESSITY OF REQUEST.

The evidence fully warranted the verdict; and, there being no express complaint that the substantial issues involved were not fairly submitted to the jury by the court in its charge, the mere omission to give a particular instruction, even if the same would have been appropriate, is not, in the absence of a special request to give such instruction, cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Wilkes county; Seaborn Reese, Judge.

Action by William E. Mikell against Fortson & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

The action was for \$500, which plaintiff alleged was due him for wages for the months of January and February, 1893, under contract beginning October 1, 1892, and ending March 1, 1893. Defendants pleaded the general issue. Further: They were engaged, during the cotton season of 1892-93, in the business of buying cotton in Washington, Ga., and shipping it to their correspondents at various places. In the prosecution of this business they required the services of a skillful and experienced grader and classifier of cotton, and to secure such employed plaintiff for the season beginning October 1, 1892, and ending March 1, 1893. Plaintiff, at and before the time of entering into said contract, represented himself to them as being an expert and skillful grader and classifier of cotton, and upon such representations defendants employed him under said contract. He utterly failed to come up to his representations as to his skill in said business. He made divers mistakes in his classification of cotton, causing great injuries to defendants in their business. He proved to be not a skillful and expert classifier and grader, but incompetent, careless, and otherwise unfit for the business about which he was employed, for which reasons, about the close of December, 1892, they discharged him. Further: At the time said contract was entered into he represented to them that through his connections in former cotton seasons he would be enabled to bring them a great deal of business, and the belief that he would be enabled to do so was one of the considerations moving them to enter into said contract; but he failed to do so, and to this extent failed to comply with his undertakings; and they urge this as an additional reason to justify them in discharging him. Further: After his discharge, and during the time covered by his term of employment, he engaged in selling fertilizers on commission for the Edisto Phosphate Company. His sales amounted to 500 tons, or other large quantity, and his commissions to \$500, or other large sum. They prayed that the amounts thus earned by him might be allowed in mitigation of damages, if any should be found

against them. Further: During the term of his employment by them, during December, 1892, without their knowledge or consent, he engaged in the business of selling fertilizers on commission. At said time he was in Thompson, Ga., whither he had been sent by them on account of the business for which they had employed him. His conduct in thus engaging in the sale of fertilizers on his own account was inconsistent with his duties to them, and caused him to neglect their business, to their damage in the sum of \$250, which amount they plead by way of recoupment to his demand. They also allege his said conduct as an additional reason justifying them in discharging him. There was a verdict for plaintiff for the amount sued for, and, defendants' motion for a new trial being overruled, they excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in failing to instruct the jury upon the proposition that an employer is not bound to discharge his employé immediately on the bad conduct or inefficiency of his employé coming to his knowledge, but may wait a reasonable time before doing so, and what is a reasonable time in each case is a question of fact for the jury; although defendants' counsel stated to the court, in the presence of the jury, that this was one of their contentions, and read authority with a view to sustaining it, but made no written or oral request to charge the same.

W. M. Howard and S. H. Hardeman, for plaintiffs in error. Wm. Wynne and Colley & Sims, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 220)

CRINE v. JOHNS.

(Supreme Court of Georgia. May 13, 1895.)

HOMESTEAD—SALE FOR TAXES—EXECUTION—PRIORITY OF LIENS.

1. Where, pending an application for homestead, and before the same is set apart, land sought to be set apart thereunder is sold under an execution against the applicant, the purchaser at such sale with notice of the application for homestead acquires the fee, subject only to the homestead estate, which may be thereafter set apart. *Grace v. Kezar*, 12 S. E. 1067, 86 Ga. 697. A different result would follow if the land was actually set apart before the sale. *Jolly v. Lofton*, 61 Ga. 154.

2. A homestead estate is subject to the lien of a tax execution for taxes due on the property covered thereby; and a tax sale under such an execution, whether it be against the applicant or against him as the head of a family, divests the homestead estate, and the purchaser at such sale acquires not only the homestead estate, but all other interest, if any, which the applicant may have in the premises at the time of sale.

3. Where, pending an application for homestead, land sought to be set apart thereunder is sold under a common-law execution against the applicant, and a deed is made to the purchaser; and where, after the homestead is set apart, a tax execution against the applicant is

levied upon the land so set apart, which land is sold to a person other than the purchaser under the common-law execution, if the purchaser under the common-law execution goes into possession under his deed the purchaser under the tax execution cannot recover upon the deed based upon the tax sale without showing that at the time of bringing his action the homestead estate was still subsisting.

4. The verdict, under the evidence, is in accordance with the principles here declared.

(Syllabus by the Court.)

Error from superior court, Dougherty county; B. B. Bower, Judge.

Action by L. J. Crine against Mary E. Johns to recover land. There was a verdict for defendant, and a new trial denied. Plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

J. W. Walters and Wooten & Wooten, for plaintiff in error. W. T. Jones, for defendant in error.

ATKINSON, J. 1. It was first decided by this court (two justices presiding) in the case of *Grace v. Kezar*, 86 Ga. 697, 12 S. E. 1067, that if, pending an application for the setting apart of a homestead, the land sought to be set apart thereunder is sold under an execution against the applicant, the purchasers at the sale, who bought with notice of the application for the homestead, would acquire the fee, but the same would be subject to any homestead right which might thereafter be established in favor of the head of the family. The principle decided by this case was subsequently approved by a majority of the bench in the case of *Jackson v. Du Bose*, 87 Ga. 761, 13 S. E. 916, but in this latter case there was a dissent by Judge Richard H. Clark, presiding in place of one of the justices. Subsequently, in 91 Ga. 132, 16 S. E. 643, in the case of *Whelchel v. Duckett*, the doctrine was again affirmed by a full bench, and the court there announced the principle to be that, where a sheriff levied on property, and the defendant in *fi. fa.* files his application for homestead or exemption, and the application is not granted by the ordinary before the day of sale, it is the duty of the sheriff to sell the property, subject to the homestead or exemption, if granted. So we may take it now to be as well-settled law that up to the time the homestead is actually set apart the property sought to be set apart is subject to be levied upon and sold as the property of the applicant, with the qualification only that, if the homestead should be thereafter established and set up, the purchaser at such sale acquires only the fee, with his right of possession postponed until the termination of the homestead estate. If it were necessary to fortify this proposition by additional reasoning, it would only be necessary to analyze the constitutional provision declaratory of the homestead right. By section 5210 of the Code (article 9, § 1, Const.) it is provided that there shall be exempt from levy and sale, of the property of each head

of a family, realty or personalty or both, to the aggregate value of \$1,600. By the language of the constitution it will be observed that this homestead estate is not imposed upon any particular property of the applicant. Segregation is essential to the establishment of the homestead estate, and the only prohibition against the jurisdiction or authority of the courts to enforce a judgment, execution, or decree is against the property set apart for such purposes. Until the property, then, is in fact set apart, this prohibition cannot be said to be operative; and therefore, up to the moment that the homestead estate is actually established, and the property identified upon which the homestead right attaches, there is no impediment to a sale of the interest of the applicant in the property. If the property designated by him in his application be subsequently set apart, the homestead right is set up, and the homestead estate in such property established, the effect of which is to postpone until its termination the enjoyment by the purchaser of the possession of that property covered by the homestead. After the property is actually set apart, no portion of it can be sold, neither the homestead nor the fee, except the debt for which it is proposed to sell it fall within one of the classes to which by the constitution the homestead estate is made subject. The homestead estate, being granted, attaches to the property itself, and prevents its alienation by forced sale until after the termination of the homestead estate. *Jolly v. Lofton*, 61 Ga. 154; *Van Horn v. McNeill*, 79 Ga. 121, 4 S. E. 111.

2. By the express language of the constitution the homestead estate is itself made subject to the payment of taxes due upon the property covered thereby. Therefore a tax sale under such an execution, whether it be against the applicant or against him as head of a family, divests the homestead estate, and the purchaser at such a sale acquires not only the homestead estate, but all interest, if any, which the applicant may have in the premises at the time of the sale. If, before the setting apart of the homestead estate, the land covered by the homestead be sold so as to divest the fee, but leave the homestead estate intact, a subsequent sale under a tax execution against the head of the family would operate only to convey the homestead estate. In the present case the contest is one of title between two adverse claimants to the same tract of land. A judgment was recovered at common law against one Smith, who was the owner of the premises in dispute. The land was levied upon under an execution based upon this common-law judgment. It was advertised for sale, and pending the levy an application was made by the defendant in execution to have the property levied upon set apart to him as the head of a family. Pending the application, which was finally granted, the property was sold by the sheriff, and a deed conveying the

same made to the purchaser. That purchaser conveyed to the present defendant, who was in possession of the premises at the time this suit was brought. During the continuance of the homestead estate under a tax execution against the head of the family, this property was levied upon, and again sold, and at the tax sale the present plaintiff became the purchaser. After the purchase at the tax sale the defendant acquired possession of the premises, and was proceeding to commit certain alleged trespasses thereon, which the plaintiff in this proceeding sought to enjoin. Upon the trial of the case the jury found in favor of the defendant. The record is silent as to whether the homestead estate has yet terminated, but, the defendant being in possession, and that possession being acquiesced in by the person or persons for whose benefit the homestead was set apart, we are bound to presume that, as against the homestead estate, the defendant is rightfully in possession. This presumption casts upon the plaintiff the burden of proving that the homestead estate has not yet terminated, because, as he purchased at the tax sale, and the fee having already been divested before the homestead was set apart by the sale under the common-law execution, he acquired only the interest of the applicant as the head of a family; and to authorize a recovery by him as against this defendant he must show affirmatively that the homestead estate is still subsisting. We think that, upon a review of all the evidence in the case, the verdict for the defendant was right, and that the court properly denied the motion for a new trial. Let the judgment of the court below be affirmed.

(96 Ga. 794)

CRONIC v. SMITH.

(Supreme Court of Georgia. July 29, 1895.)

EXECUTORY CONTRACT—IMPEACHMENT BY PARTY.

An executed contract, such as an absolute conveyance purporting on its face to be a deed for the sale of land, though in fact a "mere sham," and made for the purpose of delaying or defrauding a creditor, is binding upon the maker, and he is estopped from impeaching it; but a bond for titles, by the vendee in such deed, to reconvey to the vendor, being an executory contract, may, if directly connected with the fraudulent purpose for which the deed was made, be impeached by the vendee, when sought to be enforced by the vendor. *Parrott v. Baker*, 9 S. E. 1068, 82 Ga. 364, and cases cited. Hence, a husband who, in order to delay or defeat the collection of a claim for alimony, or other lawful demand against him, conveyed land to another person, and put that person in possession, could not maintain against the latter an action for the breach of a bond given by him to reconvey the land whenever so required. This is so, not because the law is disposed to aid one of the wrongdoers in retaining the fruits of the unlawful transaction, but because it denies the benefit of its remedies to the other.

(Syllabus by the Court.)

Error from superior court, Jackson county; N. L. Hutchins, Judge.

Action between Lewis Cronic and W. J.

Smith. From the judgment said Cronic brings error. Affirmed.

W. I. Pike and C. H. Brand, for plaintiff in error. J. A. B. Mahaffey, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 329)

TREADAWAY v. VEASEY.**VEASEY v. TREADAWAY.**

(Supreme Court of Georgia. July 29, 1895.)

SALE BY GUARDIAN—RATIFICATION BY WARD.

This case, upon its substantial merits, is controlled by the decision of this court in *Treadaway v. Richards*, 18 S. E. 25, 92 Ga. 264, which, upon a review thereof as to the law announced in the third headnote, is hereby affirmed. There was no error requiring a new trial. (Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action between E. P. Treadaway, administrator, and T. B. Veasey. From the judgment both parties bring error. Affirmed.

Dean & Dean, for plaintiff. J. Branham, J. W. Ewing, and L. W. Alexander, for defendant.

PER CURIAM. Judgment affirmed; cross bill of exceptions dismissed.

(96 Ga. 813)

BRYAN v. EDWARDS.

(Supreme Court of Georgia. July 29, 1895.)

STATUTE OF LIMITATIONS—BRIEF OF EVIDENCE.

1. The action being for the breach of a contract not in writing, to which the defendant filed a proper plea of the statute of limitations, and it appearing from the evidence introduced by the plaintiff that his right of action was barred at the time his declaration was filed, and the affidavit of illegality, signed by the defendant, and relied on by the plaintiff as an "acknowledgment and promise in writing" sufficient to prevent the bar of the statute of limitations from attaching, not being such as to have the effect thus claimed for it, there was no error in granting a nonsuit.

2. A brief of evidence made out and agreed to by counsel for a party, but not signed by the latter, and purporting to contain a report or statement of evidence given by such party in the trial of a case, is not, no matter what its contents may be, a written acknowledgment or promise to pay on his part, which could have the effect of constituting a new point from which the statute of limitations would begin to run as to a then existing debt of such party. (Syllabus by the Court.)

Error from superior court, Catoosa county; T. W. Milner, Judge.

Action by James C. Bryan against W. L. Edwards. There was judgment in favor of defendant, and plaintiff brings error. Affirmed.

The following is the official report:

The petition of Bryan alleged that Ed-

wards owed him \$147.93, with interest, for that on April 13, 1887, Edwards owed him \$247.93 on two judgments rendered in his favor against Edwards on July 10, 1885, in a magistrate's court, and on April 13, 1887, he and Edwards made a trade by which the judgments were to be satisfied by paying petitioner property valued at \$100, the balance to be paid by Edwards within a reasonable time thereafter, which balance Edwards has failed and refused to pay, that afterwards, and within four years before the bringing of this suit, Edwards has acknowledged the debt, in writing, and promised to pay it, but still fails and refuses to do so. The suit was brought September 3, 1892. At the conclusion of the evidence for plaintiff, defendant moved for a nonsuit, on the ground that the evidence did not show such acknowledgment and promise in writing as was necessary to prevent the bar of the statute of limitations from attaching. The motion was sustained, to which ruling Bryan excepted. Plaintiff introduced the *fi. fas.*; also, an affidavit of illegality, sworn to and filed by defendant September 20, 1889, to a levy made on the *fi. fas.*, the ground of illegality being that prior to the levy the judgment and *fi. fa.* issued thereon had been settled with plaintiff by delivering to him a horse received by plaintiff at a valuation of \$100, with a distinct agreement that he would take the horse at that price in full settlement of the judgment and *fi. fa.*, together with another in favor of plaintiff against defendant, rendered in the same court and for similar amount. Further evidence was introduced by plaintiff tending to show that the *fi. fas.* upon which this suit was brought to recover balance due were the same said affidavit of illegality was filed to; that, when defendant was requested to give his note for the balance due and sued for in this case, he refused to give note, or settle; that this was in July, 1892; that the attorney for defendant on the trial of the illegality wrote out the brief of evidence, from which brief it appeared that defendant testified as follows: In the spring of 1887 he and plaintiff made an agreement by which the *fi. fa.* levied, and another for \$100, were settled. He was then unable to pay plaintiff the amount due on these *fi. fas.* Plaintiff proposed to him that, if he would pay plaintiff \$100 on the *fi. fas.*, plaintiff would settle the two *fi. fas.*, and would take defendant's note for the balance due plaintiff, and, if defendant ever got able to pay him, all right,—if not, all right. He agreed to let plaintiff have a certain horse, at \$100, on the indebtedness, provided plaintiff would settle both the *fi. fas.* To this plaintiff agreed, and defendant got the horse, and delivered it to plaintiff, according to the agreement; and plaintiff took it with the distinct agreement that both *fi. fas.* were to be settled, and defendant was to give him defendant's note for the balance due on the indebtedness.

W. E. Mann and R. J. & J. McCamy, for plaintiff in error. Payne & Walker, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 908)

RAY et al. v. BOYD et al.

(Supreme Court of Georgia. July 29, 1895.)

LANDLORD AND TENANT—WHEN RELATION EXISTS—DEED AS MORTGAGE—INJUNCTION.

1. One who makes to a creditor, for the purpose of securing a debt, a deed to land, but retains possession of the land, does not thereby become the "tenant" either of such creditor or his vendee, and is not subject, at the instance of the latter, to be ejected from the land as a tenant holding over.

2. Where such vendee instituted proceedings for this purpose under section 4077 et seq. of the Code, an equitable petition to enjoin the same, filed by the maker of the deed, ought not to have been dismissed on demurrer merely because it defectively set forth a tender of payment of the debt which the deed was made to secure, the petition being in other respects meritorious and complete. Under such circumstances it was not essential to its maintenance that any tender at all should have been alleged. See *Durden v. Clack* (March Term, 1894) 21 S. E. 521.

(Syllabus by the Court.)

Error from superior court, Lincoln county; Seaborn Reese, Judge.

Action by Mary Ray and another against William Boyd and another. Defendants had judgment on demurrer, and plaintiffs bring error. Reversed.

The following is the official report:

To the petition of Mary Ray and Delliiah Elliott against William Boyd and the sheriff, Boyd demurred generally, and specially upon the ground that petitioners failed to make a continuing offer to pay the amount of money to him which they admit to be due on the debt which they claim the deed mentioned in the petition was given to secure, and did not tender said amount in court. The petitioners allege that they are cotenants in the ownership of 125 acres of land, on which they live; that about 1888 they gave to George Hogan a deed to the land in consideration of \$210, for the purpose of securing a debt for that sum, and about 1890 Hogan deeded the land, for said consideration, to Boyd, who, claiming under said deed, is proceeding to eject petitioners under section 4077 of the Code, and threatens to levy a distress warrant on the crops of said premises; that petitioners have filed their counter affidavit, claiming that they are not his tenants, and offering bond and security as required by law, but the affidavit and bond were declined by the sheriff on account of the fact that the security was not worth the necessary amount over the statutory homestead; that Boyd well knew, at the time of the transfer of title to him by Hogan, that, though petitioners held no bond for titles for reconveyance, their deed to Hogan was merely to secure a debt. They have, ever since the giving of

the deed to Hogan been in open, peaceable, and adverse possession of the land, which is worth \$600, and is the only home of petitioners, who, owing to their poverty, are unable to give satisfactory security as required by law. They are aged and infirm in health, and eviction from their home would remedilessly injure their financial interest and estate, and leave them helpless and dependent without any resources. They have tendered Boyd the money that is due him on the land, and stand ready to pay it to him, and he refuses to receive it, and is proceeding as above recited. They pray that he be enjoined from having issued or levied any distress warrant against petitioners. The special demurrer was sustained.

Colley & Sims, for plaintiff in error. J. T. West, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, J., not presiding.

(97 Ga. 331)

WRIGLEY v. BIBB REAL-ESTATE & IMPROVEMENT CO.

(Supreme Court of Georgia. July 29, 1895.)

ACTION ON NOTE—SUFFICIENCY OF EVIDENCE.

The assignments of error set forth in the bill of exceptions are without merit, and the judgment in the plaintiff's favor, rendered by the trial judge without the intervention of a jury, was correct.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by the Bibb Real-Estate & Improvement Company against Lucy M. Wrigley. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

On April 8, 1893, Lucy M. Wrigley, a married woman, living with her husband, executed 18 promissory notes, payable to the Bibb Real-Estate & Improvement Company, —one for \$18.95, due May 8, 1893; the others for \$18.65 each, the first due June 8, 1893, and the others on the 8th of each succeeding month up to and including October 8, 1894. At the same time she executed a deed conveying a lot of land to the company, and also executed a written agreement, whereby she promised, "for value received," to pay to the company \$336 "as rent" for said land, in monthly installments, uniform in amount with the notes; and further agreed, among other things, "to hold said premises as the tenant of the company, and to pay as a part of said rent, but in addition to the above sum," all taxes, assessments, repairs, etc., on the property; and "that, should I make default for three consecutive months in the payment of the monthly installments aforesaid, then the entire balance due upon the sum aforesaid shall at once become due, pay-

able, and collectible," etc. On February 10, 1894, the company brought a simple action of complaint upon the notes, the first of them having been paid, and default in payment of the next nine having been made. Defendant pleaded that the notes were not for any debt due by her to plaintiff, but were to secure a contemplated loan by plaintiff to W. M. Wrigley, defendant's son, for whom she signed the notes merely by way of security, and the same were absolutely without consideration to her; that plaintiff knew and well understood all these facts, and did not look to her for payment, save as security in the event of failure by W. M. Wrigley, who paid the first note; and defendant was not asked to pay it, or notified that it was due, and not until W. M. Wrigley's death was she presented with any of the notes and payment demanded of her; that the written agreement mentioned was part of the contract of suretyship; that the lot conveyed by her to plaintiff by conditional deed and described in said agreement was vacant and valueless for rent, and the consideration of the notes, agreement, and deed was not rent, but each and all of them were given to secure the debt of W. M. Wrigley, and so known and recognized by plaintiff at the time. She further pleaded usury, for that the debt due by W. M. Wrigley was \$300, to which plaintiff added interest at 8 per cent. for 18 months, and divided the total amount into 18 notes, each including interest on its principal sum for 18 months; and plaintiff is now seeking to collect nine notes not due, and yet insisting on interest for the full period the notes have to run, and is also seeking to collect for each month one-eighteenth of the total interest for 18 months, when the principal in each month diminished, and the interest also should be diminished in proportion. At the trial, plaintiff having introduced the notes and agreement before mentioned, defendant testified: "I never received anything, or any money, for signing these notes, and never saw any money. I never negotiated with the plaintiff company for any loan. I never received any money from them. My son asked me to let him take a mortgage on my lot to pay some debts he owed. He said to me: 'I am in trouble. I owe some money, and I can't save sufficient from my salary to pay these debts. Will you allow me to take a mortgage on one of your lots?' I told him I would, and that is all that passed between us. I was never called on to pay any part of that money by the company. My husband was looking at me when I signed the notes. He died in August, 1893. The first I heard about payment of the notes was three or four weeks after his death. My son died a month before his father, July 23, 1893. He made no statement to me about negotiating for this money. He asked me for the notes and mortgage. He wanted to put them up to raise some money to pay his

own debts. I authorized him to go ahead, negotiate a loan, and borrow the money. I executed these notes in pursuance of his negotiations for the loan. All the papers I signed were in pursuance of the contract that I authorized him to have in order to procure this loan. I suppose he was authorized by me to act for me in procuring the loan of this money on my property. I reckon he was authorized by me to receive the money that these notes were given for. I don't know. I did not tell him he could take these notes, and go and get the money. All I did was to sign them, and walk right out. I never told him anything— Yes, I told him, before the notes were signed; that I was willing to give the mortgage for him to get the money. I suppose I did authorize him to go ahead, make arrangements and get the money on the mortgage. I never had anything to do with those papers, except to sign them. I never saw them. Yes, when they were brought to me to sign, I understood that they were to secure the money that W. M. Wrigley was to get. As to whether I authorized him to negotiate for the loan, accept the money, and make all the arrangements about getting it, I did not think about it one way or the other. I just signed the notes. He was not to get the money and bring it to me. I never saw it. I never had anything to do with it. He was to get it, and use it. I authorized him to get it. No, sir; he was not authorized to take the money because I did not require him to bring it to me. I never authorized him to borrow any money for me, or from anybody. I did not want to borrow any money. I did not know where he was going to get it. When I said I authorized him to borrow it, I did not mean I authorized him to borrow it for me. He did not borrow it for me. He borrowed it for himself. I do not know how much he got. I was never called on to pay any of the notes until after my husband's death. It is true that I authorized my son to borrow this money on my property; to negotiate for it." The notes contained a stipulation to pay attorney's fees of 10 per cent. on principal and interest. The court allowed the declaration to be amended by an allegation to recover such fees. Defendant excepts to this ruling, alleging that the amendment set out a new cause of action. The judge, presiding without a jury, found for the plaintiff \$317.05 principal, \$17 interest to October 6, 1894, and \$33.40 attorney's fees. Defendant alleges that this finding is contrary to law and evidence.

H. F. Strohecker and M. G. Bayne, for plaintiff in error. John R. L. Smith, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 298)

CAIN v. MACON CONSOLIDATED ST. R. CO.

(Supreme Court of Georgia. July 29, 1895.)

STREET CARS — INJURY TO PERSON ON TRACK — CONTRIBUTORY NEGLIGENCE.

The evidence introduced by the plaintiff showing clearly that, even if the defendant was negligent at all, the plaintiff, after its negligence began, might, by the exercise of ordinary care, easily have avoided being injured, he was not entitled to recover. The court was therefore right in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by J. C. Cain against the Macon Consolidated Street-Railroad Company for personal injuries. To a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

Cain sued the street-railroad company for damages from personal injuries, which he alleged he sustained by being struck by one of its electric cars, running at a high rate of speed along Main street, in Macon, where Elm street crosses Main street. He alleged, among other things, that the car was operated at the time by a motorman alone, who was making change for passengers, and neglecting, for the time being, his duties as motorman; and that no signal was given of the approach of the car until it was too close to petitioner for him to escape. After the introduction of the evidence for plaintiff a nonsuit was moved for and granted, to which ruling plaintiff excepted.

Plaintiff testified: "I live on Elm street, a public street in East Macon. On May 5, 1894, I went down Elm street, and had to cross the street-railroad track. I was going slowly, just as I could, with my head hung down, like I do, especially when by myself; and when I stepped up on the railroad track with my left foot first (as to whether I made any other step or not I don't know), I caught the sound of the car gong or bell. I heard no car running, and, hearing none, I was not thinking about any at that time. The wind was blowing very hard in a direction opposite that the car was going, and I was in front of the car, and stepped on the track. The car was so near me when I heard the gong I could not get out of the way. I am unable to say what effort I made to get out of the way. Presume I tried to get off the track, but can't say positively, for this reason: that when I caught the sound of the car bell I flung up my eye, understanding what the bell was, but the car was so near on me I saw I could not get out of the way, and was bound to get hurt. I flung up my right hand against the car, but what effort I made to get out of the way I do not pretend to say, because I don't know. It was impossible for me to get out of the way after I discovered the car. After I threw up my hand, the

car struck it first, and then my right side, and knocked me off the track some fifteen feet. McCrary and the motorman picked me up. I did not hear any car, and was not expecting any. From the direction which the car was coming it would not have struck me on the left shoulder. In my effort to get out of the way I did not turn completely around. It could not have struck me on the left shoulder, as it was on my right hand, and on a square crossing; a public crossing on a street kept up by the city. The street-car track runs down Main street, and I was walking squarely across the street and track. The bank on which the track is laid is elevated a little. When I put my foot on the track my head was down, and I was in a brown study, reflecting about something. I did not look up and down the street. It was between nine and ten o'clock in the morning. The street runs straight, and a man could see a car with ease if he were looking up. I knew that car operated on the track every day. I don't know whether I made any effort to get off or not, because my mind was stricken with the fact that I was bound to get hurt. The sound of the gong aroused me from my brown study, and I recognized what it was when I heard it. I could not tell how long it had been sounding before I raised my head. I only caught one sound. I do not know how long it might have been ringing, and do not know how the stroke flung me, but suppose it knocked me sideways. It was the front end of the car which struck me, fairly on the shoulder and right side. A policeman approached me when I was on my way home, and asked if I wanted a case made against the motorman, and I told him, 'No,' but do not remember saying that the motorman was not to blame. My reason for not wanting a case made against the motorman was that it would not have benefited me to have him arrested and fined. In my judgment, the car was running at the rate of six miles an hour, but I can't explain how I formed this estimate, as I am not allowed to tell about the schedule time. Defendant does not always ring the bell at crossings. I reckon they do it as a general rule." McCrary testified: "I was on the car when Cain was injured. When I first saw Cain,—I don't know about the motorman; he and I probably saw him about the same time,—the car was between forty-five and fifty feet from the crossing. Cain was between three and four feet of the crossing. He was about seven feet, I suppose, from the crossing, when I first saw him. I was standing in the door of the car, and just before he saw Cain the motorman's back, or rather his side, was to the crossing. The car was still running in the direction of the crossing. The motorman had a quarter I had handed to him, and he looked to the front, and then applied his brake. The motorman tried to stop the car very soon after he saw Cain. He had to turn around to the brake, and I think he applied

the brake as soon as he turned around. I know he rung the bell and applied the brake. He did that immediately after he turned around. Cain at that time was walking at right angles to the track, with his head down. When he discovered the car, it was in five or six feet of him. He stopped very suddenly, and turned, almost facing the car, and threw his left hand up. He was walking deliberately, with his head down, leisurely along. As he stepped on the track, about six feet off, he saw the car. He turned enough to put his left hand on the car. He turned completely around; was facing almost exactly in the direction from which he was coming. He did not get entirely around. I think when he was struck he had turned completely around. He fell on the left side of the track. Was knocked between twelve and fifteen feet. If the motorman had not been making change for me, but had been attending to his duties, he could have seen Cain fifty or seventy-five feet further than he did see him. The car was about fifty feet from Cain when the motorman first saw him. It is fifteen feet from the car track to the mouth of Elm street. The car ran about twenty feet after it struck Cain. There was no conductor on the car. The motorman rang the gong after he took my change, but I never got my change back from him until after the accident. When he rang the gong, the car was about forty feet from the crossing. Cain made no effort to get off until we got right near on him. He did not seem to pay any attention to the noise of the gong. Then he tried to get off. After the motorman discovered plaintiff, he put on the brakes, and I think used every effort he could to keep from hurting him. I don't know exactly how fast the car was going. On the car, on another trip, since the accident, I counted seven very deliberately, when the car was running at its ordinary speed, not checked by the brake, until it reached the place. The velocity of the car at the time of the accident was less by reason of the application of the brake. I don't know exactly how the motorman was looking when I gave him the quarter. The supposition was that he was looking down the track, and turned when I gave him the quarter. When I called his attention to the money, he looked back, and reached back with his right hand, and took it. Then, as he turned, or very shortly afterwards, he saw Cain, and commenced to ring the gong. I don't know whether it was the stroke of the gong that made me see Cain or not. As he straightened around with my money in his hand, he struck the gong. It could not have been more than two or three seconds. He did not do anything which interfered with the management of the car after he took my quarter. He was attempting to put on brake and ring the gong until the moment of the collision from the time I first heard the gong struck. I knew the car was retarded. It stopped in about twenty feet. Cain did not

seem to notice at all the ringing of the bell. The bell rang in ample time, if he had attended to it, for him to get out of the way." He was asked: "Just before the car got to him, and he turned and faced it, did he not have time, with just a single step back, to get out of the way?" He answered: "Very little could have done it. He was approaching the track at right angles, and when he put his foot on the track the car was six or seven feet from him. Instead of stepping back, he faced around, and put his left hand up, and the force of the car threw him over on his right side. His hand received the blow. I don't think the car struck him up and down his left side. It was only a second that the motorman turned for the money, and as he faced around I saw Cain, and think he did also; and he then began ringing the gong, in ample time for Cain to have stepped off if he had paid attention. When the motorman was making change he was not touching the brake handle with either hand. The track is inclined there some, but the car is hardly heavy enough to bring it down. We could not have been more than thirty feet from Cain when the motorman turned. When I discovered that Cain was not going to stop, he was about four feet from the track. He did not make more than two steps afterward. The car was within six or seven feet of him at that time. People can stop with safety to get on the car, within two feet of the rail. When the motorman turned and saw him, I don't remember whether he shut off the current or not. The car was about twenty feet long. I suppose the motorman saw, when he turned around, that Cain was not going to stop, as he applied the brake, and tried to stop the car." There was much evidence as to the nature and extent of plaintiff's injuries, his earnings, etc.

Grace & Jones, for plaintiff in error. Bacon & Miller, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 311)

LEE v. COMER.

(Supreme Court of Georgia. Aug. 12, 1895.)

CONTRIBUTORY NEGLIGENCE.

It plainly appearing from the evidence that the plaintiff's husband met his death because of a total disregard of his own safety, and that, by the exercise of even slight care, he might have avoided the catastrophe which resulted in his death, the judgment of nonsuit was right.

(Syllabus by the Court.)

Error from superior court, Quitman county; J. M. Griggs, Judge.

Action by Sallie Lee against Hugh M. Comer, receiver, to recover for the death of plaintiff's husband. To a judgment of nonsuit, plaintiff brings error. Affirmed.

G. L. Comer, M. C. Edwards, Jr., and W. M. Harper, for plaintiff in error. J. H. Guerry, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 338)

BATEMAN v. WESTERN UNION TEL. CO.
(Supreme Court of Georgia. July 29, 1895.)

NEW TRIAL.

The charge of the court complained of in one of the grounds of the motion for a new trial, upon which a new trial was granted, was in conflict with the ruling of this court in *W. U. Tel. Co. v. Georgia Cotton Co.*, 21 S. E. 835, 94 Ga. 444; and therefore the court was right in correcting its own error by setting aside the verdict.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by C. E. Bateman against the Western Union Telegraph Company to recover a statutory penalty. To an order granting a new trial after a verdict for plaintiff, the latter brings error. Affirmed.

The following is the official report:

Bateman sued the telegraph company for the statutory penalty for failure to transmit with impartiality, etc., a telegraphic message which he alleged he delivered to it at about 8:05 o'clock p. m., October 3, 1893, at Macon, Ga., for transmission to R. L. Ezelle, Byron, Ga., and which it did not transmit until at or about 7:47 o'clock a. m., October 4, 1893. There was a verdict for plaintiff, and defendant moved for a new trial, which motion was granted on two grounds of the motion. To this ruling the plaintiff excepted.

Briefly stated, the testimony for plaintiff was to the following effect: He delivered the telegram to Palmer, night receiving clerk of defendant at Macon, at a little before 8 o'clock p. m. The message was originally written on a night blank. Plaintiff asked Palmer to get it off right away, and Palmer called his attention to the fact that it was on a night blank, and said he would change it and put it on a day blank. A day blank is attached to the original message, which shows that it was intended to be transmitted that night. Plaintiff paid 25 cents, which was the price charged. The telegram was filed in Macon during office hours. Prior to that time, plaintiff had sent some messages from Macon to Byron after 8 o'clock at night, which were transmitted and delivered. The office at Byron is open, and an operator is there, all night. Neither the night operator nor day operator at Byron is an employé of the defendant. Plaintiff knew, before sending the message in question, that the day operator at Byron was accustomed to go off duty at 7 o'clock p. m. Frequently, the day and night operator exchanged time, but the time of the day operator ends at 7 p. m. Both operators do business for defendant. Sometimes messages which plaintiff sent to

Byron after 7 p. m. were delivered under a special arrangement to pay for the delivery, but he has sent other messages without making any such arrangements. No charge is made for delivery at Byron in the daytime, but the operator, as a usual thing, does not put herself to the trouble to deliver messages. Sometimes they put themselves to the trouble to deliver them at night, and sometimes they do not. It was admitted that Ezelle lives within the corporate limits of Byron. The message in question was received at Byron at 7:47 a. m.

For the defendant, the testimony was to the following effect, in brief: Both the day and night operators at Byron are paid by the railroad. The day operator is accustomed to handle business for defendant, and the usual office hours of defendant at Byron were from 7 a. m. to 7 p. m. Plaintiff knew what these office hours were. The night operator had no connection with the telegraph business of the defendant, though occasionally he received messages for defendant, and sometimes urgent messages have been transmitted by defendant to Byron after 7 o'clock p. m., and delivered that night. The office at Byron was the same for defendant and the railroad. Defendant did not keep any messenger boy there to deliver messages, but the day operator herself employed a boy for the daytime, who does not stay at night. Frequently, before the time in question, plaintiff had been notified that it was impracticable to deliver messages at Byron after 7 o'clock p. m., unless it could be done by special arrangement, because the office hours had passed. Messages were received from him for transmission after that time upon the understanding that the office hours at Byron were over, but that there was an operator there for railroad purposes, and an effort, would be made to get him to have the message delivered, and, if there was any additional expense, plaintiff was to settle it the next day, when he got to Byron. No such arrangement seems to have been made as to this particular telegram. The message was sent from defendant's office at Macon in a few minutes after business opened there on the morning of October 4th.

The first ground of the motion was that the verdict was contrary to law. The eleventh ground was: Because, after the jury had retired and had been in their room some time, they returned into the court, and requested to be recharged, whereupon the court charged as follows: "I charged you, and still charge you, that if the telegraph company received the message when it was tendered to them, and accepted pay for its transmission and delivery, and said nothing about whether the office hours at Byron were over, or not, that they were bound, by such reception, to transmit it; and the only thing that could relieve them from the penalty would have been the proof that they made all due effort to transmit it to that office, and, if there is no

proof that they made any effort to transmit it until the next morning, you would be authorized to find a verdict for the plaintiff for the penalty. If, at the time of the reception of the message and payment for its transmission, they received it with the statement that the office hours at Byron were over, and they accepted it with or upon the condition that it would not be transmitted until the office hours on the following day, then they would not, under those circumstances, have been bound to transmit it until the opening of office hours on the following day. And if, after the opening of office hours on the following day, under those circumstances, they transmitted it with due diligence, impartiality, and good faith, they would not be subject to any penalty; but if they failed, after the opening of the office hours, to use such diligence and good faith, then they would be bound."

Harris & Harris, for plaintiff in error.
Gustin, Guerry & Hall and Dorsey, Brewster & Howell, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 206)

RUCKER v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

CRIMINAL APPEAL — ASSIGNMENTS OF ERROR —
CONFESSIONS AS EVIDENCE.

1. A ground of a motion for a new trial assigning error upon the admission of a portion of the evidence of a named witness, viz. "The part thereof pertaining to the confession of the defendant, * * * as set forth by brief of evidence," and which does not otherwise designate the evidence objected to, presents no question for consideration by this court. In alleging error upon the admission of evidence it is essential not only to state the ground of objection taken when the evidence was offered, but also to set out in the motion for a new trial or the bill of exceptions, as the case may be, the evidence itself which was complained of as inadmissible.

2. The corpus delicti was duly proved, and the confession of the accused was sufficiently corroborated to authorize his conviction.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

Ed Rucker was convicted of larceny, and brings error. Affirmed.

The following is the official report:

Evans, Craft, and Rucker were indicted for the larceny of a bale of cotton. Rucker was placed upon trial, and found guilty. His motion for new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in admitting the testimony of McMullan, the prosecutor in the case,—the part thereof pertaining to defendant's confession,—the same having been objected to on the ground that it was not freely and voluntarily made,

but induced by reward and benefit offered by McMullan, "as set forth by brief of evidence in said case." McMullan testified that he lost a bale of cotton between February 15 and March 1, 1894, in Hart county; that he never did find the cotton after it was stolen; that it was taken from the shelter of the barn on witness' premises; and that it was about a week after it was taken before it was missed. He further testified: "The defendant told me several weeks ago about his knowledge of this bale of cotton being taken away. He told me this in the presence of Charley Norman. No one else was present. The statement of the defendant was freely and voluntarily made to me. I did not induce him to make this statement by any hope of benefit. I did not extort this statement from him by any fear of injury or punishment to him. I told him I thought it would be better for him, and would go lighter with him, to tell the truth about it. I told him that on Saturday. I did not tell him that at the first time he disclosed it to me. When he first told me about his knowledge and connection with it I did not say to him that it would be better for him. I told him that Saturday, and told him so a week ago. I told him: 'Ed, you had better tell the truth about it. It will be better for you.' That was what I said to him. I did not approach Ed on the subject. I told him I had missed a bale of cotton, and asked him to tell me about it. I believed he knew about it. I did not tell him in advance of any statement by him that it would be better for him to tell about the transaction. The time I made that suggestion to him was subsequent to that conversation,—on Saturday; and I have seen him several times since then, and told him it would be better. The first time he made disclosures to me about it he said that he himself and Bed. Evans and George Craft went to the barn, and took out a bale of cotton, and put it on an ox wagon, and carried it down the path to the big road, and took it over to Bed. Evans', and put it in his straw pen. That is about what he said. He said he didn't know what was finally done with it. He was living on my place at the time, and knew the cotton was mine. He nor none of the other persons employed on my place had my authority or consent to take the cotton and make any disposition of it whatever. They did not have authority to take it to Bed. Evans'. It was done in the night. Ed said he was there with the other parties who got the cotton. I don't know that he said he helped to put it in the wagon, but he said, 'I was there.' I am not positive whether he said 'we' or 'they' put the bale of cotton on the wagon. I think he said he insisted on the moving." Error in admitting the testimony of Charley Norman, witness for the state, as to the confession of defendant, over objection that the same was not freely and voluntarily made, but induced by reward and benefit offered by McMullan, "as

set forth in the evidence of said case." Norman testified that before the confession was made McMullan told defendant that it would be better for him to tell the truth about it; it would be some lighter on him. Because defendant's confession was not sufficiently corroborated to justify a verdict of guilty in the case. It appears from the evidence: That defendant lived on the place of McMullan off and on for 10 years, and was familiar with the premises. That about March 1, 1894, a witness went to the straw pen on the place of Bed. Evans, and it seemed that there was a vacant place or hole in the straw pile; a square-looking place, and looked like somebody had moved the straw. That it was about as large as a bale of cotton or larger. That witness saw no cotton there, and no wagon tracks about the place. That defendant, a day or so before McMullan missed his bale of cotton, had a talk with Alfred Teasley and Bob Hunt at the gin house on McMullan's place, and said he could take a bale of cotton and McMullan would not miss it. That defendant talked like he wanted them to go in with him and take one, but they didn't agree to do so. That defendant did not say he was going to take one, but just said McMullan had so many a fellow could take one and McMullan would never miss it. That Teasley told defendant he guessed McMullan had them counted. That defendant did not ask them to assist him to take one, did not insist on their taking one, but was just talking about what they could do. That defendant said there had been a bale of cotton stolen from him, and he did not miss it. That defendant met Hunt there at the gate one night and said something about wanting Hunt to watch for him. He told Hunt to stand there a while; that he had some fellows down there waiting for him. That Hunt asked him what was his business, and defendant told him to stand there a while; that he had some fellows down about the road; but didn't say what he had them there for. That this was about three or four days after the talk at the gin house. And that the bale of cotton was missing after defendant told him to stand there at the gate, which was the gate going into McMullan's lot. The defendant made a statement, in which he said that he told McMullan that he saw the boys when they took the cotton; that he met the boys in the road, when he told him what they were going to do; that he told them he was not going to have anything to do with it; that they told him to go up to the gate, and told him that if ever he told anything they would kill him; that he had nothing to do with putting the cotton on the wagon or helping them to take it off; and that McMullan misunderstood him when McMullan said he (defendant) told McMullan he helped to take the cotton.

W. L. Hodges, for plaintiff in error. W. M. Howard, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 218)

WILSON v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

CRIMINAL APPEAL—REVIEW.

Where a motion for a new trial is based upon the general grounds that the verdict is contrary to law and the evidence, and alleges the commission of no error at the trial, the supreme court will not set aside a verdict supported by the evidence and approved by the court below.

(Syllabus by the Court.)

Error from superior court, Warren county; Seaborn Reese, Judge.

Esau Wilson, having been convicted on a criminal charge, brings error. Affirmed.

E. P. Davis, for plaintiff in error. W. M. Howard, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

(96 Ga. 268)

BIVINS et al. v. MARVIN.

(Supreme Court of Georgia. May 15, 1895.)

SUPERIOR COURT—JURISDICTION—APPOINTMENT OF RECEIVER.

1. There was equity in the petition, and, the superior court having taken jurisdiction of the case, that jurisdiction could not be ousted by the subsequent appointment by the ordinary of an administrator of the decedent whose estate was in controversy.

2. Under the pleadings and evidence in this case, the order appointing the receivers was erroneous. The main defendant being undoubtedly entitled to one-half of the estate, it was in no event necessary to put in the hands of a receiver more than enough of the property to secure to the petitioner his alleged half of the estate in case his heirship should be established; and under the allegations and proof as to the solvency of the defendant above referred to it was error to appoint a receiver at all without first allowing that defendant the opportunity to give a bond in a sufficient amount and so framed as to fully protect the petitioner in whatever rights he might be able to establish by the verdict and judgment at the final hearing. Had such bond been given, the petition for a receiver should have been denied altogether. Direction is accordingly given that the trial judge, without hearing further evidence, so modify the order already passed as to make the same conform to the rulings above announced.

(Syllabus by the Court.)

Error from superior court, Dooly county; C. C. Smith, Judge.

Petition by Francis G. Marvin against Theodora Bivins and others. There was a judgment in favor of petitioner, and defendants bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Allen Fort and Martin & Whipple, for plaintiffs in error. Littlejohn & Thompson and J. L. Hopkins & Sons, for defendant in error.

LUMPKIN, J. In July, 1892, Dr. George W. Marvin died intestate, leaving a considerable estate, consisting of lands, bank stock, money, notes, and accounts and other personality. His widow, Mrs. Theodora Mar-

vin, by whom he left no children, supposing herself to be his only heir at law, took possession of his entire estate, the indebtedness of which amounted to little or nothing. She afterwards intermarried with Joseph E. Bivins, and at the time the petition in the present case was filed they were in possession of and managing the property. This petition was filed by Francis G. Marvin, a citizen of Nebraska, who claimed to be a son of the intestate by a former marriage, and therefore entitled to one-half of the estate as a coheir with Mrs. Bivins. It is not necessary to the present purpose to set forth all the contents of the petition. Its material allegations were that the petitioner was entitled to one-half of the estate; that Mrs. Bivins and her husband denied this right, were mismanaging the property, and fraudulently making away with it, so as to prevent the petitioner from obtaining his share of the same. Among other things, the petition prayed for an injunction and for the appointment of a receiver to take charge of the estate until the petitioner's rights could be duly established by a judgment in his favor. After the filing of the petition, Bivins was appointed administrator of Dr. Marvin's estate. The answer denied the heirship of the petitioner; distinctly alleged the solvency of Mrs. Bivins, and her ability to answer to any judgment the petitioner might obtain in the case should he prove to the satisfaction of the court that he really was an heir of Dr. Marvin; resisted the appointment of a receiver, and prayed that the estate might be duly administered and wound up by the administrator. There was no proof of insolvency on the part of Mrs. Bivins, but, on the contrary, the evidence tended to show that she was amply solvent. Besides, it appeared that a very large portion of the estate—probably more than half of it in value—consisted of property which it was not within the power of Mr. and Mrs. Bivins to put beyond the reach of a judgment of the court, especially after the filing of the petition and the pendency of litigation thereon. It also appears that it was a matter of dispute between the parties as to whether or not certain realty in the city of Atlanta was a part of Dr. Marvin's estate or belonged to Mrs. Bivins in her own right. The court appointed two receivers, with authority to take possession of all the property in controversy except the Atlanta real estate, and as to that granted an injunction restraining the defendants from disposing of the same.

1. It is well settled law in this state that courts of equity have concurrent jurisdiction with the courts of ordinary in the administration of the estates of deceased persons in all cases where equitable interference is necessary or proper to the full protection of the rights of the parties at interest. This undoubtedly was such a case, and therefore the superior court very properly took jurisdiction of it, and, under another well-known

equity rule, will retain the jurisdiction until the respective rights of the contending parties can be ascertained and adjudicated by a proper judgment or decree. It seems perfectly clear that the jurisdiction thus obtained by the superior court cannot be ousted merely because, after the petition was filed, an administration upon the estate was, for the first time, asked for or obtained. Indeed, this might have been a case for equitable interference even if an administrator had been appointed before the petition was filed; and certainly, when this had not been done, the superior court, which, by reason of its larger powers, and in view of the numerous and complicated issues involved, is the better enabled to wind up and dispose of the estate, will not let go its hold on the parties and the subject-matter of dispute.

2. We think that, in any view of the matter, the order passed by the judge was unnecessarily broad and comprehensive, and operated too harshly upon the unquestioned rights of Mrs. Bivins. She was, beyond any doubt, entitled to one-half of the estate and its income. By the order in question, she was deprived, so far as her interest in the estate was concerned, of everything; not even being left a home, or a single dollar for support. This was going further than was requisite for the fullest protection of the plaintiff, even granting that his claim of heirship was demonstrated. The property of the estate was such that it would have been comparatively easy, if a receiver was necessary at all, to put a portion of it in his hands; and every right of the petitioner could have been sufficiently protected by making such portion large enough in value to cover his half of the estate and the income thereof in the event of a final judgment in his favor. No part of the income could be properly paid over to him until after the rendition of such a judgment; but we can see no good reason why Mrs. Bivins should have been kept out of the enjoyment and use of her half of the income. Again, she alleged her ample solvency, and introduced evidence strongly in support of this allegation, and there was no evidence to the contrary. While she did not, in her answer, distinctly offer to give a bond for the protection of the plaintiff, we think, under the circumstances, the order of the court should have been so framed as to allow her the alternative of doing so, instead of peremptorily and unconditionally directing a surrender of the property to the receivers. If such opportunity had been allowed, and the proper bond had been given, there would have been no need for a receiver at all. *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100, 13 S. E. 963. We do not think there is any necessity for again burdening the trial judge with a full hearing of the interlocutory matters involved in this case, and therefore have directed that, without hearing further evidence, the order already passed be so modified

as to make the same conform to the rulings herein made. Judgment reversed, with direction.

(97 Ga. 327)

HERNDON v. BLACK.

(Supreme Court of Georgia. July 29, 1895.)

RES JUDICATA—DISMISSING DISTRESS WARRANT—EVIDENCE—HARMLESS ERROR.

1. Where a distress warrant was issued, to which a counter affidavit was filed, and upon the trial of the issue thus made, in a justice's court, the magistrate, after hearing the evidence of the plaintiff, rendered a judgment dismissing the warrant and awarding the costs against the plaintiff, such judgment was, in effect, equivalent to a judgment of nonsuit only, and constituted no bar to the issuing of a second distress warrant for the rent alleged to be due in the first. After the filing of the counter affidavit, the first warrant became mesne process, the trial was similar to that of an action at law, and there was no general judgment for the defendant. See *Phipps v. Alford*, 22 S. E. 152, 95 Ga. 215, and cases there cited.

2. There was no error in overruling the defendant's objection to the admission in evidence of the written contract referred to in the third ground of the motion for a new trial, the objection being that the paper was mutilated and altered materially by cutting off a portion thereof. Attached to the bill of exceptions was a facsimile of this paper, and it does not appear, upon inspection, to have been materially mutilated or altered.

3. Where it appears that a considerable mass of testimony was offered, apparently as a whole, the greater part of which was manifestly irrelevant, it was not error to rule out all of it, although some portion of the same may have been relevant and pertinent. If there was any error at all in ruling out the letters offered in evidence by the defendant, it was not of sufficient importance to require a new trial.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; Seaborn Reese, Judge.

Action by T. J. Black against B. T. Herndon. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

On October 21, 1893, T. J. Black made affidavit to obtain a distress warrant against B. T. Herndon, who filed a counter affidavit; and on the trial the jury found for the plaintiff, \$89.35 principal and \$7.14 interest. Defendant's motion for a new trial was overruled. The affidavit for the warrant alleges that Black rented to Herndon, by and with the consent of Mrs. E. P. Callaway, about 35 acres of land, part of the place owned by Mrs. Callaway; the terms of rental being that Herndon was to pay one-fourth of each and all the crops raised by him on the land in 1893, as rent therefor; the land so rented being a field near the barn, and known as the "Barn Field," and about 20 acres thereof; also, a portion of said place known as the "George Smith Field," opposite the Dorrough place, containing about 15 acres. The counter affidavit alleges that Herndon never rented said land from Black for the year 1893, and does not owe Black the amount distrained for, or any other sum, for rent. Further, that in September, 1893, Black made affidavit

that the rent here distrained for was due and unpaid, and that Herndon was his tenant and refused to pay said rent, whereupon a distress warrant issued for the rent herein distrained for, in favor of Black, against Herndon, which warrant was levied on the property levied on in this case; that Herndon having given bond, and filed his affidavit denying that he owed Black the rent distrained for, the same came on to be tried on October 14, 1893, in a justice's court, and, after hearing all of plaintiff's evidence, judgment was given by the court for the defendant, against the plaintiff, and the warrant was by the court dismissed. Wherefore defendant says he does not, and never did, owe plaintiff the rent distrained for, or any part thereof, and that the subject-matter of this case has been fully and legally adjudicated by a court of competent jurisdiction. By amendment, Herndon set forth copies of the proceedings in the justice's court, and alleged that said case was tried upon the issue whether he owed the plaintiff any rent, or was his tenant, and upon the introduction of all of plaintiff's evidence, and argument of the case, the court rendered the judgment pleaded as a former adjudication. The copy of the affidavit for distress warrant so attached appears to have been made by Black, and alleges that Herndon, as tenant, is indebted to him \$100 for rent of farm for 1893; said farm situated on the road leading from the Washington road to Salem, and adjoining farm of George H. Smith and Annie Smith. Upon this affidavit the warrant was issued September 22, 1893, and Herndon interposed a counter affidavit alleging that the sum distrained for under the warrant he did not owe, nor any part thereof, at the time of issuing said warrant. Also, attached is a copy of the bond given by Herndon, after which appears a judgment signed by the justice of the peace,—that "upon hearing the evidence of the plaintiff in the within case, and defendant's motion to dismiss being argued by both sides, the within distress warrant is dismissed, and judgment given against plaintiff for costs."

At the trial, Black testified: Rented the land occupied by Herndon from J. I. Callaway in January, 1893. Had heard before that he and Callaway were on a trade. Herndon agreed to pay Black one-fourth of all the crops raised, as rent. There were grown about 8 bales of cotton, 450 pounds, at 6¼ to 7½ cents; 150 bushels corn, at 60 cents; 30 or 40 gallons syrup, at 30 cents; 25 bushels cotton seed per bale, at 15 cents. Rent was due, demanded, and unpaid. Recognized writing as Callaway's in letters from Callaway to Herndon. (Rent contract of Black and Callaway, of which facsimile is attached, was introduced.) Subrented to Herndon with consent of Mrs. E. P. Callaway. John I. Callaway was husband of, and agent for, wife, Mrs. E. P. Callaway, in renting to Black, and acted generally as her agent. Herndon testified: "I did not agree

to rent the land from Black. He never said anything to me about rent, but simply pointed out the land I might occupy." Sims testified: "I was present all the time Mr. Black and Mr. Herndon were arranging about the land. Nothing was said about rent to be paid, or about Mr. Black's having rented the land. One-fourth of the crops is a reasonable rent. Eight or nine hundred pounds of lint is a reasonable rent for the land." Hubbard testified: "I rented from Mr. Black. Was with him and Herndon and Sims, when looking over the land. Heard Mr. Herndon agree to pay Mr. Black one-fourth of all the crops, as rent."

The motion for new trial is upon the following grounds:

(1) Error in overruling the plea of *res adjudicata*.

(2) Error in refusing to admit the following testimony of defendant: "The plaintiff, in September, 1893, swore out a distress warrant against me for the same rent now in dispute. Upon the trial before the justice, the plaintiff introduced all his evidence going to show that I was liable to him for the rent; and I introduced none, but went to trial upon his evidence. Upon argument by both sides upon the issue that the plaintiff had no right to demand the rent distrained for, the court decided that he had not the right to collect the same, and dismissed the warrant."

(3) Error in admitting in evidence the written rent contract between plaintiff and J. I. Callaway, over defendant's objection that the same was mutilated, and materially altered by cutting off a portion thereof; the court not requiring any explanation of the mutilation, and the paper coming from plaintiff's custody. (Attached to the bill of exceptions is a paper identified by the judge as the original facsimile of the rent contract mentioned. It appears to have been written upon a folded sheet of note paper, the bottom of which has, at some time, been cut off. It recites that: "This memorandum of agreement between John I. Callaway of the first part, and T. J. Black of the second part, witnesseth, that said Callaway has rented to said Black for the year 1893 the following described lands in Oglethorpe Co., Ga., to wit: The place on which he now lives, the place on which Hubbard now lives, and what is known as the old homestead place,—save and except what is sown in grain and rented to Holmes,—and such of the lands south of Buffalo Creek as he may need; he, said Black, to pay for same 1-4 (one fourth)."

Here ends the first page; and the second is as follows: "Said Callaway also agrees to let sd. Black have the wagons and other implements he has on land during said year. Witness our hands, this Jany. 21st, '93. Jno. I. Callaway.")

(4) Error in ruling out the following testimony of defendant: "In 1892 I lived in Augusta. In January, 1893, J. I. Callaway wrote me, urging me to come to his place. I replied that I would do so if he could make

it to my interest for two or three years. He then wrote me the second letter [showing them]. In response to that, I came to this county February 2, 1893, and went to Mr. Black, as Mr. Callaway had directed me, to be shown the land I might occupy. I showed Mr. Black Mr. Callaway's letter, at his house. While I was there, Mr. J. J. Sims brought Mr. Black a letter from Mr. Callaway. I asked Mr. Black if it was anything about me. He said it was about the same as Mr. Callaway's letter to me. I never made any reply to Mr. Callaway's last letter to me, and made no final arrangement with Mr. Black then. A few days later, Mr. Black, Mr. Hubbard, and Mr. Sims went with me over the land; and Mr. Black pointed out the land that I could have, that he and Mr. Hubbard had not rented. I knew that they had rented some, but did not know what, or how much. I told them that, if I was to interfere with either of them, I would not move from Augusta. Mr. Black said he had rented only what he needed. I regarded him only as Mr. Callaway's agent to point out the land, and thought I was renting from Mr. Callaway, on the terms in his last letter. Mr. Callaway knew I had moved. I wrote him on other business in May. In the fall he was here. He came to where I was boiling syrup, and said he wished to see me. I was busy then, and he afterwards sent Mr. Sims to see me about the rent. I offered him eight hundred pounds of lint cotton, which I thought fair rental, but he refused to accept it. This was before the present warrant was sworn out. Did not pay to Callaway, or any other person, the rent for the land."

(5) Error in ruling out the following letters: "Stephens, Ga., Jan'y. 19, 1893. Mr. B. T. Herndon, Augusta, Ga.—Dear Sir: Mr. J. J. Sims (my brother-in-law) has just informed me that you had been here looking at my plantation in Oglethorpe, this county; says he wrote me at Louisville, Ky., in reference to it. If you will come up Saturday or Sunday, I will wait over to see you. From what I can learn, you are the kind of man I have been hunting for years. There is no place in the South that will compare with mine for grass, grain, and stock. Be certain to come up at once. I am certain we can trade. Yours, truly, John I. Callaway.

"If you can't come, you can write me at Louisville, Ky. My address, after next Wednesday, will be Jno. I. Callaway, Atty. at Law, Louisville, Ky."

"Louisville, Ky., Jan'y. 28, 1893. B. T. Herndon, Augusta, Ga.—Dear Sir: Yours of the 26th inst. just received, and contents noted. It will be impossible for me to meet you on Feb. 2nd. Besides, I have made arrangements for a great deal of the land during the present year. However, there is enough left for a couple of families to cultivate. If you will see Mr. T. J. Black, any arrangement you can make with him for the year will meet my approval; that is, he can show you

house and lands, and I will leave it to you as to rent. You can pay what you please (keep this a secret) for this year. I will be down in August, if nothing prevents, and can then make arrangements for the future. There is no such place in the South; not only the best for grass, grain, and stock, but equally as fine for cotton and other products. By staying on it a year you will grow familiar with the character of the land, its different soils, mode of culture, etc., etc. You can go there now, and sow oats,—level ground for mowing grass, etc.,—and plant other crops as you may determine best. I am anxious to get a man who thoroughly understands, and will know how to manage, such a place, especially since Mr. Black will go to the 'Old Homestead' after this year. I think I have made you a most excellent offer, and hope you will find it to your interest to accept the same. You can move at once. Mr. Black will be glad to have you come. You cannot find another place in the South the equal of this. Yours, truly, Jno. I. Callaway."

S. H. Sibley, for plaintiff in error. W. M. Howard, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(96 Ga. 733)

HITT et al. v. AMERICUS, PRESTON & LUMPKIN WAREHOUSE & COM-PRESS CO. et al.

(Supreme Court of Georgia. Aug. 16, 1895.)

CONTRACTS—INTERPRETATION—EVIDENCE.

Where complicated questions of fact are involved in the interpretation of written contracts, which are in themselves so far ambiguous as to require the aid of extrinsic evidence and the services of a jury in arriving at the real intention of the parties; and where, out of a transaction collateral to the main contract out of which the contentions of the parties arise, one of them has obtained a judgment at law, which is assailed by the other upon the ground of fraud in its procurement, and the validity of which is dependent upon what view may be taken by the jury of the main agreement between the parties,—the judge of the superior court, upon application for injunction, should not, in advance of a finding by the jury, in effect finally adjust the conflicting equities between the parties, and, by a denial of a temporary injunction, practically accomplish this result. In such a case an injunction should be granted, preserving the existing status of the parties, and in the granting of such injunction the judge may impose such conditions upon the complainant as will secure to the respondent such rights as may be awarded to him by the final decree in the case.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action between W. M. Hitt and others and Americus, Preston & Lumpkin Warehouse & Compress Company and others. From the judgment, W. M. Hitt and others bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

Allen Fort and J. F. Watson, for plaintiffs in error. E. A. Hawkins and W. E. Kay, for defendants in error.

PER CURIAM. Judgment reversed.

(96 Ga. 263)

DUNCAN v. CLARK.

(Supreme Court of Georgia. May 15, 1895.)

LANDLORD AND TENANT—LIEN ON CROPS—PRIORITY.

Although the special lien of a landlord for rent on crops made upon land rented from him dates from the maturity of the crops, and is superior in dignity to the lien of an older common-law judgment against the tenant, yet where the rent is payable in money, and the tenant delivers the whole or a portion of the crops to the landlord in payment or satisfaction of the rent debt, the landlord takes the same subject to the lien of the older judgment, and cannot resist the enforcement thereof by claiming the property, but must assert the priority of his lien for the rent by foreclosing the same and claiming the proceeds of the sale.

(Syllabus by the Court.)

Error from superior court, Catoosa county; T. W. Milner, Judge.

In an action by J. E. Duncan, to recover rent, against one McGhee, W. H. H. Clark, the landlord, intervened, as claimant, on levy of execution. From a judgment for claimant, plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

W. E. Mann, for plaintiff in error. J. H. Anderson, for defendant in error.

LUMPKIN, J. The rent due by McGhee to his landlord, Clark, for the tract of land for the year 1891, was payable in money. The tenant delivered to the landlord, in payment of the rent, corn raised upon the land that year. Duncan had the corn, while in Clark's possession, levied upon under an execution issued from a common-law judgment rendered in 1883. Clark filed a claim, and the question was whether the property was, or was not, subject. Section 2289 of the Code declares that: "When the rent agreed to be paid is a part of the crop, such portion shall not be liable to be levied on by any process for debt against the tenant: provided, the contract is in writing and the rent does not exceed one-half of the crop." In *Toler v. Seabrook*, 39 Ga. 14, this court, in construing section 2263 of Irwin's Code (it being the same as the above-quoted section of the present Code), held that this section applied only when the rent was for a fractional part or share of the crop, and not where it was a fixed amount. The rent stipulated in that case was 35 bags of cotton and 500 bushels of corn. In *Stallings v. Harrold, Johnson & Co.*, 60 Ga. 478, it appeared that this firm had, under the law then in force, a lien upon the crops of one Jowers for supplies furnished him to make the same, and

that he delivered to them certain cotton in part payment or satisfaction of this lien. After such delivery the cotton was levied upon under an older judgment against Jowers, in favor of Stallings, and Harrold, Johnson & Co. interposed a claim to the cotton. Upon this state of facts, this court distinctly held that, though the crop lien was of superior dignity to that of the judgment, its priority could not be asserted by a mere claim at law, but by foreclosure and claiming the proceeds of the sale. In other words, it was held that the lien of Harrold, Johnson & Co. was not title, and that the title which they had acquired in consequence of the delivery of the cotton to them by Jowers was not good, as against the older judgment, and that the special crop lien was one which had to be asserted by sale under legal process, and not by mere detention or retention of the property in pursuance of delivery by the debtor. This case, in principle, rules the case at bar. The controlling difference between the case in 60 Ga., just mentioned, and that of *Durbin v. Hill*, 75 Ga. 228, is that in the latter the rent stipulated for was a part of the crop in kind; and accordingly it was held that after the tenant had actually delivered to the landlord, in settlement of the debt for rent, a part of the crop, which was afterwards levied upon by a general judgment creditor of the tenant, the landlord could properly file a claim to the property. While no section of the Code was cited in the opinion, the decision was in perfect harmony with the section above quoted.

The act of December 22, 1884 (Acts 1884-85, p. 91), which controls the present case, is really the same, in substance, as section 2289 of the Code, with the proviso omitted. The case of *Almand v. Scott*, 80 Ga. 95, 4 S. E. 892, decided since the passage of this act, is also somewhat in point. It was there held that where a landlord, having a lien upon his tenant's crop for supplies furnished, wished to protect himself from a levy under an older judgment, he could not do so by mere claim, but must foreclose his lien, and have the property sold under it. The case of *Wiggins v. Tumlin* (decided April 1, 1895) 23 S. E. —, is distinguishable from the case at bar. Indeed, that case was decided upon its own peculiar facts. There it appeared that the mortgage was to secure the payment of a promissory note given for the purchase money of the identical property described in the mortgage. When the note matured, nothing whatever had been paid upon it, and the purchaser, being unable to pay it in cash, simply returned to the seller the property itself, in satisfaction of the debt. It appeared, beyond question, that this was done in absolute good faith, and without fraud of any kind, and that the property was not worth more than the amount of the note. While it is true that the mortgage did not vest any title in the mortgagee, he had, both in law and in justice, the highest and best lien upon the

property; and, as between himself and the debtor, there was certainly no good reason why the latter should not be permitted to surrender, in satisfaction of the note and mortgage, the very property for which they were given. In a case of this kind the opportunity to perpetrate a fraud upon other persons was very slight indeed, if it existed at all; for every one well knows that personal property, after being used, is rarely worth as much as it was before. Again, the mortgagee had shown diligence by contracting for a lien upon the property sold, the purpose of which was to secure beyond peradventure the payment of the purchase money. In short, it was simply a case where one bought from another property for which he was unable to pay, and subsequently returned it to the seller in settlement of the debt, who at that time had a higher and better right than any other person to make his money out of this very property, and the circumstances were such that no other creditor could possibly be injured by permitting this to be done. See *Rasin v. Swann*, 79 Ga. 703, 4 S. E. 832. In the case at bar the lien of the landlord for his rent arose by operation of law, and not by virtue of a contract he had himself made. It covered the entire crop of the tenant, and it is obvious that in such a case the landlord and tenant, by collusion between themselves, could easily defraud judgment creditors of the latter, if he were allowed, by merely delivering the crops, or a portion thereof, to the landlord, to vest in him a title which would be superior to the lien of existing judgments against the tenant. The tenant, by delivering to the landlord more than enough of the crops to satisfy the landlord's lien, could, with the latter's connivance, cover up property really subject to judgments held by other creditors. Hence, in such cases, as was suggested in *Stallings v. Harrold*, supra, the necessity that the property be legally administered, and the proceeds paid out according to due priority, thus giving to all persons interested the assurance of obtaining their exact rights. No such necessity exists where a specific article of personalty is given up in satisfaction of the identical mortgage debt contracted in purchasing it. Again, section 2289 of the Code, which, as we have seen, was not, relatively to the question in hand, affected by the act of 1884, seems to imply that, unless the rent agreed to be paid is a part of the crop, the landlord cannot take it from the tenant free from liability to be levied on under process against the latter. The decision of this court in the case of *Stewart v. Berry*, 84 Ga. 177, 10 S. E. 601, was based expressly upon section 356 of the Code, which distinctly declares that when a person holds property under a bond for titles, and the purchase money has been partially paid, the same may be levied upon under judgments against such person, and the entire interest stipulated in the bond shall be sold, etc., and it is therefore manifest

that the decision in *Wiggins' Case* is not in conflict with the case just mentioned. Judgment reversed.

(96 Ga. 246)

PALMER v. YOUNG.

(Supreme Court of Georgia. May 13, 1895.)

MORTGAGE FORECLOSURE — SALE — PURCHASE BY MORTGAGEE.

1. Where, by the terms of a mortgage, a power is conferred upon the mortgagee to sell the mortgaged property in satisfaction of the debt secured thereby, such stipulation does not impose upon the mortgagee such a special personal trust as that the sale thereunder could only be conducted by himself in person. The conduct of such a sale is a purely ministerial act, does not in any manner affect the real execution of the power, and may be performed by the mortgagee through the instrumentality of an auctioneer or any similar agent.

2. While, as a general rule, no trustee can purchase trust property at his own sale, yet, if such mortgagee, under such a mortgage, at a sale of the mortgaged property in the execution of the power, himself becomes the purchaser, the sale, if made fairly and without fraud, is not void, but only voidable at the election of the mortgagor to redeem at any time before final judgment of eviction; and this is true, although the power of sale does not, in terms, confer upon the mortgagee the power to purchase the mortgaged property at a sale made in pursuance thereof.

(Syllabus by the Court.)

Error from superior court, Montgomery county; E. A. Hawkins, pro hac Judge.

Action of ejectment by John Young against Joseph Palmer. Plaintiff obtained a verdict, and a new trial was denied. Brought forward from the last term. Code, §§ 4271a-4271c. Defendant brings error. Affirmed.

E. A. Smith, for plaintiff in error. J. E. Wooten and J. H. Martin, for defendant in error.

ATKINSON, J. To secure the payment of a debt to them, Palmer executed a mortgage to Ellis, Young & Co., by means of which he created a lien upon the premises in dispute in their favor for the amount of the debt. In the mortgage was a power of sale conferred upon the mortgagees, but there was no express provision authorizing them to become purchasers at the sale of the mortgaged property. Upon maturity of the debt, it remaining unpaid, they advertised and exposed the property for sale in accordance with the terms and stipulations of the power contained in the mortgage deed. At the sale neither of the mortgagees was present, but it was conducted by the sheriff of the county, who acted in the capacity of auctioneer; and at the sale the property was bid off by a third person, for the benefit of the mortgagees, and not on his own behalf; and he subsequently, at the request of the mortgagees, conveyed to John R. Young, who was himself an individual member of the partnership of Ellis, Young & Co. The mortgagees, by virtue of the power, conveyed to the purchaser who bought for them at the sale, and

he, in turn, conveyed to John R. Young. Young brought an action of ejectment against the mortgagor, introduced in evidence the deeds executed in pursuance of the sale under the power contained in the mortgage, and upon the trial recovered a verdict against the mortgagor. A motion for a new trial was made, and two questions arise for consideration in this case.

1. The first question is whether Ellis, Young & Co., being empowered to sell this property, could delegate that authority to some person other than themselves. We think that their actual physical presence at the sale was not essential to its validity. While the partnership, who are the mortgagees, occupied in a certain sense the position of a trustee with respect to this property, we do not think that, with respect to the mere conduct of the sale, the trust imposed was of such a special personal character as that the sale could only be conducted by the mortgagees in person. The mere conduct of the sale is at best a purely ministerial act. It involves the exercise of none of those elements of discretion and personal confidence which ordinarily make imperative the personal execution of a special trust; and if the sale be conducted by such ministerial officer, and the mortgagee thereafter ratify the sale, there being no omission to give due notice of the time and place of sale as required by the terms of the mortgage, we know of no reason why this should not be a good execution of this power. Indeed, it has been so held in courts of last resort in many of the states of the Union. In the case of *Dunton v. Sharpe*, decided by the supreme court of Mississippi, April 17, 1893, and reported in 12 South. 800, it was held that the personal attendance of the trustee at the sale under the deed of trust was not necessary, and that he could act through others in advertising and auctioneering the land, it being sufficient if this was done with his approval and sanction. In *Munn v. Burges*, 70 Ill. 604, it was decided that where a sale was conducted by an attorney for the mortgagee in his absence, and the mortgagee subsequently ratified the sale by making the deed, the sale is not void. To the proposition that it is not necessary that the sale be conducted personally by the mortgagee, or that he be present thereat, see *Boone, Mortg.* § 219, citing *Fogarty v. Sawyer*, 23 Cal. 570; *Parker v. Banks*, 79 N. C. 480; *Hubbard v. Jarrell*, 23 Md. 66; *Watson v. Sherman*, 84 Ill. 263. See, also, *Jones, Mortg.* § 1861. Even if this be an irregularity, it is not a matter of such vital consequence as would avoid the sale. If voidable by reason thereof, the remedy was for the mortgagor to avail himself of his equity of redemption.

2. The next question which we come to consider is whether or not the mortgagees, at their own sale, could legally purchase the mortgaged property, and, if not, to what extent a want of power in the mortgagees to

purchase would affect the validity of the sale. There is considerable conflict of authority upon this question, some of the courts holding that a mortgagee under such a power can legally purchase the mortgaged property, and one of the best considered cases, viz. *Howards v. Davis*, 6 Tex. 174, assigns as a reason why a mortgagee should have the power to purchase at such a sale the following: "A mortgagee is a trustee, but in a qualified sense. He does not hold for the benefit of others, but for himself. He is a *cestui que trust* as well as trustee. He has an interest in the property. It is pledged expressly to secure his claim, and, were he deprived of the power to purchase, he might suffer a great loss by its sale at a low price. He has an interest that the bid shall amount to his incumbrance, and that the property be not sacrificed, to the injury as well of the mortgagor as the defeat of his own claim, as this may be the only fund for the discharge of his debt. Sales at foreclosures, whether under a power or by decree, are open and public, and are made after long notice; and it is to the interest of the mortgagor that the mortgagee shall enter into the competition at the sale,"—while in other of the states the doctrine prevails that a purchase by a mortgagee of the mortgaged property under such a power is *ipso facto* voidable. In some states such a sale may be avoided by a disaffirmance thereof by the mortgagor within a reasonable time. The rule may be stated to be in such cases that an unauthorized purchase by the mortgagee arms a mortgagor, or his successors in title, with an option to have the sale declared invalid and the right of redemption established. It would seem that such a purchase is good for all purposes, except that it does not bar the mortgagor's equity of redemption. The mortgagor may elect to abide the sale, or, at his election, he may redeem; and while, in the execution of the power, there might be such fraud as would of itself avoid the sale, and which would authorize a court of equity to set it aside without reference to the equity of redemption still remaining in the mortgagor, yet, if the sale be fairly made and free from fraud, it cannot be attacked and set aside as a void sale, simply because the mortgagee was himself the purchaser thereat. Besides, according to the authorities, there is less strictness in applying the rule to cases of a mortgagee purchasing at his own sale under the power than there is in the case of a trustee purchasing. A mortgagee in such a case is not merely a trustee, but he is also a *cestui que trust*, and, as such, has an interest to protect. See 2 *Jones, Mortg.* § 1881. The question as to whether this sale was fairly conducted was found favorably to the plaintiff in this case, who holds under the mortgagees. The legal title passed to him, subject to be divested by the mortgagor paying to him the amount of the debt to secure which the mortgaged prem-

ises were pledged. When he brought the action in ejectment, he had an unimpeached legal title derived from the mortgagor under a sale of his property, which up to that time had been acquiesced in by the latter. The mortgagor had the right at any time to disaffirm this sale, and avail himself of his equity of redemption. This he might have done by filing an equitable plea, tendering the debt due, at any time before final judgment of eviction against him; but, not then disaffirming the sale by the mortgagee, he is concluded by this verdict; and the sale being, as we have before said, in all respects fair and regular, and in accordance with the power conferred by the terms of the mortgage deed, the court properly declined to set aside the verdict and award a new trial. Let the judgment of the court below be affirmed.

(96 Ga. 816)

POSTAL TELEGRAPH CABLE CO. v.
DOUGLAS et al.

(Supreme Court of Georgia. July 29, 1895.)

LIABILITY OF BAILEE FOR HIRE—SUFFICIENCY OF
EVIDENCE.

1. The action being for the value of a horse alleged to have been killed by hard driving and improper usage on the part of an employé of the defendant, to whom the animal had been hired, the declaration of this employé, made on the road, while returning from his journey, after the horse had become sick, that he (the employé) had just discovered this fact, if admissible in evidence at all, was, in the absence of any testimony as to how he had previously used or treated the animal, of no material weight or importance, and its rejection was not cause for a new trial.

2. In view of the judge's explanatory note, the charge complained of, even if erroneous, could have resulted in no injury to the defendant.

3. The evidence for the plaintiffs made out a prima facie case, and, while that introduced in behalf of the defendant might have warranted inferences which would have authorized a verdict for the defendant, yet as it failed to introduce as a witness the employé above mentioned, or to account for his absence, and it is manifest that he alone knew the real truth of the case, as to how the animal had been used or treated before becoming sick, this court will not disturb the judgment of the trial court in refusing to set the verdict aside.

(Syllabus by the Court.)

Error from city court, Floyd county; W. T. Turnbull, Judge.

Action by James Douglas & Co. against the Postal Telegraph Cable Company. Plaintiffs had judgment, and defendant brings error. Affirmed.

The following is the official report:

Douglas & Co., liverymen, sued the telegraph company for damages which they alleged they sustained because of the wrongful treatment and driving of a horse hired by them to one of defendant's linemen, John

Dempsey, to be used in the service of defendant, as such lineman, by reason of which, it was alleged, the horse died. There was a verdict for plaintiff for \$135 principal. Defendant's motion for a new trial was overruled, and it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and that it was excessive; also, because the court, on motion of plaintiffs, ruled out the following testimony of John Winkle: "When I got to where Dempsey was, he said he had just discovered that the horse was sick." Movant insists that what Dempsey said when Winkle went to him, and he was in the act of trying to get the horse up, and was caring for it, was *res gestæ*, and tended to show that Dempsey had used proper care in the management of the horse. The evidence introduced prior to the evidence of Winkle, ruled out as above stated, was to the effect that Dempsey was acting as lineman for defendant; that plaintiffs hired a horse and buggy to him, and he took his tools and wire to go to Gores, about 20 miles from Rome; that the horse was sound, worth \$135, and was well when he left Rome with the horse, about 8 or 9 o'clock in the morning; that he came back the next day without the horse, and said it had died on the road. Winkle testified, among other things, that he lived on the road between Rome and Gores, about 12 miles from Rome, and 8 or 9 miles from Gores; that he saw John Dempsey in the road about 100 yards from his (witness') house, 2½ hours before sundown; that the horse laid down, and witness went there; that the horse seemed to be sick; that witness and Dempsey did everything they knew of to help the horse, etc. Error in charging: "You will, under rules I have given you, weigh all the evidence in the case, and see upon which side the preponderance is; and you will find your verdict for the plaintiff or defendant as you may find the preponderance of the evidence." Movant contends that if the testimony was evenly balanced the verdict should be for the defendant, and that rule should have been given to the jury, as a modification of the charge as given. In a note the court states: "The court did previously charge that the burden was on plaintiff to make out a prima facie case, but that, if they believed the plaintiff had made out a prima facie case, then the burden would be shifted to the defendant, and it would then be for the jury to weigh all of the evidence, and determine in whose favor the evidence preponderated."

Fouché & Fouché, for plaintiff in error.
Reece & Denny, for defendants in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 244)

PALMOUR v. DURHAM FERTILIZER CO.

(Supreme Court of Georgia. July 29, 1895.)

BAIL TROVER—IMPRISONMENT OF DEFENDANT—PLEADING.

1. Where the defendant in an action of bail trover, being unable to give the security required by law, was imprisoned for a failure to deliver up the property sued for, neither a petition filed by him under section 3420a of the Code to obtain a release from the imprisonment, nor the plaintiff's traverse or answer to the same, nor any of the proceedings had in this matter, formed any part of the pleadings upon either side in the main action.

2. If the plaintiff in such action fails to show title in himself, he cannot recover either the property sued for or its value in money, although it may be conceded at the trial that the defendant was indebted to the plaintiff for the property in question, the defense being that the defendant had purchased the property, and was liable on account for its value. An action of trover, which proceeds upon the assumption that the plaintiff has the title to the property sued for, cannot, under any circumstances, be converted into an action on account for the price of property sold and delivered, which necessarily involves the contrary assumption that the title had passed to the defendant.

3. The foregoing notes practically dispose of all the questions made in the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Hall county; C. J. Wellborn, Judge.

Action by Durham Fertilizer Company against J. L. Palmour. There was a judgment in favor of plaintiff, and defendant brings error. Reversed.

The following is the official report:

The Durham Fertilizer Company sued Palmour in bail trover for the recovery of certain bags of guano, alleged to be of the value of \$416.10. It appears from the record that Palmour, being imprisoned under the bail process, presented his petition for release from custody on the ground that he was unable to give the bond and security required, and unable to produce the property sued for; and that in this petition he stated that he purchased from plaintiff several tons of fertilizer, and under the contract with plaintiff was to give his notes for the same, payable November 15 and December 15, 1890, and was to sell the fertilizer to farmers on time, taking their notes therefor, payable in November and December, 1890, and was to collect said notes, and out of the proceeds to pay said purchase notes; that under the contract plaintiff furnished him with the fertilizer, which he sold to farmers, taking their notes therefor; that these notes are not yet due, but he holds them, and will proceed to collect them promptly at maturity, and pay plaintiffs their proportion; and that he has tendered to plaintiff his promissory note, according to the contract, and has been and is ever ready and willing to deliver plaintiff his note due November and December 15, 1890, in accordance with said contract, for the full amount of the fertilizer at his contract price. He

was released from custody under this petition, it being provided in the order of release that, it appearing that he had sold certain of the guano, and taken notes therefor, payable to himself, he be restrained from selling, assigning, etc., any of said notes, without first paying plaintiff the amount due it thereon, and, in case of collection on said notes, from using the money, without first paying plaintiff the amount due it on such collection. It was further ordered that he make a return to the court of his collections on the guano sales, at the court to which the case stood for trial. Upon the trial of the cause there was a verdict for plaintiff for \$416.10, with interest. Defendant's motion for new trial was overruled, and he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in allowing plaintiff, over defendant's objection, on the trial of the case, to treat his petition for release and plaintiff's answer to the same as a part of the pleadings in the action to recover the guano. Movant contends that these proceedings had nothing to do with the pleadings in the trover case, and were no part of the record proper.

Error in allowing plaintiff, over defendant's objection, to set up its answer to his petition for release as a part of its original action to recover the guano. Movant contends that said answer was not a part of the original action, and that it was error to so consider it.

Error in allowing plaintiff, over defendant's objection, to amend its answer to his petition for release, by inserting near the end of said answer: "And that on final trial of said case respondents be allowed to take a judgment against said J. L. Palmour for the amount he owes respondents." Movant contends that said answer was no part of the pleadings in the action to recover the guano, had never been made a part of plaintiff's petition by any order or amendment, and that said amendment was illegal and unauthorized; and that, if said answer was properly a part of the pleadings, the amendment set up a new and distinct cause of action, and should not have been allowed.

Error in refusing to charge the following written request of defendant: "If plaintiff sold the guano in question to the defendant, and the defendant is indebted to plaintiff for the same, plaintiff could not recover in this action." Alleged to be error, because plaintiff sued in trover, claiming title to the guano, and defendant insisted that the evidence showed he had purchased the guano outright, and was simply indebted to plaintiff on account; and the refusal so to charge placed no issue before the jury regarding the question of title, or of bargain and sale, to the guano at the time of the commencement of the action.

Error in charging: "Now, in this case the defendant sets up an answer, or made an

answer, to plaintiff's case, in which answer he insists that this guano was not the property of the plaintiff, but that it was his; or that, at least, he held it under a contract the terms of which he 'understood' to state that he insisted that under the terms of that contract, when the guano came into his possession, that it took the title out of the plaintiff in the case, and that, therefore, the plaintiff was not entitled to recover in an action of this sort. The plaintiff, after this answer of defendant, said, in effect, 'If what you say is true as to how you got possession of the property, then you owe us for the guano, and under this action we brought here we will take the value of the guano; we will accept that in lieu of the guano itself.' Well, counsel for the defendant in this case has insisted that that could not be done. The court has held, however, that it could be, and, in so far as the legal question affects the case, why, you are to consider that as the law of it,—what the court has ruled. I charge you that if the defendant admitted in his pleas that he got the guano, and that he owes for the guano under a given state of facts set up by himself, that then it is legitimate for the plaintiff in the case to accept the theory of the case presented by the defendant himself; and, if that involves indebtedness upon the part of the defendant to the plaintiff, the plaintiff would be entitled to recover whatever the defendant admitted to be due, if he admitted anything to be due." Alleged to be error, because it amounted to instructing the jury that defendant had admitted that he purchased and owed for the guano, and asked them to find for plaintiff. It withdrew from the jury the question as to whether plaintiff had the right to maintain an action of trover, and in fact withdrew every fact from their consideration except that of amount, if any, defendant had admitted to be due. Further, because the charge was otherwise illegal, and unauthorized by the pleadings and evidence.

Error in charging: "Now, under the state of facts in the contract in this case, the plaintiff insists that the title remained in them to this property, that they had a certain interest in it, and they sued in trover. The defendant produces the contract, and says that under this state of facts trover is not the remedy; that he is only indebted to them. Well, I charge you that under that contract, then, and under one state of facts, trover might have been brought. There is a stipulation in it that title to it shall remain in them until it is sold, or until the notes for which it is sold are deposited with them as collateral security. If they brought trover under the impression that this state of facts existed, which left title in them, when in truth it was not in them, and it is made to appear by the other side that a different state of facts existed,—that is to say, that the guano was not in his possession, but was sold or had been sold, and that he had failed

to deliver or deposit the notes for which the guano had been sold, or to give his own notes for it,—it is competent for the plaintiff, who has commenced his action of trover upon a supposed state of facts different from that, to amend his pleadings so as to conform to the state of facts set up by the defendant in his pleadings, and would be entitled to recover the amount that he did himself admit to be due in the state of facts he sets up." Alleged to be error, because it instructed the jury as to what the stipulations in the contract were, and that under plaintiff's view of the facts trover could be brought. Further, because it instructed the jury that under the pleadings as they were set up, and under the evidence and admissions of defendant, plaintiff could recover. Further, in instructing them that if plaintiff made a mistake in bringing action in trover, yet, if defendant admitted he had not paid for the guano, or had not complied with his contract in other respects, that this would entitle plaintiff to recover what defendant admitted to be due. Further, because the charge was not authorized by the evidence and pleadings, and was otherwise illegal. Further, error in holding that the action of trover could be changed by amendment into one of debt. Further, in holding that if defendant had sold the guano, but had failed to carry out his contract to pay for it, or give his note for it, plaintiff could recover the purchase price of the same in this action of trover.

Error in charging: "Now, if you are satisfied that the defendant in the case received the guano sued for here, and that he sold it, and has not paid for it, and you are further satisfied that he got possession of it under contract that left the title to the guano in the plaintiff, the Durham Fertilizer Company, until it was sold, or until the notes for which it was sold were deposited with that company as collateral security, then the plaintiff would be entitled to recover the value of the guano that was disposed of by the defendant, and not accounted for." Alleged to be error, in holding that, if defendant sold the guano, as he had a right to do, but failed to keep his contract to pay for it or give notes for it, such a violation of his contract would give plaintiff a right to recover in its action. Further, because not authorized by the pleadings or evidence, and otherwise illegal.

Error in charging: "You will understand that it is no longer insisted that the defendant in the case has got the guano itself. It is admitted that he has made some disposition of it, and the plaintiff is only seeking now to recover the value of the guano that has been unaccounted for up to this time by the defendant. I charge you that he is entitled to recover whatever he shows to be the value of the guano so unaccounted for, with interest from the date of when the last payment would have been due under

this contract. You can see what that is,—December 15, 1890, I believe." Alleged to be error, because it amounted to instructing the jury to find for the plaintiff, and left them no discretion save as to the value of the guano unaccounted for. Also because otherwise unauthorized by the pleadings and evidence, and illegal.

H. H. Dean, for plaintiff in error. W. L. Telford, for defendant in error.

PER CURIAM. Judgment reversed.

(97 Ga. 247)

MAYOR, ETC., OF CUMMING et al. v. PUETT.

(Supreme Court of Georgia. July 29, 1895.)

MUNICIPAL CORPORATIONS—TOWN MARSHAL—
POWER TO ELECT—CONSTABLES—COL-
LECTION OF TAXES.

1. Inasmuch as the charter of the town of Cumming (Acts 1884-85, p. 414) declares that either of the constables of the militia district in which that town is situated is authorized, empowered, and required "to levy and collect all *fi. fas.* and enforce all orders" of the council, and inasmuch as that charter, while adopting numerous sections of the general law for the incorporation of towns and villages as embodied in the Code, expressly omits section 779, which authorizes the election of a marshal, the mayor and council have no authority to elect a marshal *eo nomine*; and therefore, if, contrary to law, they went through the form of electing a person to this office, he had no authority to levy a tax *fi. fa.* issued by the direction of such mayor and council, but the duty of levying the same devolved upon one of the constables above mentioned.

2. Although section 786 of the Code, which was adopted as a part of the charter of the town of Cumming, confers upon the council the authority "to preserve peace and good order therein, and for this purpose to appoint, when necessary, a police force to assist the 'marshal' in the discharge of his duties," and although section 790 of the Code, which was also adopted as a part of this charter, provides that "it shall be the duty of the 'marshal' to collect the town or village taxes," etc., the language of these sections is to be considered in connection with the express terms and provisions of the act incorporating the town, the manifest purpose of which was to dispense with the office of marshal, and impose the duties which would ordinarily devolve upon that officer upon the constables of the district. Therefore it would be incumbent upon the "police force" referred to in the former section, if appointed, to assist the constables as *ex officio* marshals; and the duty of collecting taxes, provided for in the latter section, is to be performed by these constables, or one of them, acting in the capacity of marshal.

3. Under section 786, it is within the power of the mayor and council of Cumming to revise the returns of taxpayers in that town, and to correctly assess the property of a taxpayer whenever, in their judgment, there has been an undervaluation of the taxpayer's property in a return made by himself. It does not appear in the present case that the increase made in the valuation of the plaintiff's property was unjust or excessive.

4. Inasmuch as the levy by the so-called "marshal" was absolutely illegal and void, the injunction should have been granted without condition. Direction is given for a proper modification of the judgment.

(Syllabus by the Court.)

Error from superior court, Forsyth county; G. F. Gober, Judge.

Action by Joseph G. Puett against the mayor, etc., of the town of Cumming, and others. There was judgment in favor of plaintiff, and defendants bring error. Affirmed.

The following is the official report:

The petition of Puett alleged: He resides in Cumming, doing a general mercantile business there, with many customers residing in the country. Cumming was incorporated by act of October 10, 1885. The act of incorporation does not provide for a marshal, because the people of the town expressly declared they did not wish one, as it was not necessary, caused strife between the country and the village, and was used as an excuse by many of the country people for not patronizing the merchants of the town, and tended to injure its business. The ninth section of the act provides that either of the constables of the militia district in which the town is situated was authorized and required to serve all notices, etc., of the council, and to levy and collect all *fi. fas.*, and enforce all orders of the council, and discharge all duties that the marshal of the town might or could do, for which he is to receive the same fees as are now allowed by law to constables for like service. At the last election A. H. Fisher was elected mayor; and T. J. Pirkle, of the firm of Edmonson & Pirkle, C. C. Foster, of the firm of Foster & Bro., J. R. Echolls and E. R. Barrett, both clerks of Foster & Bro., and R. W. Shadburn, who has a grocery store, all said firms being merchants in Cumming, were elected councilmen. C. C. Foster has been chosen clerk of the council, and under said act it is his duty to receive tax returns and to collect taxes. At the council meeting in December, 1894, an ordinance was passed levying an *ad valorem* tax of 25 cents upon each \$100 worth of property in the town, without specifying for what purpose, and without making up and entering upon the journal an accurate estimate of the sums which are or may be lawfully chargeable against the town, to be paid within 12 months from said date, as required by section 787 of the Code, which section is adopted as a part of said act of incorporation. At a council meeting on December 31, 1894, one Howard was elected as town marshal, at a salary of \$16½ per month in addition to the regular fees of his office. The clerk of the council has never given public notice when or where he would receive tax returns, nor how he desired them to be made, or that he was ready to receive them. In February, 1895, Howard, who claimed to be acting as receiver of tax returns for the mayor and council, came to petitioner with a book in which a number of returns had been entered; and petitioner thereupon entered the taxable property held by him in the town on January 10, 1895 (the day fixed for the levy of said tax), at \$3,000,

which was a fair valuation thereon, considering the value fixed by other citizens upon their property, and accepted by the mayor and council. Afterwards, at a council meeting on January 18, 1895, without notice to him, and without authority of law, the mayor and council raised petitioner's return of his taxable property from \$3,000 to \$6,000, basing their assessment upon the returns appearing upon the county digest. By the same basis of calculation, the mayor and council should have raised the returns of Foster & Bro., Edmonson & Pirkle, and others named, amounts specified, above the returns accepted of said persons and firms. Petitioner has often tendered to the mayor and council the amount due by him upon the return made by him, which they have refused to receive, and have issued against him a *fi. fa.* for \$15, with cost, and placed it in the hands of Howard, with instruction to levy. He pointed out to Howard a storehouse and lot, the property of petitioner, worth \$1,000, upon which to levy the *fi. fa.*, and also again tendered to him the amount due upon the return which he (petitioner) had made; but the mayor and council refused to allow Howard to levy upon the storehouse and lot, which would not have interfered with petitioner's business, and directed Howard to levy upon two buggies for which petitioner had constant use in his business, and worth daily for hire to him one dollar; and Howard, on March 15, 1895, did seize and take the buggies, and still holds them. Howard has levied another *fi. fa.* against petitioner and one Davenport upon a corn mill, as their property, which mill is set up in running order in a house firmly fixed to the land upon which it stands, and has the same advertised for sale as personal property, and proposes to so sell it. The levy of said tax, for the reasons above mentioned, is illegal. The employment of Howard as marshal, for the reasons above mentioned, is illegal. Howard has no right to levy and collect the *fi. fa.*, even if the same were legal, as he is not one of the constables of the district in which the town is situated, both of whom are responsible men, ready and willing to perform all the duties devolving upon them under the act, for the compensation therein named. The appointment of said marshal, and the fact that "he is strutting and parading the streets of said town, armed with a police cudgel," are interfering with the trade of the town and of petitioner. The acts of the mayor and council in refusing to accept petitioner's tax return, in raising his tax, in refusing to accept the money thereon, in levying upon his personalty, and in refusing to levy upon the property pointed out by him, are not done to raise revenue for the necessary and legal expenses of the town, but are for the purpose of annoying him. The levies made by Howard, and his seizure of the stationary corn mill, set up and attached to the realty, and the attempt to sell it as personalty, are illegal

and unwarranted. By all these illegal acts, and by forcing petitioner to employ counsel to protect his rights, the mayor and council and Howard have damaged petitioner \$500. He prayed that they be required to deliver to him the buggies and account for their hire; that they be enjoined from the further enforcement of said pretended tax or any part of it, or from interfering with his property; that the mayor and council be enjoined from paying out any of the public funds of the town to Howard or any other person for services as marshal; that levy of the tax by the mayor and council to pay a marshal's salary and appropriation of funds arising from taxation, the payment of such salary being illegal, and not warranted by the charter of the town, be enjoined; that Howard be enjoined from further acts as marshal, in levying and collecting any *fi. fa.* or other process against petitioner or his property; for general relief, etc.

Defendants answered: It is not true that the act of October 10, 1885, does not provide for a marshal, but, on the contrary, it expressly enacts, as a part thereof, section 790 of the Code, which provides the duties of the marshal. Defendants do not know what the people of the town declared and wished with reference to a marshal in the past, but, upon the election and qualification of defendants, the citizens insisted on the appointment of a marshal, and this desire was unanimous among the citizens, with the exception of plaintiff. The appointment of a marshal has not injured the business of the town, nor has his conduct done so. The marshal has arrested intoxicated and boisterous white and colored men. The people of the town and county are in the main quiet and law-abiding, and how the protection of customers while they are in town trading can drive them away, or disincite them to trade, defendants cannot understand. Neither of the constables resides within the corporate limits, and the past experience of the municipality has shown the insufficiency of the constables in maintaining order and meeting urgent cases of a violation of the town laws. It is not true that the tax mentioned was levied without specifying for what the sums were to be raised, and without making up and entering upon the journal an accurate estimate of the sums which are or may be lawfully chargeable to the town; but, on the contrary, such estimate and entry were made on December 21, 1894, the estimate being for marshal's salary not to exceed \$200, and for building and repairing bridges and improving cemetery not more than \$50. Printed notice was duly posted that the tax must be paid by January 15, 1895, and every taxpayer was given personal notice that he would be required to pay said tax, and every person in the corporate limits knew where the business house of the clerk of the council is located, on the public square, and that he could be found there or at his hotel, on the public square, at all times when he was not

out of town, which rarely happened. All the citizens in the town received personal notice to make return and pay their taxes. Plaintiff returned, not under oath, \$3,000 worth of taxable property in the town, whereas his tax returns for 1894 of property in the town amounted to \$7,000, and the property he still has is worth even more. The mayor and council were not satisfied with his return not under oath, \$4,000 less than his return of 1894,—in the absence of any evidence that he had less property than in 1894, when the return was made under oath, and proceeded to assess his property at \$6,000, under the authority given to them in section 786 of the Code, because his return not under oath was manifestly false. The answer then set forth why the tax returns of Foster & Bro. and certain others named were accepted, and that the valuation of a number of property owners named was raised by the mayor and council, all of said parties paying taxes on the assessment. The mayor and council, by ordinance, authorized all those whose valuation had been raised, and who were dissatisfied therewith, to return their taxable property under oath, and the same would be accepted, and certain persons did so, and their return was accepted. Plaintiff was distinctly so notified, but peremptorily refused, and still refuses. This was before any execution was issued against him. The tender of \$7.50 in full of his tax, made by plaintiff, was not received, because it was only one-half of the taxes due. It is not true that plaintiff pointed out to Howard his storehouse, upon which to levy. The mayor did instruct Howard not to levy a \$15 execution on a \$1,000 storehouse full of goods, but did direct him to levy on the two buggies, plaintiff having refused to point out any property. When Howard made the levy, he asked plaintiff for a forthcoming bond, which plaintiff refused to give. Howard has levied a tax *fi. fa.* against Davenport & Puett on a little corn mill, movable at pleasure, and therefore personalty, which they owned in partnership. The levy and collection of the tax is legal, being expressly authorized in section 786 of the Code, which was made a part of the act of October 10, 1885. The duties of the marshal are not only to execute warrants, *fi. fas.*, etc., but to superintend working the streets and sidewalks, look after the cemetery and after the sanitary condition of the town, to work on the streets and sidewalks, etc. The appointment and contract to pay the marshal is legal under section 786 of the Code. There are schools, churches, and Sunday schools in the town, and quite a large proportion of its population is colored. Whisky is sometimes secretly brought into the town, and it is absolutely impossible to execute the laws of the corporation, and afford the protection they were intended to secure, without the aid of a marshal, residing in the town, who is constantly on the watch and under the control of the mayor and council. Neither the

appointment of the marshal nor his conduct as such has injured the business of the town, but has promoted its peace and good order. Defendants deny that their acts have been for the purpose of harassing plaintiff, or that they have injured or damaged him. He cannot individually complain of a matter affecting the partnership of Davenport & Puett.

Upon the hearing for temporary injunction, defendants showed for cause, by way of demurrer, that there is no equity in the petition which entitles plaintiff to injunction; that plaintiff has a full, complete, and adequate remedy at law; and that there is a misjoinder of causes of action by putting the *fi. fa.* against Davenport & Puett into the case, and making it multifarious. The judge below held that the mayor and council are the sole judges of the question as to the necessity of police protection, and have a right to employ a man for this and other purposes in and about running the municipality, but cannot employ such a man to levy a tax *fi. fa.*, which must be done by one of the constables of the militia district, as provided by the charter. He therefore ordered that Howard be restrained from levying and executing the tax *fi. fa.* upon the payment or tender of the \$7.50, and that the mayor and council be restrained from collecting the balance of the *fi. fa.*, but, upon failure of payment or tender of the \$7.50, should have the right to collect that amount on the *fi. fa.* To the granting of the injunction, the defendants excepted.

H. P. Bell and R. P. Lester, for plaintiffs in error. H. L. Patterson, for defendant in error.

PER CURIAM. Judgment affirmed, with direction.

(97 Ga. 235)

LOONEY v. WATSON.

(Supreme Court of Georgia. July 29, 1895.)

SPECIFIC PERFORMANCE—GIFT—SUFFICIENCY OF EVIDENCE.

There being evidence of a parol gift of land upon a meritorious consideration by the defendant to her daughter and the husband of the latter, accompanied by possession, and also that the donees had made improvements on the faith of such gift, it was a question for determination by the jury as to whether or not the improvements were of such character as to authorize a decree against the defendant for a specific performance in favor of the husband and the child of his deceased wife. Consequently it was error to grant a nonsuit. Code, § 3189.

(Syllabus by the Court.)

Error from superior court, Hart county; Seaborn Reese, Judge.

Action by W. T. Looney, individually and as next friend for another, against Elizabeth C. Watson, for specific performance. A nonsuit was granted, and plaintiff brings error. Reversed.

The following is the official report:

W. T. Looney, for himself and as agent

and next friend of his minor daughter, brought a petition against Elizabeth C. Watson to compel specific performance of a parol agreement to convey certain land. The court granted a nonsuit, and plaintiff excepted. The evidence showed the following: W. T. Looney testified: "I married Mamie A. Shirley, daughter of defendant, on January 2, 1887; and on November 24, 1887, the minor plaintiff was born to us. In the fall of 1891 we were residing in Atlanta, where I had purchased a home, and was engaged in business, earning \$1.50 per day. In consequence of letters received from Laura Watson and R. A. Bartlett, daughters of defendant, in February, 1892, I closed out my business in Atlanta, and moved back to Hart county, after which defendant admitted in conversation that she authorized Laura Watson to write the letter of November 19, 1891; and she repeated to me the promise or agreement to give me and my wife the land in question [41.6 acres, describing it]. Defendant had the land run off by Bowers, surveyor, and platted by him, and placed me and my wife in possession of it soon after we returned from Atlanta. We went into possession under the agreement of defendant that she would make us a deed of conveyance, and directed me to have a deed prepared. At one time I got a blank deed, and carried it to her, but it was one of the Bowersville town lot deeds, containing a clause forfeiting the property if liquor was sold on the premises, and therefore defendant advised me not to take that sort of deed; and for one cause and another the making of the deed was postponed. We held possession and made crops on the land in 1892 and 1893. While we were in possession on faith of defendant's agreement to convey the land, I made improvements thereon [specifying them] which cost \$300, and were of permanent value to the land. After all this was done, on July 1, 1893, while we were in the midst of preparations to build a residence on the land, my wife died, leaving myself and daughter as her sole heirs. After that defendant refused to make the deed in pursuance of her agreement." The letter referred to, signed by L. Watson, was dated November 19, 1891, and contained the following: "Dear Sister & Bro.: * * * Ma says, if you all want to come back, she will give you thirty (30) acres of land on the road to cousin Millard's, on the lower end of Calny branch. She says there are about twelve acres cleared." Ab. Looney testified: "Just before W. T. Looney moved back to Hart county from Atlanta, I was at defendant's house, and she told me she intended to cut off thirty acres of land, and give it to Tom and Mamie. She showed us the land, and told us she had cut off some for the other children, and that she would cut off thirty acres, and deed it to plaintiff and his wife. She pointed out a place for a residence, and asked me what I thought of it. I heard her say she refused to make plaintiff

the deed on account of the death of his wife." Bowers, surveyor, testified, that on March 12, 1892, he surveyed 41.6 acres of land off of defendant's tract, at the instance of defendant and W. T. Looney, both being present. Defendant directed him where to run the lines. He also made a plat of said survey, which plat was put in evidence. J. A. Gunnin, testified that he heard defendant say, after the death of Mamie A. Looney, that she had intended to make Mamie and W. T. Looney a deed to the land in controversy, but had changed her mind on account of the death of Mamie. Hugh Crawford testified to the same effect, except that he used the word "promised" instead of "intended." Two other witnesses testified that they helped plaintiff clear and ditch some of the land and manure the same.

A. G. McCurry and W. L. Hodges, for plaintiff in error. Jas. H. Skelton, Jr., and P. P. Proffitt, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, J., not presiding.

(36 Ga. 785)

FRAZIER v. GEORGIA RAILROAD & BANKING CO.

(Supreme Court of Georgia. Aug. 16, 1895.)

ACTION FOR DEATH OF CHILD—WHO MAY MAINTAIN.

1. The father has no right of action, under the act of October 27, 1887 (Acts 1887, p. 43), for the homicide of a minor child, if the mother was in life at the time of the homicide. If, in such case, she died without bringing an action for the homicide, no such right of action survived to, or was conferred upon, the father by the above-recited act.

2. Construing all together the allegations of the plaintiff's declaration, it was manifestly intended to be an action for the homicide of his minor son, and cannot be construed as an action for the services of such son.

(Syllabus by the Court.)

Error from superior court, Tallahassee county; Seaborn Reese, Judge.

Action by A. Frazier against the Georgia Railroad & Banking Company to recover for the death of plaintiff's minor child. Defendant had judgment, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Acts 1887, No. 588, p. 43, § 1, provides that "a mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, on whom she or he is dependent, or who contributes to his or her support, unless said child leaves a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child."

Hart & Sibley, for plaintiff in error. J. B. & B. Cumming and M. P. Reese, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 333)

WESTERN & A. R. CO. v. WILLINGHAM.
(Supreme Court of Georgia. Aug. 16, 1895.)**WEIGHT AND SUFFICIENCY OF EVIDENCE.**

There was no error in refusing to give in charge to the jury the several requests presented by the defendant. There was sufficient evidence to warrant the verdict, and, the trial judge having approved the same, this court will not overrule his discretion in refusing to grant a new trial. Lumpkin, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action between the Western & Atlantic Railroad Company and R. L. Willingham. From the judgment both parties bring error. Reversed.

Payne & Tye and J. W. Harris, Jr., for plaintiff. J. W. Akin and A. H. Cox, for defendant.

PER CURIAM. Judgment on main bill of exceptions affirmed. Both bills of exceptions filed by defendant in error dismissed.

LUMPKIN, J. (dissenting). The evidence failed to make out a case authorizing a recovery, and the judgment ought to be reversed.

(97 Ga. 341)

ORR et al. v. FARMERS' ALLIANCE WAREHOUSE & COMMISSION CO.

(Supreme Court of Georgia. Aug. 29, 1895.)

SALE—ACTION FOR PRICE—WITNESSES—REFRESHING MEMORY.

1. The action being upon a check given by the defendants to the plaintiff as a partial payment on account for various lots of cotton sold by the latter to the former, and the defense in part being that the plaintiff had damaged the defendants by a failure to deliver according to its contract certain portions of these several lots of cotton, it was error to charge: "Certain checks have been introduced in evidence by defendants, showing payments on these cottons. It is the duty of defendants to show which special checks were paid on each lot of cotton. The defendants must go further, and show which identical check was paid on each identical lot. If the defendants have failed to do this, then there should be a verdict for plaintiff."

2. A witness may refresh his memory by examining a book kept by another, the entries on which were made from memoranda furnished by the witness himself, and who had verified the correctness of these entries by comparing the same with his original memoranda. It was, in effect, the same as if the book had been kept by the witness himself.

3. There was no error in refusing to allow a witness, who had "refreshed his memory" by examining a book kept by another, and with the keeping of which he had never had anything to do, to testify to the contents of the book, he being unable to recall the figures or entries therein "without depending on the books." See *Hematite Min. Co. v. East Tennessee, V. & G. Ry. Co.*, 18 S. E. 24, 92 Ga. 269, 271.

4. Profits which the purchaser of cotton would have made on a contract for the sale thereof to a third person, if the party who had sold and contracted to deliver the cotton to such purchaser had duly performed his con-

tract, are not recoverable by such purchaser from that party, unless the latter had notice of, and contracted with reference to, such resale by his own vendee; certainly not unless notice thereof was brought home to such party before he made a breach of his own contract. *Sanderlin v. Willis*, 21 S. E. 291, 94 Ga. 171.

(Syllabus by the Court.)

Error from superior court, Clarke county; Howell Cobb, Judge pro hac.

Action by the Farmers' Alliance Warehouse & Commission Company against Orr & Hunter. There was a judgment in favor of plaintiff, and defendants bring error. Reversed.

The following is the official report:

The Farmers' Alliance Warehouse & Commission Company sued Orr & Hunter for \$1,606.30 on a check dated Athens, Ga., November 19, 1892, directed to the National Bank of Athens, payable to the order of plaintiff, signed by defendants. Defendants pleaded that they drew and delivered the check to plaintiff in part payment for cotton purchased of plaintiff. On October 17, 1892, they bought of plaintiff 50 bales of middling cotton, for prompt delivery, averaging 450 pounds, at 7¼ cents per pound. After having delivered 32 bales on said contract, plaintiff refused to deliver the remaining 18. On October 27, 1892, plaintiff sold to defendants 200 bales of cotton, on the 28th, 100 bales, and on the 29th, 300 bales, all averaging 450 pounds, at 7½ cents on a basis of middling, and all being for prompt delivery. In pursuance of these contracts of purchase and sale, plaintiff invoiced to defendants 477 bales, but delivered only 445 bales. Defendants paid and plaintiff received, as part of the purchase money of said 650 bales, \$25,580.21, or other large sum. Soon after making said sales and purchases, the price of cotton advanced considerably. About November 20, 1892, plaintiff refused to deliver the balance of the cotton sold to defendants as aforesaid, at the prices agreed upon. When defendants purchased the 650 bales, relying on plaintiff's contract in good faith to deliver the same, they sold said cotton for prompt delivery on a basis of the prices agreed upon with plaintiff. Because of plaintiff's said refusal to deliver the cotton, defendants were forced to replace the same in open market at the ruling prices, to wit, at an advance of loss to them of 2¼ cents per pound on said 18 bales and 2½ cents per pound on said 155 bales. There was due defendants on the purchase of October 17th, 8,100 pounds of cotton, upon which defendants lost, as above mentioned, \$222.75, which they set off against plaintiff's claim; and upon the purchases of the 27th, 28th, and 29th of October, 69,750 pounds, upon which defendants lost, as above mentioned, 2½ cents per pound, amounting to \$1,646.75. Their said losses are directly due and chargeable to plaintiff's bad faith, and said breach of contract in failing and refusing to deliver said cotton, whereby plaintiff has injured them \$1,646.57, which they recoup and set off against plaintiff's claim, and pray judgment

for the excess. Further, plaintiff is indebted to them for drayage \$114.65, which sum they set off. Further, plaintiff is indebted to them \$30 on a duebill, which sum they set off. Plaintiff is utterly insolvent, and its assets are now in the hands of a receiver, who they pray may be made a party plaintiff that their rights may be protected. There was a verdict for plaintiff for \$1,491.65 principal, with interest. Defendants' motion for a new trial being overruled, they excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in charging: "Certain checks have been introduced in evidence by defendants, showing payments on these cottons. It is the duty of the defendants to show which special checks were paid on each lot of cotton. They must go further, and show which identical check was paid on each identical lot. If the defendants have failed to do this, then there should be a verdict for plaintiff." Alleged to be error because not the law, and imposed a burden on defendants unnecessary for them to carry; and, as the proof showed that checks were given as part payment on all lots and amounts due, and it was not in defendants power to point out each check as a special payment on special lots, the payments not having been made or the business done that way, this charge prevented them from a verdict in their favor, and virtually instructed a verdict against them, which was error, as it did not allow the jury to pass on this evidence of defendants' witness, but made the test of his nonliability depend on his doing something which it was impossible for him to do, and which was not a proper test or requirement of him, and made defendants' burdens greater than they could bear. Error in refusing to allow E. Levy, one of defendants' witnesses, to refresh his memory in regard to the number of bales delivered by plaintiff to defendants on the contracts, their quality, etc., by reference to a book of defendants, kept for the purpose of indicating these facts, the entries on which were made by Hussey, one of defendants' bookkeepers, from memoranda furnished by witness, and which book witness had checked from said memoranda. Alleged to be error, because it was competent evidence. Because the court refused to allow defendants to prove by Levy, after refreshing his recollection by the invoices on the book furnished by plaintiff, the number of bales, and their quality, delivered by plaintiff on their contracts, unless he could recall the figures as an independent fact without depending on the books. Defendants offered to prove by Orr, one of defendants, that after purchasing said 650 bales of cotton from plaintiff, relying on plaintiff's promise and contract to deliver said cotton in good faith as they agreed to do, defendants sold said cotton to manufacturers in England and on the continent for actual delivery, and to be shipped to them after

November 20, 1894; that defendants were engaged in buying cotton locally and reselling in the North and in foreign countries, and that they had orders and offers for such cotton from said parties before said purchases from plaintiff; that they made said purchases from plaintiff, and, after so doing, on faith of plaintiff's contract, they sold these cottons so purchased by them from plaintiff to said parties as stated, and made contracts on the faith of plaintiff's contract with them, and its promise and contract to deliver said cotton purchased from them by defendants, they having closed said sales with said parties in England and on the continent; that by reason of the refusal to deliver all of the cotton by plaintiff as it had contracted to do, and which defendants had resold, the defendants were forced, in order to comply with their said contracts (which were made on the faith of plaintiff carrying out their contract with them), to go into the open market, and purchase at the ruling price then the balance of said cotton which plaintiff had sold them, and which it refused to deliver after the advance in cotton, to wit, 145 bales at an advance of $2\frac{3}{4}$ cents per pound,—that is, 69,750 pounds, at $2\frac{3}{4}$ cents, equaling \$1,646.57,—and 18 bales at an advance of $2\frac{3}{4}$ cents per pound over the amount at which plaintiffs had sold it to them,—that is, 8,100 pounds equaling \$222.75; that is, a total loss to defendants of \$1,869.32, which they lost and had to pay out by reason of the failure of the plaintiff to comply with its contract, and deliver said cotton as agreed. This evidence was objected to by defendants on the ground that it was irrelevant, which objection was sustained. To this ruling defendants excepted pendente lite, and as to it assign error in their final bill of exceptions upon the grounds: (1) It was proper and relevant evidence, illustrated the issue on trial, and went to show the damage sustained because of plaintiff's failure to comply with its contract. (2) It was an incident of the purchase, and illustrated the acts of one done in pursuance of the trade, and tended to show why said purchase was made by defendants, and their good faith in the matter, and went to their credit as to the making of said purchase by defendants from plaintiff. (3) It illustrated the acts of both parties done in pursuance of the contract, and gave the reasons,—the large advance in cotton,—upon which the jury should have been allowed to pass as to whether this was not the true reason why plaintiff did not comply with the contract and deliver the balance of the cotton. It also showed what was the loss sustained by defendants because of plaintiff's failure to carry out its contract.

Lumpkin & Burnett, for plaintiffs in error.
Geo. C. Thomas, T. S. Mell, J. D. Mell, and J. J. Strickland, for defendant in error.

PER CURIAM. Judgment reversed.

(97 Ga. 335)

WRIGHT et al. v. BOWSER et al.

(Supreme Court of Georgia. Aug. 5, 1895.)

APPEAL—SUFFICIENCY OF EVIDENCE.

This case turned mainly upon questions of fact, and there being no complaint that any error of law was committed at the trial, and the ground of the motion for a new trial relating to newly-discovered evidence being without merit, the verdict, which was supported by the testimony and approved by the trial judge, will not be set aside by this court.

(Syllabus by the Court.)

Error from city court, Floyd county; W. T. Turnbull, Judge.

Action by S. F. Bowser & Co. against Frank Wright & Co. Plaintiffs had judgment, and defendants bring error. Affirmed.

The following is the official report:

Bowser & Co. sued Wright & Co. upon an account. Defendants pleaded not indebted. Further, that it is true defendants purchased the instruments as charged, but before the purchase it was agreed between plaintiffs and defendants that said instruments would shut off drippings, save leakage, and measure accurately. The gauge in said instrument was defective. It would not measure accurately, nor did it stop drippings when shut off. Wherefore defendants claim a failure to comply with the contract by plaintiffs. There was a verdict for plaintiffs for the amount sued for. Defendants' motion for a new trial was overruled, and they excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the verdict was contrary to the following charge: "If the tanks were bought, guaranteed to come up to a model, and totally failed to come up to the model represented, and were not fit for the purposes for which they were bought,—were so defective they were unfit for use,—and you further believe that defendant tendered them back to plaintiffs, within a reasonable time, you should find for defendant." Because certain facts have come to the knowledge of defendant, since the trial, of which he did not know, or have reason to know, before the filing of the motion for new trial, to wit, that the piston in the pump attached to the tank is totally imperfect, and lets the air by from below into the space where nothing but oil should come, and the siphon which delivers oil from the barrel into the tank in the cellar cannot be induced to draw at all, caused by a similar defect in the piston to the one in the pump. Also, the delivering pipe to the pump is so ruined that it does not hang over the four-inch hole made to receive waste. In support of this last ground, movant produced the affidavit of Frank Wright, one of the defendant firm, that the facts stated in this ground are true, and that none of said facts, except the last mentioned, in regard to the delivery pipe being crooked, were known to defendants, or any member of that firm, before the trial, and came into possession of the firm

by virtue of an examination the firm had made of said tank by a mechanical expert, who, perhaps, was more informed than the one the firm had previously had to examine the tank.

Hal Wright, for plaintiffs in error. Reece & Denny, for defendants in error.

PER CURIAM. Judgment affirmed

(97 Ga. 335)

PARKS v. RAGAN.

(Supreme Court of Georgia. Aug. 5, 1895.)

APPEAL—REVIEW.

It not being alleged in the motion for a new trial that any error of law was committed at the trial, and the verdict being fully sustained by the evidence, and consistent with the substantial justice of the case, there was no error in refusing to set it aside.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by R. B. Parks against one Brewer, wherein R. J. Ragan interposed a claim to property sought to be reached by garnishment against the Patton Sash, Door & Building Company. To a judgment for Ragan, plaintiff brings error. Affirmed.

The following is the official report:

Parks obtained judgment by default against Brewer on September 1, 1892, on a suit brought returnable the fourth Monday in February, 1892, on which suit he had sued out summons of garnishment, directed to the Patton Sash, Door & Building Company. It answered that at the time of the service of the summons it was indebted to Brewer \$161.63, for lumber purchased by it of Brewer; that said sum was claimed R. J. Ragan, who had given bond to dissolve the garnishment; and that it had paid to Ragan the money. Upon a trial of the issue between Parks and Ragan, there was a verdict for Ragan. Parks moved for a new trial, and, his motion being overruled, excepted. The motion was upon the general grounds alone.

Ragan testified: "Some time in January, 1892,—the middle of the month,—Brewer came to my store, in Rome, to buy some groceries. I told him I could not sell him any more goods on his credit. He said he was going to ship the Patton Manufacturing Company some lumber, and would give Mr. Patton an order to pay the money to me. He and I went to that company's office, in Rome, and agreed with Patton that, when the lumber came, Patton was to pay the money over to me. This agreement was not in writing. About a week afterwards, Patton notified me that the lumber had come, and that he had been garnished. Thereupon, after said agreement between us, I shipped goods to Mr. Brewer to the amount of about \$162. Did not sell him more than this amount. Brewer was owing me at that time notes to the amount of about \$4,000. Patton

and Brewer talked over the dimensions of the lumber."

There was evidence for the plaintiff tending to show the following: Between the 7th and 15th of January, 1892, J. B. Hunt, then agent for the Patton Manufacturing Company, went to Cedartown, and saw Brewer, and bought lumber from Brewer, Brewer agreeing to ship at once, there being two car loads of the lumber; and the lumber was shipped. Brewer and Hunt loaded one of the cars, and Hunt got a bill of lading for that, and Brewer promised that the next load should be shipped the next day. It was about a week between the time Hunt gave the order and the time when the lumber was shipped. At the time of purchasing this lumber there was nothing said about Ragan. Nothing was said as to the payment, nor was anything said as to the payment when the car was loaded. Hunt does not remember as to the terms of his instructions from Patton, as to payment,—only he knew it would be cash, from what Patton said. There was nothing said by Brewer as to who was to be paid for the lumber. He accepted the order, and Hunt turned over the bill for the lumber to him, and left. Hunt did not examine the lumber until it was to be loaded, which was a week or 10 days afterwards. Parks asked Hunt what was his business in Cedartown, and Hunt told him he was buying lumber for the Patton Company, and wanted to see if he could not make a trade with Brewer; and Parks asked Hunt to let him (Parks) know when Hunt had bought the lumber from Brewer, which Hunt promised to do, and did. Brewer did not come to Rome to see Patton before the trade was finally closed and the lumber shipped. He did come to Rome before shipping the lumber. Hunt thought he heard the conversation between Brewer and Patton, and thought they were talking about some other lumber, but paid no attention to it. Ragan was not with Patton at that time. Hunt remembered Brewer's calling at Patton's office, and having an interview with Patton relative to these two cars. It was after the garnishment had been "run," and the lumber had been shipped. The garnishment was "run" after the lumber was shipped; but how long after, Hunt did not remember. If Ragan and Brewer called on Patton before the lumber was shipped, Hunt did not remember it. Brewer never came again to see Patton, after the conversation which Hunt thought was about other lumber, before Hunt finally closed the trade with Brewer with reference to the two car loads.

J. B. Patton testified: "We never had any dealings with Brewer before Hunt bought the two car loads of lumber from him, in January, 1892, which is the identical lumber for which I was garnished by Parks. I had a contract with Brewer for some dry lumber. This was made at the time Ragan and

Brewer came to see me, before it was shipped. I had been garnished, and he never shipped any more lumber to me, but shipped to Mr. Ragan, and I agreed with Mr. Ragan that I would take it. There was two car loads of this lumber shipped to Mr. Ragan. I took part of it, but was unable to use it all, on account of the grade. Ragan sold the balance of the cars that I refused to another company. Ragan and Brewer came to my office, in Rome, and I agreed to pay the money to Ragan. There was no writing in reference to it. We just simply agreed among ourselves to pay it this way, but before I paid the money to Ragan I was garnished by Parks, and the balance of the lumber was shipped to Ragan. At that time I was general manager for the Patton Manufacturing Company, which afterwards was organized into the Patton Sash, Door & Building Company, and all of the assets and contracts of the first business went into the new company. \$162 was more than the value of the two car loads of lumber bought by Hunt."

Dean & Dean, for plaintiff in error. Reece & Denny, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 224)

RYAN v. FULGHUM.

FULGHUM v. RYAN.

(Supreme Court of Georgia. May 13, 1895.)

MOTION TO DISMISS—REVIVAL—PRACTION ON APPEAL—RES JUDICATA—DISMISSAL BY PLAINTIFF—EFFECT ON CROSS PETITION.

1. The motion to dismiss the equitable petition of the plaintiff below, on the grounds that there was no equity in the petition, and that it set forth no cause of action, was properly sustained, although made *ore tenus*, and not until the trial term.

2. Where a bill of exceptions was brought to this court, and the defendant therein had sued out a cross bill of exceptions, and while both were pending here the plaintiff in error in the main bill of exceptions died, the effect of making his administrator a party plaintiff in error in that bill of exceptions was to make him a party defendant in error to the cross bill of exceptions.

3. A nonsuit in an action of ejectment does not conclude the plaintiff from subsequently asserting the same title in another action. Especially is this so where the first suit is brought by him in his individual right, and the second in his capacity as administrator of the estate of another.

4. Inasmuch as the defendant's answer, in the nature of a cross bill, alleged facts entitling him to independent and distinct equitable relief, the dismissal of the plaintiff's petition did not interfere with the defendant's right to a hearing and trial on the matters set up in his answer; and, this being so, it was error to dismiss the same.

(Syllabus by the Court.)

Error from superior court, Pulaski county; J. J. Hunt, Judge.

Action by R. G. Fulghum against L. C. Ryan, administrator. To orders entered, both

parties bring error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed on main bill of exceptions, and reversed on cross bill of exceptions.

L. C. Ryan and J. H. Martin, for plaintiff in error. Jordan & Watson and W. L. Grice, for defendant in error.

ATKINSON, J. The plaintiff filed his petition against the defendant, alleging in himself a prescriptive title to the premises in dispute; alleging, further, that previous to the filing of his petition the defendant had instituted an action of ejectment against him for the recovery of the land in question, and, upon the trial of that case, had been nonsuited. He alleged that the defendant threatened to enter and take possession of the premises; was then making preparations to that end; was still claiming title to the premises; that his claim of title was fraudulent, and that he (the plaintiff) apprehended a serious injury to himself unless restraining order would be granted. There was no allegation of the insolvency of the defendant. There was no identification of the particular title deeds claimed by the plaintiff to be fraudulent. There was no allegation of any damage to the plaintiff. A restraining order issued. The defendant answered, admitting the former action, but, in explanation of the nonsuit granted thereunder, alleged that the suit was brought by him in his individual capacity against the plaintiff; that he bought the land from the former administrator of John Rainey, who was the true owner of the land; that by mistake the order authorizing the sale by said administrator was granted upon the same day that letters of administration were granted to him, and the sale was therefore void, leaving the title still in John Rainey; that he thereupon himself sued out letters of administration de bonis non upon the estate of John Rainey, and that he now claims the property by virtue of such administration, as the property of the estate of John Rainey. He alleged that no one was in possession of the premises until he himself took possession, and constructed thereon a small cabin. He denied that he was a trespasser, but claimed the rightful possession of the premises. As an amendment to this answer, he filed an additional answer, in the nature of a cross bill, in which he alleged that he was the true and lawful owner of the premises in dispute; that the plaintiff was himself insolvent, and that, pending the continuance of the restraining order granted upon the prayer of his original petition, the plaintiff had himself entered upon the premises, in defiance of the right of the defendant; was engaged in cutting and carrying away the wood and timber thereon, to the injury and damage of the defendant. The case coming on to be heard, the plaintiff moved to strike the answer of defendant, upon the ground that the whole matter set up by the cross bill was *res adjudicata*, for that at a

former term of the superior court of that county, which court had full, ample, and sole jurisdiction of the matter, the defendant had brought an action against the plaintiff for this particular piece of land; that the defendant, upon the trial of that case, had been nonsuited, and the judgment of nonsuit was conclusive in the case, and upon the further ground that defendant cannot defend his individual case by setting up a representative capacity. The court sustained this demurrer, and dismissed the cross bill of the defendant, and to this judgment the defendant excepted. After this had been done the defendant moved to dismiss the plaintiff's petition for the want of a cause of action. The plaintiff objected to the consideration of this motion made on the part of the defendant, upon the ground that it came too late; that it should have been made at the first term of the court. The court overruled this objection, proceeded to a consideration of the defendant's motion to dismiss, and made an order dismissing the plaintiff's petition. The plaintiff excepted to this ruling, and upon the direct and cross bill of exceptions all of the rulings of the court are here for review. In dealing with these questions, we will present them in the inverse order in which they were considered in the court below.

We think the court properly ruled that the plaintiff's petition contained no cause of action. It was a simple application for an injunction to restrain an ordinary alleged trespass, of that class wherein the insolvency of the defendant is essential to the maintenance of an equitable petition. There was a prayer for general relief, but no facts were alleged upon which a decree for general relief could have been predicated. There was no injury alleged to have been committed. The bill was filed upon a bare apprehension that a trespass might be committed. It is true that there was, in general terms, an allegation that the defendant was claiming the property under some pretended title, and a prayer that the title be decreed to be delivered up for cancellation. There was no identification of the particular paper or papers sought to be canceled, nor a suggestion as to how or where in the deed or deeds was or were fraudulent. So that, placing the most favorable interpretation upon the plaintiff's petition that could have been given to it, there was scarcely the semblance of a cause of action stated in it. It is never too late to move to dismiss a petition for the want of a cause of action, until after verdict. If its infirmities then be not cured by the verdict, a motion in arrest of judgment will serve the same purpose which would be accomplished by a motion to dismiss before judgment. The defendant's answer having already been stricken, upon the plaintiff's motion, before the motion to dismiss the plaintiff's petition was made, if the answer itself contained any admissions which might have been favorable to the plaintiff, upon his own motion he placed the pleadings

of the defendant where they could not avail him. So that under no view of this case did the court commit any error in dismissing the petition of the plaintiff.

We come now to deal with the answer of the defendant. We think the court took too seriously the proposition that the defendant in the case was concluded as to his claim of title by the judgment of nonsuit upon the trial of the former ejectment case. In the first place, that suit was instituted by him in his individual capacity. Upon the introduction of his evidence, it appeared that he had no title. The court awarded a judgment of nonsuit, which operated simply as a dismissal of his then pending action. The Code provides that a judgment of nonsuit, or the dismissal of an action, shall not conclude the party against whom that judgment of nonsuit or dismissal is entered, but he may thereafter bring his action, if not otherwise barred by the statute. Aside from this, the exact title submitted to the court by the respondent, in his answer, was not the title upon which the judgment of nonsuit had been awarded. The answer, in the nature of a cross bill, set up title in him as administrator upon the estate of John Rainey; and, so far as this record discloses, the title of his intestate had never been called in question in any controversy with the present plaintiff respecting the land in question. We conclude, therefore, that there was no estoppel on him, and he was free to assert, if otherwise entitled so to do, his title as administrator, as against this plaintiff. His answer, in the nature of a cross bill, alleged a complete title and possession in himself, as administrator. It alleged the insolvency of the plaintiff. It alleged that, since the grant of the original restraining order at the suit of the plaintiff, the plaintiff had entered upon the land while he (the defendant) was thus restrained, and, without title, was proceeding to cut and carry away the timber and wood upon that land. He prayed an injunction against the plaintiff, and, in addition thereto, that the plaintiff be required to deliver up, for cancellation, his deed attached to his petition, under and by virtue of which he claimed title to the land, and also for such other and further relief as the facts of the case might seem to require or warrant, and especially that the lot of land in controversy be decreed to be the property of the defendant. We think the cross bill of the respondent set up such a cause of action as entitled the defendant, upon proof of the facts therein stated, to some relief at the hands of the court. The dismissal of an equitable petition will not have the effect to carry out with it an answer filed in the nature of a cross bill, in which independent equitable relief is prayed by the defendant. And upon the equities stated in this cross bill this defendant is entitled to be heard. Judgment on main bill of exceptions affirmed. Judgment on cross bill of exceptions reversed.

(97 Ga. 331)

COMMERCIAL BANK OF CEDARTOWN et al. v. POSTELL.

(Supreme Court of Georgia. Aug. 5, 1895.)

REVIEW ON APPEAL—NEW TRIAL.

The motion for a new trial being based on general grounds, alleging no error of law on the part of the trial judge, and the evidence, though conflicting, being sufficient to support the verdict, this case falls within the general rule, so repeatedly announced, that under such circumstances the verdict, after its approval by the trial judge, will be allowed to stand.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Junes, Judge.

Action by the Commercial Bank of Cedartown against John Postell and the administrator of A. G. West. Verdict for plaintiff against the administrator, and in favor of Postell. A new trial was refused, and plaintiff and the administrator bring error. Affirmed.

The following is the official report:

The suit was on a promissory note for \$3,000 principal, dated July 6, 1892, and due 60 days after date, made by the Coal City Mining Company, and indorsed by West and Postell, and payable to plaintiff or order. The mining company, being a nonresident corporation, had no agent or place of business in Georgia, and was not sued or served in the action. Its name was signed to the note by Postell as secretary and manager. Postell pleaded the general issue; further, that before the note fell due, and before it was protested, West having died, plaintiff agreed with the Coal City Mining Company, its agents and officers, and with the representatives and heirs of his coindorser, West, to extend the note sued on for an indefinite period of time, upon said company and said heirs paying plaintiff 10 per cent. interest, which agreement was made without the knowledge or consent of Postell; and that the mining company did pay plaintiff the interest at said rate, as indicated by the payments on the note, thereby increasing defendant's risk and releasing him. Thompson, administrator, adopted the plea of Postell. There was a verdict for plaintiffs against Thompson as administrator, for the amount due on the note, but in favor of Postell. Thompson moved for a new trial, and his motion being overruled, excepted. The plaintiff moved also for a new trial as to the verdict releasing Postell, and, its motion being overruled, excepted. Thompson's motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the verdict was contrary to certain specified portions of the charge. Further, because the release by the jury of Postell, coindorser with West, operates by law as a release of Thompson, administrator. Error in charging: "I charge you, if indulgence was granted by plaintiff to defendant in consideration of the payment of ten per cent. interest per annum, without the knowledge or consent

of the indorser, or either one of the indorsers ratifying this act, the indorser so ratifying the act would not be released. Such ratification would be equivalent to agreeing originally to the arrangement. If the administrator of A. G. West ratified the agreement or arrangement between the Commercial Bank and the Coal City Mining Company, the estate of West would not be released." "Although that arrangement may have released West and Postell, still, if the administrator of West afterwards ratified the act expressly or impliedly,—that is, by word or act,—then the estate of West would be bound, and you would so find." The motion for new trial by plaintiff was upon the grounds that the verdict releasing Postell was contrary to law, evidence, etc., and because the verdict was contrary to a specified portion of the charge; further, because, under the facts, the money which is the consideration of the note was really loaned to West and Postell, who signed the mining company's name to the paper. Plaintiff parted with the consideration for the note solely upon the strength and credit of defendants' names, and their liability to it is that of the makers, and not that of the indorsers, strictly, under the facts of the case.

Blance & Fielder and Colville & Noyes, for plaintiffs in error. Glenn & Rountree and J. W. Harris, Jr., for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 337)

LEWIS et al. v. BRACKEN et al.

(Supreme Court of Georgia. Aug. 12, 1895.)

SALE—BREACH OF WARRANTY—FALSE REPRESENTATIONS—AMENDING DECLARATION—CONTINUANCE—INSTRUCTIONS.

There was no error in allowing the amendments to the declaration, nor in overruling the demurrer to the same, nor in refusing to grant a continuance, nor in admitting or rejecting evidence. The charges complained of were substantially correct, and the verdict was amply supported by the evidence, and quite reasonable in amount. This case involves no new questions of law rendering necessary a more elaborate statement of the points decided. The court properly refused to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Stewart county; W. H. Fish, Judge.

Action by Bracken & Wilson against Lewis & Thompson. Plaintiffs had judgment, and defendants bring error. Affirmed.

The following is the official report:

Bracken & Wilson, of Gadsden county, Fla., sued Lewis & Thompson, of Stewart county, Ga., for \$3,000, for that on or about December 18, 1891, defendants, by their agent, Statham, sold and conveyed to plaintiffs nine horses, guarantying them to be sound and free from disease, and the purchase was made solely upon the representations of defendants as aforesaid; but now it transpires that said representations were made with a

fraudulent intent, and well known to defendants; whereby, upon said representations, petitioners were induced to buy and handle said stock, and thereby lost, by reason of said representations, the sum sued for, in that the stock so bought of defendants were diseased, and not only the fact that petitioners lost upon said purchase, but lost other valuable stock by contamination from said stock bought from defendants, said horses bought from defendants being at the time of sale infected with a loathsome and contagious disease known as "farcy," all of which was well known to defendants at the time of said sale. By amendment, plaintiffs alleged: On or about December 11, 1891, by false and fraudulent representations of the true condition of the stock described in the declaration [defendants] induced petitioners to purchase said stock, representing, by themselves and their agent, Statham, that the stock were sound in every particular, when in fact the stock had been contaminated by recent association with other stock of defendants suffering from farcy, or some other infectious and fatal disease, and that some of the horses sold by defendants to plaintiffs were at the time of sale already infected with said disease, which facts were well known to defendants and their agent; said purchased stock having been purposely removed from the stables and neighborhood of defendants, and sent to a great distance, for the purpose of selling them to parties who did not know of the true state of affairs, and in total disregard of the rights and interest of whatever strangers might be induced to purchase the stock; one of the horses having at the time of said sale evidences of the existence of said disease, which was falsely explained by defendants as being due to a splinter. Of the horses purchased by plaintiffs from defendants, the mare Belle, valued at \$125, died of said disease, to the injury and damage of petitioners in that amount. Of their own stock who caught the disease from the stock so purchased of defendants, plaintiffs lost from said disease four horses and two mules, of the value of \$685, to their damage that amount. On account of the disease being introduced into their livery stables, they were compelled to remove a large part of their stock to another isolated stable, for which they paid \$15 per month rent for four months. During that time they were put to an expense of \$3.50 per day for services in looking after and caring for said diseased horses. The feed of the horses so removed and cared for amounted to at least 90 cents per day during said four months, and the medicine and expenses of treating them amounted to \$50, to the damage of petitioners \$638. Of said disease so contracted eight died in plaintiffs' stables, which had to be hauled off and buried, at an expense of \$5 per horse, to the damage of petitioners \$40. In order to properly protect and care for the horses that did not have

said disease, they were put to the expense of whitewashing and fumigating their stables, at a cost of \$50. At the time of the wrongful acts of defendants in thus introducing diseased stock in their midst they were making clear money out of their established livery business, as much as \$50 per week, and on account of said acts of defendants their business fell off to such an extent that for the first month the disease broke out in their stables they did not make expenses, and during the next six months lost in net profits \$600, to their damage \$800. To this declaration defendants demurred generally. Also, because the damages alleged are remote and speculative, and because they are remote and consequential, and only imaginary, or the possible result of the tortious acts of defendants. Also because there is no allegation in the declaration that plaintiffs did not have knowledge, at the time of the purchase, of the diseased condition of the horses. Also because there is no allegation that defendants knew of the disease of the horses at the time of the alleged sale, and, so knowing, sold them to plaintiffs, with intent to defraud them of the value, service, and benefit of said horses.

Plaintiffs offered to amend, by alleging that they did not know of the infectious, contagious, and diseased condition of the horses at the time of the purchase, but relied solely upon the representations of defendants, made to them, that the horses were sound, and free from disease. Also that the fact of such a disease being among their stock became widely known, and their customers ceased to patronize them as livery men; they at that time doing a livery and feed stable business. The amendment was allowed by the court. Defendants then moved to continue the case on the ground that they were surprised by the amendment, and their counsel stated in his place that he desired a continuance, in order that he might secure testimony to show what patronage plaintiffs had at their stable, and the expense of carrying on their business, and what they had taken in each day and paid out. The court overruled the motion. Defendants then demurred to the declaration as amended, which demurrer the court overruled. The case then proceeded, and, after the testimony had closed, plaintiffs offered to amend, by adding to the words "infectious and fatal," in their declaration, the words "or destructive," so that the declaration as amended would read, "infectious and fatal or destructive disease." To this amendment defendants objected upon the ground that it was too vague and uncertain to charge defendants, and was in the disjunctive, and brought in a new cause of action, and did not name what disease the horses were affected with. The court overruled the objection, and allowed the amendment. To the overruling the motion to continue, to the overruling the demurrer, and to allowing of the last-mentioned amendment,

defendants excepted *pendente lite*, and assign error upon the same in their final bill of exceptions. There was a verdict for the plaintiffs for \$1,000, and, defendants' motion for a new trial being overruled, they excepted.

The motion was upon the general ground that the verdict was contrary to law, evidence, etc. Also because the court overruled objection of defendants to the following testimony and question of counsel to Statham: "You heard that it was glanders or farcy that Lewis & Thompson's horses had in their stables?" The question was objected to upon the ground that it was hearsay, and not admissible. The witness then testified: "I heard the Lewis & Thompson horses had the glanders, farcy, or something else. Did not know it, but had heard that Lewis & Thompson had some horses to die from this disease they had." This testimony was objected to on the ground that it was hearsay, which objection was overruled. Plaintiffs offered to read the testimony of James Shaw, which had been sued out by defendants. Defendants objected. This objection the court overruled, which defendants allege as error. Plaintiffs having read in evidence interrogatories of W. D. Cox, which had been sued out by defendants, but not offered or read by defendants, defendants then introduced R. F. Watts, and offered to prove by him that he was that attorney of defendants, and that Cox had made different and contradictory statements to him than those sworn to in his interrogatories. Plaintiffs objected upon the ground that the witness could not be impeached by proof of contradictory statements without first laying the foundation, as the law provides, and that no such foundation had been laid. The objection was sustained, which movant alleges as error.

Error in charging: "Although the disease was not at the time fully developed, and the defendants, Lewis & Thompson, at the time believed that the horses were so diseased, although they may not have actually known it, and plaintiffs, not knowing or believing that the horses were so diseased, and not having been put on notice of the disease, or of defendants' belief that the horses were so diseased, and if, under these circumstances, plaintiffs were induced to purchase the horses by the fraudulent and reckless representations that the horses were sound, then the plaintiffs would be entitled to recover, if they acted to their injury." "If, however you should be of opinion from the evidence and the law given you in charge that the plaintiffs should recover, then you would look to the evidence, and determine how much the damage to be recovered should be. Now, if the plaintiffs are entitled to recover, are they entitled to recover for the mare Belle? If so, how much? Well, I charge you, that if, at the time the plaintiffs bought her from the defendants, that she had farcy or some other contagious and fatal or destructive disease, and the defendants knew or believed

that she was so diseased, and induced plaintiffs to purchase her by representing to them that she was sound, or if she appeared to be unsound as to one of her legs or feet, and if, upon inquiry by the plaintiffs of the defendants as to the cause of the apparent unsoundness, the defendants represented to the plaintiffs that it was caused from a splinter, when defendants knew that such was not the fact, but knew or believed that such apparent unsoundness was caused by farcy or some other contagious, fatal, or destructive disease, and by such misrepresentations induced plaintiffs to buy her, and she soon thereafter died from said disease, then the plaintiffs would be entitled to recover from the defendants what would have been the market value of the mare at the time of sale, if she had been sound as represented by defendants." "If you should find that the plaintiffs should recover, you will look to the evidence to find out whether or not plaintiffs lost any horses by reason of having contracted a contagious disease from the horses which the plaintiffs bought from the defendants, which disease the purchased horses had at the time they were purchased; and if you should believe that the plaintiffs lost any horses in that way, and from that cause, why, you will look to the evidence to see if there was any proven market value of the horses so lost. If there was, you would be authorized to find in favor of the plaintiffs against the defendants for the market value of such horses." "Now, the plaintiffs contend that they are entitled to damages for actual expenses in the way of erecting stables for the purpose of stabling their horses which did not have the disease, and they contend that they were put to the expense of giving such horses extra feed, and they contend that they were put to the expense of furnishing medicine and attention to the sick and diseased horses,—the horses that they purchased, and their own horses that contracted the disease from the horses that they purchased. The plaintiffs contend that they are entitled to recover in the way of damages for actual expenses in whitewashing and fumigating their stables, attempting to eradicate the disease from them. They contend further that they were damaged in their business; that at the time they purchased these horses from the defendants they were doing a livery, feed, and sale stable business; that their business was prosperous; that they were making money, and that by reason of interruption on account of the diseased horses in the stable their business was damaged by loss of custom; that their business decreased; and they claim for that they should have in the way of damages whatever they have proven their loss to have been on that account. As I have already said, I charge you that all of these are legitimate subjects of damage. In other words, if the plaintiffs are entitled to recover, in your opinion, under the evidence and the law I have given you in charge, they would be en-

titled to recover these damages which they contend they have sustained in these various ways, provided the evidence shows to your mind what such damages are; in other words, if the evidence is sufficiently definite to show you what damages, if any, the plaintiffs have sustained in the way they allege they sustained them." "Well, if plaintiffs are entitled to recover under the evidence and law I have given you in charge, then they could recover the market value of the horses which they lost by reason of taking the farcy, or some other contagious, fatal, or destructive disease, from the horses purchased from the defendants." "Now, the plaintiffs contend that they are entitled to recover damages, actual damages, which they claim they suffered on account of and by reason of the alleged fraudulent acts of the defendants in inducing them to purchase their horses. You will look to the declaration, and see what those allegations are. I cannot recall all of them, but I charge you that the damage set out in the plaintiffs' petition, if proven to your satisfaction, would be such damages as the plaintiffs would be entitled to recover in this case, provided you should believe from the evidence that they are entitled to recover at all."

Watts & Hicken and C. J. Thornton, for plaintiffs in error. Clarke, Hooper & Harrison, W. H. Ellis, and J. B. Hudson, for defendants in error.

PER CURIAM. Judgment affirmed.

(36 Ga. 732)

BROXTON v. ENNIS.

(Supreme Court of Georgia. Aug. 12, 1895.)

LANDLORD AND TENANT—CONTRACT—RENT.

1. Where, under a contract for the sale of land, the vendor executes to the vendee the usual bond for title, and delivers to him the possession of the premises, even if the latter fail to pay the purchase money at maturity, he may, nevertheless, retain possession, either by himself or his tenant, until such time as he shall be legally evicted therefrom by the vendor; and the tenant who enters under the vendee cannot, without first surrendering his possession to the latter, attorn to the vendor upon any supposed right of the latter, without the consent of the vendee to rescind the contract of sale.

2. In such a case, where the tenant undertakes to acknowledge a tenancy both under the vendor and vendee, and distress warrants are issued at the instance of both the vendor and vendee, and levied upon the property of the tenant, the warrant in favor of the vendee is the legal lien, and should prevail.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Fish, Judge.

Application for certiorari by J. A. Broxton against J. J. Ennis to review proceedings on distress warrants. To an order refusing the writ, plaintiff brings error. Affirmed.

The following is the official report:

On August 24, 1894, Broxton obtained a

distress warrant against Downing for the rent of certain land for 1894, upon the ground that Downing was removing or about to remove the crop from the land. On October 18, 1894, Ennis obtained a distress warrant against Downing, as his tenant, for rent of the same land; it being alleged in his affidavit for distress warrant that the amount claimed for rent was due and unpaid. Both the warrants were levied on the same property, and, by consent, the property was converted into cash, which was held by the levying officer, for distribution. Thereafter the issue between Broxton and Ennis as to the right to the fund was tried before a magistrate, and there was a judgment in favor of Ennis. Broxton appealed to a jury in the magistrate's court, who found in favor of Ennis. Broxton presented his petition for the writ of certiorari, in which he set forth the above facts and the evidence introduced on the trial before the jury, and alleged that the verdict of the jury was contrary to law and evidence, against the weight of the evidence, without evidence to support it, and wholly unauthorized. The judge of the superior court refused to grant the writ of certiorari, because he was of the opinion that the verdict was authorized by the law and the evidence. To this ruling, Broxton excepted.

On the trial before the jury, Broxton introduced his affidavit and distress warrant; also, a deed conveying the land to him from M. L. Spencer, dated February 4, 1876. Broxton testified: That he was the owner of the land. That on February 14, 1891, he contracted to sell Ennis the land according to the terms of a bond for titles and certain notes (hereafter to be set forth). That none of the notes had ever been paid, nor any part thereof. That during December, 1893, Ennis stated to him that he could not pay the notes, and was going to leave the place; that he was going to put a tenant on the place. Witness then and there objected to the same, and told Ennis that from that date on he (witness) would do the renting and receive the rents; that the bond for titles was then out; and that, so far as he was concerned, the contract to sell was then at an end, and he then and there rescinded the same; and that, if Ennis remained on the place any longer, he would be treated as a tenant at will. That Ennis then went away and moved from the place. That witness rented the place to Downing for 1894, and had not received his rent to the amount of \$50, and that he had demanded it. The bond for titles was from Broxton to Ennis, dated February 14, 1891, conditioned to convey the land to Ennis upon the payment of three notes, each dated February 14, 1891,—one for \$250.56, another for \$270.30, and a third for \$298.98,—due, respectively, January

1, 1892, January 1, 1893, and January 1, 1894. Three notes were introduced, signed by Ennis, and payable to Broxton, conforming to the description of the notes in the bond, except that the first note was for \$251.69, and due January 1, 1893(7). Ennis testified that he went into possession of the place on February 14, 1891, under the contract as expressed by the bond for titles and the notes; that he had never paid a cent on the notes; that he left the place on or about January 1, 1894; that he rented the place to Downing; and that he had no other claim on the place than the bond for titles. Downing testified that he rented the place from both Ennis and Broxton; that he knew there was going to be a lawsuit about the place, rented from both of them, and agreed to pay the rent to the one who was entitled to it; and that he went to Broxton before he would take the place for 1894, and rented from him.

Busbee, Crum & Busbee, for plaintiff in error. W. A. Aaron and John F. Powell, for defendant in error.

PER CURIAM. Judgment affirmed.

(7 Ga. 336)

CENTRAL RAILROAD & BANKING CO. v.
EAST TENNESSEE, V. & G. RY. CO.
(Supreme Court of Georgia. Aug. 12, 1895.)

REVIEW ON APPEAL—INSTRUCTIONS—CONFLICTING EVIDENCE.

The charge, in the main, was a clear and accurate presentation of the rules of law applicable, most of which are well settled by repeated adjudications of this court. If any errors were committed in charging, in refusing to charge, or in any other respects, they were not of sufficient weight or importance to materially affect the determination of the case by the jury upon its substantial merits, or to require the granting of a new trial. The case depended mainly upon the evidence, which, though voluminous, confused, complicated, and conflicting, both upon questions of boundary and title, warranted the verdict rendered; and, the same having been approved by the trial judge, this court will not control his discretion in refusing to set it aside.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Action between the Central Railroad & Banking Company and the East Tennessee, Virginia & Georgia Railway Company. Judgment for the latter, and the former brings error. Affirmed.

Stead & Wimberly, John R. Cooper, and Lawton & Cunningham, for plaintiff in error. Hill, Harris & Birch and W. A. Henderson, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 302)

EAST TENNESSEE, V. & G. RY. CO. v.
BUTLER.

(Supreme Court of Georgia. Aug. 12, 1895.)

NEW TRIAL—DISCRETION OF TRIAL COURT.

There was evidence to warrant the jury in finding that the defendant was negligent, and that the plaintiff was not. This being so, and there being no dispute as to the fact that he was injured, this court will not overrule the discretion of the trial judge in refusing to set aside the verdict rendered in the plaintiff's favor.

(Syllabus by the Court.)

Error from city court, Floyd county; W. T. Turnbull, Judge.

Action by E. M. Butler against the East Tennessee, Virginia & Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is the official report:

Butler sued the railway company for damages, and obtained a verdict for \$1,100. Defendant moved for a new trial, on the grounds that the verdict was contrary to law and evidence, and the motion was overruled. The evidence was conflicting. Plaintiff testified, in brief: February 13, 1892, he was employed as a brakeman or car coupler in the yard of defendant, and was instructed to make up a train in the yard. A train of freight cars had just got into the yard, there being 25 or 30 cars. It was between 12 and 2 o'clock at night. He went to the southern end of the train, and attempted to make a coupling. He attempted to couple a moving car, attached to an engine, to a stationary car that had just run in. He went to the stationary car, and set the pin, and gave signal to the engineer to come back. He had a lantern in one hand, and his coupling stick with him. He then stepped between the rails to set the pin, placing his right hand upon it. The approaching train was then 20 or 30 feet away. Just as he did so, an engine at the other end of the cars jolted against the line of standing cars, causing them to run back on him. He was in a position where he could not escape, and knew nothing about the engine striking the train at the other end until it had hit. He grasped the pin firmly, and moved back with the train. If he had attempted to get out from between the track, he would have been knocked down and killed. When the two cars came together, the pin was driven in such manner as to catch his hand between the pin and the deadwood, cutting off the two middle fingers about the end joint. The engine he was coupling for came up, and he signaled it to stop. It is the duty of the coupler to set the pin, after which it is his duty to couple them together. He goes in and sets the pin, and the car coming back sometimes knocks the pin down, and sometimes it does not. He has a stick to hold the link up. There is no way to hold the pin up. He had not set the pin before he motioned the engine back. It is owing to circumstances whether it is safest

to set the pin and then walk out. He does not know that that was the safest way to do this work. If he had set the pin and then walked out, he expects he would have been injured. If he had the pin out, he would have had to be in train to make the coupling anyway. He does not know whether it would have been necessary to have touched the pin in setting it or not. Very often it is necessary to put your hand on the pin after it is set ready to be knocked down; very often, also, it is unnecessary. He had read the rules, but did not have a copy of them. In making a coupling, you set the pin and lean it. If you have time, you let it go. In this case he did not have time. The pin was in the drawhead. He could have stopped the engine that was coming back 20 feet away from him. He had plenty of time to get in and set the pin if the standing cars had not come back on him. He supposes, if he had not held the pin, he would have fallen down, and the cars would have run over him. He could not (?) have set the pin and got out if the engine had not struck the cars. He could not get out afterwards; it was too hard a lick. Hendricks was standing 20 feet to his right. It was his intention, when he went in, to make the coupling; but, when he went in to set the pin, the engine struck the cars, and he could not turn the pin loose. The usual custom among couplers was just owing to circumstances. Sometimes they stepped inside, and sometimes would lean over. The only easy way—all that he would have done—would be to step in and set it. If he had been leaning over, of course it would have been more dangerous, because he could not have held, and would have fallen across the track. He heard the engineer to whom he had signaled say that the lick was a "hell of a lick."

Defendant introduced three of its rules in force at the time of the injury: "(1) Great care must be used in coupling cars. Coupling apparatus cannot be uniform in size and strength, and is liable to be broken, and from various causes to render it dangerous to expose the hands and arms of couplers; and all employes are enjoined, before coupling cars, to examine so as to know the kind and condition of the coupling apparatus, and are prohibited from placing in trains any car with defective coupling, until they have first reported the defect to the yard master or conductor. Sufficient time is allowed and may be taken by employes. Use coupling stick in all cases, and make the examination required. Coupling by hand is strictly prohibited. Sticks must be used to guide the link or shackle, and each employe expected to couple cars is required to provide himself with a stick for that purpose. (2) In all cases of doubt or uncertainty, take the safe course, and run no risks. (3) The use of intoxicating liquors will be a sufficient reason for dismissal." Defendant introduced also the testimony of half a dozen

witnesses, in brief as follows: The engineer obeyed the signals given by Butler and Hendricks. His engine was backing about one mile an hour when hit. Just before he was hit, the stop signal had been given. He reversed his engine to stop as quickly as he could; and, as he stopped, the cars ran up, struck him, and knocked him about a car length. That was a moderate lick for that position. The grade was downhill, descending towards the south. He was moving north with his engine. The slack coming out of all the cars he had would give 8 or 10 feet of slack. If the train had stopped suddenly, the engine would have rolled back 8 or 10 feet. He had 12 or 14 cars. If he had the brakes off the engine, the cars would roll back. The blow was very moderate for that place. It was a usual blow. The safest place for the coupler to occupy in setting a pin is on the outside of the rail, just to catch hold of the end of the car, and set the pin and make the coupling. If he was in that position, he could avoid injury by jerking himself back. He should have his hand on the end of the car, standing on the outside, reach over to the drawhead, and still hold to the outer edge of the car. If he were standing in that position, and a train should be going south, and the stationary car to which he was making the coupling should be struck, he would be thrown back from the track. Is in a dangerous position when he lifts the link to make the coupling. The proper way is to stand outside the track when he lifts the link with an iron stick made for that purpose. At that time it was usual, when a train came into the yard, for one engine to take hold of one end of the train, and the other engine to take hold of the other end. As a general thing, both engines take hold of the same train. It was the usual method of doing the work, and occurred every few nights. The engineer did not know where the other engine was at the time. Was not looking for it. Had not seen it. It was 20 to 25 car lengths from his engine. Does not know why the other train was run up against this one. It is a pretty common occurrence, when one train is starting to couple to a car, for another to come up and back against it. It is a safe way to make a coupling at night, when a man has a lantern in his hand, to catch hold of the end of the car with one hand, and set the pin with the other. In the condition of things as they were, it was likely that the engine would be at work at both ends of the train. It was the duty of the coupler to look out for them. He should look out for engines at both ends. He is supposed to know, having to work there every day. It would be impossible for him not to know it. It is not necessary for the fireman to let the couplers know that two engines are working on the train. There is no reason why he should not see them, etc. The general rule for setting a pin is for the coupler to stand outside of the rail, with one hand on

the car, reach over, and set the pin in a slanting position, and, when the engine backs up, the lick causes the pin to drop. Cars are from seven to ten feet wide. A man can rest his hand on the side of the car, and set the pin, with no difficulty whatever. If he sets the pin in the right way, and guides the link into the drawhead with the coupling stick, he could not possibly be injured. No good man will walk in and take hold of the link when the car is standing and has been stopped. There is a doubt that something might move the car. It is not allowed on the railroad to go between the cars and make the coupling. No first-class man will go between the cars. Men have been discharged on that account. One witness saw Butler take a drink of whiskey that night, and throw the bottle away. The engineer did say it was a hard lick, but that it was a common thing. They all are hard licks. It was not harder than is usual in making up trains, etc.

McCutchen & Shumate and Hoskinson & Harris, for plaintiff in error. Wrights & Harper and Dean & Dean, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 297)

CROW v. STATE.

(Supreme Court of Georgia. May 13, 1895.)

ABANDONMENT OF CHILD BY FATHER — WHAT CONSTITUTES.

1. Abandonment, dependency, and destitution are each equally essential to the commission of the offense defined by section 4373 of the Code; and the requirements of that section are not met, in a prosecution thereunder, by showing an abandonment by the father of his minor child, and its dependence upon another, but it must also be shown that the child was left in a destitute condition.

2. Where, under an indictment for such an offense, the evidence shows that the father, before the birth of a child, abandoned its mother; that she thereafter lived with her father, who voluntarily supported her; that the father of the child, upon request of the mother, made, from time to time, suitable provision for its support, and never at any time refused to make adequate provision therefor, — a verdict of guilty is unwarranted by the evidence, and a new trial should be awarded.

(Syllabus by the Court.)

Error from superior court, Cobb county; G. F. Gober, Judge.

Anthony Crow was convicted, under Code, § 4373, for abandoning his child, and brings error. Reversed.

Section 4373 provides that if any father shall willfully abandon his child or children, leaving them in a destitute condition, such father shall be guilty of a misdemeanor.

A. N. Edwards, T. B. Irwin, and D. P. Lester, for plaintiff in error. Geo. R. Brown, Sol. Gen., for the State.

ATKINSON, J. To the principle stated in the first headnote, it is only necessary to

cite the language of the statute from which section 4873 of the Code is taken; and to the point that the words "dependent" and "destitute," as employed in that statute, were not designed to be used as synonyms, it is only necessary to refer to the language employed by Chief Justice Jackson in 78 Ga. 188, in the case of *McDaniel v. Campbell*, which we quote, as follows: "So, to leave a child dependent does not convey the idea of absolute destitution. The child may be cared for and comfortable, and yet dependent on some charity; but, left destitute, it has no protector, friend, or other author of benevolent kindness, feeding and clothing it." In that case the indictment failed to allege that the child had been left in a destitute condition. The chief justice further says: "It would seem that the strength of the crime, as defined in the statute, is emasculate" of much sinew and muscle by the indictment, and the crime is not substantially charged." In the present case the allegations in the indictment are technically accurate, but the evidence wholly fails to sustain the proposition that the child was left in a destitute condition. According to the testimony of the mother, who was the principal witness in the case, the father made ample provision for the support of the child suitable to its condition in life. Of his means, he provided according to his ability; and she testified that he had never failed to respond when advised of the necessities of his offspring. Many cases occur in human experience where a child is less destitute under the tender care of affectionate grandparents than when its wants are left to be supplied by an improvident and shiftless parent. At all events, neither abandonment nor destitution is proven unless the father leaves the child, intending to abandon it to its own fate, without providing for it the necessities of life, and leaving it wholly dependent upon others who are themselves unable or unwilling to provide for it. Let the judgment of the court below be reversed.

(96 Ga. 200)

LEWIS v. OLIVER.

(Supreme Court of Georgia. May 15, 1895.)

GUARDIAN AND WARD—ACTION ON GUARDIAN'S BOND.

Construing section 1819 of the Code in the light of the act of March 5, 1856 (Acts 1855-56, p. 145), amendatory of the act of January 15, 1852 (Acts 1851-52, p. 235), creditors of guardians are persons so far interested in the administration of estates committed to their care as entitles them to the same ample remedies afforded, by section 3383 of the Code, to legatees and distributees as against executors and administrators, and, by section 3385, to wards against their guardians; and therefore, upon the recovery of a proper judgment against a guardian for and on account of a debt legally incurred by him in respect of the trust estate, supported by a return of nulla bona upon the execution thereon issued, such a creditor is entitled to sue the guardian and the sureties upon his bond, and a declaration alleging these facts

sets forth a cause of action, and should not be dismissed upon demurrer.

(Syllabus by the Court.)

Error from superior court, Bibb county; H. C. Roney, Judge.

Action by W. M. Lewis against J. W. Oliver. There was a judgment in favor of defendant, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

The following is the official report:

Lewis brought his action in the city court of Macon against Oliver as principal and Head as security, alleging that they were indebted to him \$240, with interest, on a bond made by them to the ordinary of Bibb county, conditioned that Oliver, as guardian of one Moore, an orphan, should well and truly maintain, clothe, and educate said orphan according to his circumstances, and should take good and lawful care of his person and property, according to law. The petition further alleged that the indebtedness arises by reason of the following facts, which constitute a breach of the bond: On December 25, 1892, petitioner obtained a judgment in the city court of Macon against the said Oliver, guardian of Moore, for \$245. On January 20, 1893, a *fi. fa.* was placed in the hands of the sheriff, and he being unable to find any property or effects of Oliver, guardian as aforesaid, and Oliver refusing to pay the judgment, on May 15, 1893, entered his return of nulla bona on the *fi. fa.* Copy of the bond was attached. Defendants demurred to this declaration, and moved to dismiss the case, on the ground that there was no cause of action set out. The demurrer was overruled, and there was a verdict in favor of Head, security, but against Oliver, guardian, for \$100; and, on a motion filed by Lewis, a new trial was granted. Oliver took the case by certiorari to the superior court, alleging that the court erred in overruling the demurrer and motion to dismiss. In the superior court Lewis objected to the manner in which the certiorari was brought, because brought by only one of the defendants in the suit on the bond. This objection was overruled. The court sustained the certiorari, and ordered the case dismissed in the court below. To these rulings Lewis excepted.

Ryals & Stone, for plaintiff in error. John R. L. Smith, for defendant in error.

ATKINSON, J. Upon the questions of practice made in this case in the court below, there does not appear to have been any such assignments of error upon the judgments thereon rendered as will authorize this court to proceed to judgment thereon, and therefore, in the consideration of this case, the court confines its inquiries to the questions of law made upon the demurrer to the declaration of the plaintiff. The record is set out with sufficient fullness in the offi-

cial report to clearly indicate upon what points the court ruled, and to what propositions in the rendition of this judgment we specially address ourselves.

If this were a contest between a creditor of an estate and an executor or administrator, the question would be wholly free from difficulty, upon the provisions of the Code. If it were between a guardian and his ward, no difficulty would arise. But the question is whether a creditor of a guardian has the same remedies against him and his bondsmen as are given by section 3383 of the Code to creditors as against administrators and executors. We think this question should be answered in the affirmative. The general assembly, by an act approved on the 15th day of January, 1852, enacted those statutory provisions which are embraced in sections 3383-3387 of the Code. By section 3383 it is provided that any person having a demand against an executor or administrator, upon reducing his claim to judgment as against the executor or administrator, and upon a return of nulla bona entered thereon by the sheriff or other officer authorized to make the same, may at once proceed to sue upon the bond of the executor or administrator, and may recover judgment against the principal and his sureties in the same action; and if the principal has removed beyond the limits of this state, or has departed this life, or has no legal representative, then he may sue the sureties on his bond. Section 3385 gives the same remedy to the ward against his guardian upon his coming of age. Subsequently an act of the general assembly was passed, and approved on the 5th day of March, 1856, being entitled "An act to explain and amend" the act of January 15, 1852, which is heretofore referred to. In the preamble of this act it is expressly declared: "Whereas, it was the meaning and intention of the legislature in the passage of the above-recited act to give to creditors the same ample remedy against executors, administrators and guardians as is there given to legatees, distributees and wards, and which was omitted to be done in said act, for remedy whereof * * *." Then section 1 of that act provides that when any executor, administrator, or guardian shall remove beyond the state, or place himself in such a situation under the laws of this state as to render himself liable to attachment, in such case any person having claims or demands against such executor, administrator, or guardian should have the privilege to proceed immediately against him and his sureties. When the Code was adopted, provisions were made authorizing the institution of such actions against guardians, whether they be absconding or not; so that section 1819 of the Code provides that suit may be instituted against guardians and the sureties on their bonds in the same action, either at the instance of the ward or a new guardian or any other person interested,

without first suing the guardian thereon. Now, the creditor of an estate represented by a guardian is, to the extent of having his debt liquidated therefrom at least, interested therein; so that, under section 1819 of the Code, he comes squarely within that class of persons to whom the same ample remedies were intended to be extended as were provided by the act of 1856, which was amendatory of the act of 1852. Therefore, this plaintiff having reduced his claim to judgment, and having had a return of nulla bona entered upon the execution thereon issued, he was entitled, without more, to proceed to judgment against this guardian and the sureties on his bond; and, the declaration alleging fully these substantive facts, the court erred in sustaining the certiorari, and in directing a dismissal of the action by the judge of the city court. Let the judgment of the court below be reversed.

(97 Ga. 337)

LONG v. SILVEY et al.

(Supreme Court of Georgia. Aug. 12, 1895.)

EXECUTION—PROPERTY SUBJECT TO—SUFFICIENCY OF EVIDENCE.

The evidence fully warranted the verdict, and nothing appears in the record which would authorize this court to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Harris county; W. B. Butt, Judge.

To property levied on as that of E. D. Long, E. C. Long interposed a claim of ownership. To a judgment finding the property subject, claimant brings error. Affirmed.

The following is the official report:

A number of *fi. fas.* in favor of John Silvey Co. against E. D. Long, based upon judgments of May 5, 1893, were levied on lots 170 and 151, and 63 acres off the west side of lot No. 138, containing 468 acres, in the Eighteenth district of Harris county. The property was claimed by Mrs. E. C. Long, wife of E. D. Long. There was a verdict finding the property subject, and claimant's motion for new trial being overruled, she excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because plaintiff's counsel asked W. A. Ward (one of the firm of John Silvey & Co., who sold Long the goods for which the notes were given) the following question: "Did you sell them goods upon the strength of the ownership of this land?" which question was objected to by claimant's counsel. The court then said to plaintiff's counsel, "You can ask him what representations he made to him at the time about paying for these goods," to which remark and ruling of the court the claimant excepts, and assigns the same as error. The witness then said: "I sold Mr. Long these goods that he owes for. It was

after Long & Lynch dissolved. We first commenced selling them when Long and Lynch were together. After they dissolved, they paid us our claim, Long & Lynch. When I sold him these goods, I asked him his financial standing. I asked him if Mr. Lynch's going out of the business would take any strength from it, and he said: 'No; I am in a better fix now than when I had Lynch with me.' He said: 'Lynch was robbing me, and I got rid of him.' He says: 'Now I am all right. Lynch had nothing. I had everything all the while.' I says: 'What property have you got?' And he told me about five hundred acres of land,—between five hundred and six hundred acres of land. I asked him, was it his home, and he said: 'Yes; it is my home, and I don't owe a dollar on it.' I says: 'Have you paid anything on that mortgage?' And he says: 'Parker still holds the mortgage on the stock of goods, but I can run that as long as I please. I can pay it when I get ready. I have got enough on my books to pay off the mortgage.' He said: 'I still own my land, and don't owe a cent on it.' He says he could not pay the notes when they fell due, 'but I can pay them in the fall, at eight per cent. interest.' He said he would pay them, and the last conversation I had with him he says: 'The land is unincumbered, and is my own home.' The admission of this testimony is assigned as error. It is not stated in this ground what objection was made to the evidence. Error in charging: "You may look to all the transactions between the claimant and the defendant, anything the claimant may have stated, any representation the defendant may have made in order to purchase these goods, the foundation of this indebtedness."

B. H. Walton and C. J. Thornton, for plaintiff in error. R. A. Russell and Brannon, Hatcher & Martin, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 811)

CLEMENT et al. v. HAWKINS.

(Supreme Court of Georgia. July 29, 1895.)

ADMINISTRATION—ACTION ON BOND—SUFFICIENCY OF EVIDENCE.

1. The defense to an action upon an administrator's bond, brought by the ordinary, for the use of an heir of the intestate's estate, for a distributive share therein, being that the administrator had paid out the entire estate, or its proceeds, upon debts due by the deceased, in order to sustain this defense, it was essential to show, not only that the entire estate was in fact paid out and exhausted, but also that the payments by the administrator were upon valid and lawful debts or demands against the estate.

2. No returns having been made to the ordinary showing the administrator's disbursements, the evidence in this case did not so plainly establish the defense above indicated as to require a finding for the defendants. This being so, and there being ample evidence to sus-

tain the verdict in the plaintiff's favor, this court will not control the discretion of the trial judge in refusing to set it aside.

(Syllabus by the Court.)

Error from superior court, Forsyth county; G. F. Gober, Judge.

Action on a bond by H. L. Hawkins, ordinary, against P. A. Clement, executor, and others. Plaintiff had judgment, and defendants bring error. Affirmed.

The following is the official report:

Hawkins, as ordinary of Forsyth county, for the use of Fannie Humphrey, formerly Fannie Medlock, daughter of Arsenia Medlock, deceased, sued P. A. Clement, as executor of Isaac S. Clement, and R. P. Lester upon an administrator's bond, given by Isaac S. Clement, and Lester and one Kellogg as sureties, for the due administration of the estate of Arsenia Medlock. It was alleged in the declaration that Kellogg is dead, that there was no administration upon his estate, and that his entire estate was set apart as a year's support to his widow and minor children. There was a verdict for plaintiff for \$72. Defendants' motion for a new trial was overruled, and they excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc.; also, that the verdict was contrary to the following portion of the charge: "An administrator takes charge of an estate for the purpose of administering it, and he must pay the debts of the deceased before any distributee of the estate can receive anything from it, and if an administrator pays out all the assets of an estate in the settlement and payment of valid, subsisting debts against the estate, and there was no assets left, a distributee would not be entitled to a judgment against the administrator for any part of the estate." The evidence for plaintiff tended to show the following: Clement was appointed administrator of Arsenia Medlock at the November term, 1874, of the court of ordinary of Forsyth county, and gave bond and qualified November 2, 1874. Kellogg is dead, his estate is unrepresented, and his entire estate has been set apart as a year's support for his widow. A sale bill of sale of personalty of Arsenia Medlock was filed in the office of the ordinary by the administrator December 22, 1874; the sale having been made November 20, 1874, and amounting to \$34.35. The administrator also filed, October 26, 1875, a sale bill of sale of lands of Arsenia Medlock the first Tuesday in January, 1875, for \$252 cash. Isaac S. Clement has died, and letters testamentary issued to Paul A. Clement, his executor, October 3, 1893. Isaac S. Clement died about Christmas, 1891. He made no annual return as administrator of Arsenia Medlock. Fannie Humphrey is the daughter of Arsenia Medlock. When said Arsenia died, she possessed two lots of land in Forsyth county, a one-horse wagon, a horse worth about \$125, household and kitchen furniture, about 200 bushels of corn (witness thought), worth

from 75 cents to \$1 per bushel, some fodder, shucks, cotton seed, etc., two or three bales of cotton, and some money (witness did not know how much). The witness, Mrs. Humphrey, further testified: "A part of the property was sold by Clement, administrator. I do not know what became of the remainder. I am 33 years old; was 13 years old when my mother died. I never received a cent of her estate. I was the only child, and the only legal heir, unless my father would be considered an heir. I never had a guardian appointed. If my mother was indebted to any one I did not know it. I do not know of the administrator having paid out any of the money on her debts. I do not know how much James M. Medlock has received. Arsenia Medlock was not insolvent, and was in debt but very little, if any, when she died. She did not owe Robert Thompson anything at her death. She may have owed Dr. Brown a small bill. If she owed S. E. Dodd anything, I do not know it; and I do not know of any other small debt she owed at the time of her death. If Clement, the administrator, paid J. M. Medlock anything, I do not know it.

Defendant introduced receipts from appraisers of the estate of Arsenia Medlock, dated December 6, 1875, amounting to \$6, for services as appraisers, the receipts being to Clement, administrator, one of them being signed by A. P. Bell, "by I. S. Clements." Also, evidence showing the genuineness of the signatures, and that the persons who purported to act as appraisers did so act. One of the appraisers testified that, at the time of her death, Arsenia Medlock owned a horse or mare worth \$100, and another that was worth \$100 or \$125; and one of them testified, further, that he did not remember what personal property was on hand,—that there was some corn, but not much. The sale bill of personalty introduced by plaintiff did not show the sale of any mare or horse, but showed the sale of 20 bushels of corn at 75 cents a bushel. Defendant also introduced a receipt from the publisher of a newspaper, to Clement, administrator, dated December 26, 1874, for \$18 for legal advertising connected with the administration, and showed the genuineness of the signature. Also, a receipt to the administrator, dated January 11, 1876, for \$66, "upon the claims of Robert Thompson" against the estate, this receipt to include a receipt for \$44 "which is now lost." This receipt was signed by Thomas L. Lewis, as attorney for Robert Thompson. Also, receipt to Clement, administrator, dated December 2, 1875, for \$43.98 "on the claims against Arsenia Medlock filed with him by Robert Thompson." This receipt was also signed by Lewis, as attorney for Thompson. Lewis testified that he signed these receipts, and received the money on them from Clements; that it was also his recollection that he represented S. E. Dodd, who held claims against the estate, and that Dodd signed the receipt

(introduced), and got the money on it. The receipt was to Clement, administrator, dated December 7, 1875, for \$60, "in full of all demands against said estate." The witness further testified that the claims of Thompson consisted of notes and accounts (he did not remember the amounts, nor character of the claims); that he did not collect all of the debts of Thompson and Dodd, because the estate was not sufficient to pay them off in full, and the creditors had to prorate. Also, a receipt from D. J. Brown to Clement, administrator, dated December 7, 1875, for \$26.38, "in full of all demands against the estate of said deceased," and evidence as to the genuineness of the signature of Brown to the receipt. Also, receipt to Clement, administrator, dated December 7, 1875, for "four dollars in full of all demands," signed "Stone & Rusk." Stone testified that he signed this receipt; that the debt against the estate was for J. M. Medlock's store account, but he might be mistaken as to that, and charged the goods to Arsenia Medlock; and that witness did not get the entire amount due Stone & Rusk. Also, receipt to Clement from J. M. Medlock, December 13, 18—, for \$44, "in full of amount due me as a creditor of my wife Arsenia Medlock, deceased, on debts of hers paid off by me after her death." Defendant also introduced an account of J. M. Medlock against Arsenia Medlock for amounts for physician's bills, medicine, expenses, etc. in last illness of deceased, footing up \$85.70, with an affidavit of Medlock thereto attached, dated November 5, 1875, that said account was just and true, and proved the genuineness of the signature of Medlock to the affidavit. Also, a promissory note given by Arsenia Medlock to S. E. Dodd, dated July 4, 1873, and due January 1, 1874, for \$55, purchase money of lot of land in Forsyth county, and proved the genuineness of her signature to the note. Also, account of Dr. B. J. Brown against Arsenia Medlock for medicine, medical services, etc., \$64,—\$27.36 of which was for services rendered in her last illness,—and the affidavit of Brown, attached thereto, verifying the same, dated November 2, 1875, and evidence of the genuineness of Brown's signature thereto. Also, two accounts of Robert Thompson against the estate, one amounting to \$14.85 and the other to \$13.35, sworn to by Thompson, November 19, 1874, and August 17, 1875, respectively, and evidence as to the genuineness of the signature of the officer attesting the affidavit. Also, account of F. H. Nickols against Arsenia Medlock for medicine, \$5, with the affidavit of Nickols verifying the same, and testifying as to the genuineness of the signature of the officer attesting the affidavit.

G. L. Bell and W. W. Braswell, for plaintiffs in error. H. L. Patterson, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 334)

AUSTELL et al. v. JAMES.

(Supreme Court of Georgia. July 29, 1895.)

ASSIGNMENTS OF ERROR—REQUESTS TO CHARGE.

The exception to the charge "as a whole," and the assignments of error in connection therewith as to the "failure" of the court to charge so and so, are too vague and indefinite to present any distinct question for determination by this court; the refusal of the trial judge to give in charge to the jury the oral request submitted is not cause for a new trial; and it has not been made to appear to this court that the evidence, which was exceedingly confused and complicated, was insufficient to warrant the verdict. The plaintiffs in error have not successfully carried the burden imposed upon them by law of affirmatively showing error entitling them to a new trial.

(Syllabus by the Court.)

Error from superior court, Cobb county; G. F. Gober, Judge.

Action by J. L. James against W. W. Austell and others. Plaintiff had judgment, and defendants bring error. Affirmed.

Mozley & Morris, for plaintiffs in error. Clay & Blair, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 335)

CENTRAL RAILROAD & BANKING CO. v. OGLETREE.

(Supreme Court of Georgia. July 29, 1895.)

INJURY TO PASSENGER—COMPETENCY OF JUROR—EVIDENCE.

Under the facts appearing in the record, there was no error in refusing to "excuse" the juror alleged to be disqualified; there was no substantial error, if any at all, in admitting or ruling out evidence; the requests to charge were, in view of the evidence and of the entire charge given, sufficiently covered; and the verdict was warranted by the evidence. None of the grounds of the motion for a new trial are of sufficient novelty or importance to render it necessary to formulate distinctly the legal principles involved. There was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Action by Louisa Ogletree against the Central Railroad & Banking Company for personal injuries. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

Louisa Ogletree sued the railroad company for damages from personal injuries alleged to have been sustained by her from the derailling of a car in which she was a passenger when the train was running at a high and dangerous rate of speed over a defective portion of defendant's track, of which defective condition defendant had previously been put upon notice, and had neglected to repair the track. There was a verdict for plaintiff for \$1,500, and defendant's motion for new trial being overruled, it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also,

the ground that the verdict was excessive. Further, because the court erred in ruling as follows: Upon the trial of said case, the court having adjourned at the conclusion of a day's work till 9 o'clock a. m., on June 13, 1894, upon the reassembling of the court on the morning of said June 13th, and before the conclusion of the testimony of the first witness for plaintiff, defendant's counsel stated to the court that, during the adjournment, defendant's counsel learned for the first time that one of the jurors trying the case was a member of a jury that had rendered a verdict against the defendant at the November, 1892, adjourned term in the case of W. J. Phinazee against the Central Railroad & Banking Company of Georgia, in Bibb superior court, growing out of the same accident, and involving the same circumstances of alleged negligence on the part of defendant; that said juror, during the adjournment, had called the attention of defendant's counsel to said fact in order that he might determine whether he was a proper juror in the present case; that defendant's sole counsel in the Phinazee case, the late Judge Richard F. Lyon, was dead, and defendant's counsel did not know before that said juror was upon said jury in the Phinazee case; that defendant's counsel considered said juror objectionable on that account, and insisted that he was disqualified, and now called the matter to the attention of the court at the first opportunity, and asked that the court might excuse said juror. The court stated that said juror had, during said case, come to the court, and stated to the court the same facts that he had told defendant's counsel. Defendant's counsel insisted that said juror was disqualified. Thereupon the court held that said juror was not disqualified, and further held that, if he had been disqualified, such fact had been waived by defendant not having objected to him on such ground before starting into the case, the court holding that the fact that the names of the jury in the Phinazee case were on the minutes was sufficient notice of the fact, and then and there overruled defendant's objection to such juror. Error in ruling: Plaintiff proposed to prove that W. J. Phinazee was in the same car with her at the time she was hurt. To the admission of this testimony defendant objected, on the ground that it was wholly irrelevant. This objection was overruled, and the testimony admitted. Phinazee was afterwards introduced as a witness by plaintiff. Error in ruling as follows: Plaintiff proposed to prove that one Eliza Pharr, who was on the train at the time with plaintiff, and in the same seat with her, was dead at the time of the trial. To the admission of this testimony defendant objected, on the ground that it was wholly irrelevant. This objection was overruled, and the testimony admitted. Error in ruling as follows: Dr. Ponder, a witness for defendant, having testified that, before he went out to see plain-

tiff, plaintiff's husband had Dr. Alexander to prescribe for her, plaintiff's counsel asked the witness, on cross-examination, how he knew that Dr. Alexander had treated plaintiff, and witness stated that her husband told witness so. Thereupon plaintiff moved to rule out the testimony of the witness about Dr. Alexander having treated plaintiff, which motion the court sustained. Error in ruling, as follows: Plaintiff tendered in evidence table showing the value of annuities on single lives according to the Carlisle Table of Mortality, being the table found in 70 Ga. 847, Append. Defendant objected to the evidence as irrelevant, but the objection was overruled, and the table admitted. Error in refusing to charge the following written requests of defendant: "If you believe that any of the witnesses for either plaintiff or defendant have been successfully impeached by disproof of any of the material facts testified to by said witness, you would be authorized to entirely disregard the testimony of such witness." "The burden is upon the plaintiff to establish the fact that her injury was caused by the railroad company by a preponderance of testimony. If the evidence should indicate the existence of an independent disease, not caused by the railroad, and which might have caused the symptoms plaintiff testified to, and you are left equally undecided as to whether the injury was caused by the railroad company or by such independent cause, you would be authorized to find for the defendant."

Steed & Wimberly and John R. Cooper, for plaintiff in error. H. V. Washington and Hardeman, Davis & Turner, for defendant in error.

PER OURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 207)

WYLIE v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

LARCENY—SUFFICIENCY OF EVIDENCE.

Taking the evidence most favorably for the state's contention, and the statement of the accused most strongly against him, nothing more was established than that he contracted with the prosecutrix to build for her a house within a stipulated time, and at a stated price, which she paid to him in advance, and that he really never intended to build the house at all, but fraudulently pretended he would do so, for the purpose of obtaining the money, and applying it to his own uses. While these facts show great moral turpitude on his part, they do not render him guilty of larceny after trust, and therefore a conviction of this offense was contrary to law.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Sherman Wylie was convicted of larceny, and brings error. Reversed.

Geo. P. Roberts and F. R. Walker, for plaintiff in error. C. D. Hill, Sol. Gen., and T. W. Rucker, for the State.

PER CURIAM. Judgment reversed.

(97 Ga. 214)

CUNNINGHAM v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

WITNESS—COMPETENCY—ENTERING COURT ROOM IN DISOBEDIENCE OF ORDER—HARMLESS ERROR.

1. Where, in the trial of a criminal case, a witness for the accused was sworn and sequestered, but, in disobedience of the court's order, returned to the court room, and heard the testimony of some of the state's witnesses, this fact alone afforded no reason for excluding him from testifying. Having heard the testimony of the other witnesses would go to his credit, but would not render him incompetent; and his misconduct, while not operating to disqualify him, simply rendered him amenable to the court as for a contempt. May v. State, 17 S. E. 108, 90 Ga. 200, and cases cited; Railroad Co. v. Johnson, 16 S. E. 49, 90 Ga. 500. The ruling now made is not inconsistent with that announced in Pergason v. Etcherson, 18 S. E. 29, 91 Ga. 785. The conduct of the counsel amounted to a voluntary waiver of their right to introduce the witness who had disobeyed the court's order, and by means of such waiver they had procured the discharge of the witness from the rule for contempt. After having thus waived the right to introduce the witness under the circumstances stated, this court would not compel the trial judge to allow the waiver to be recalled and the witness examined.

2. Under such circumstances, it was error to reject the testimony of the witness when offered to prove competent facts; but this error will not require the granting of a new trial when the evidence rejected was only of an impeaching character, of little or no materiality, and not such as would be at all likely to produce a verdict different from that which the jury rendered.

3. The several grounds of the motion for a new trial alleging error in admitting evidence cannot be considered, it not appearing that any objection to such evidence was made at the time when it was offered.

4. The evidence fully warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Pomp Cunningham was convicted of robbery, and brings error. Affirmed.

The following is the official report:

Pomp Cunningham and Henry Almand were indicted for the offense of robbery, which it was alleged they committed by violently, etc., taking from the person of Robert Starks seven dollars in silver currency. Pomp Cunningham was put upon trial, and was found guilty. His motion for new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in excluding Rob McEwing from testifying, when offered by defendant in rebuttal, and by whom defendant proposed to prove that on Sunday morning, after the crime was alleged to have been

committed, Robert Starks told witness, while on the train to Covington, that Pomp Cunningham had robbed him of \$9.50; that he had \$9.50 in his overcoat pocket, and they got that, and he had a half dollar in his watch pocket, and they failed to get that. It appears that Starks had testified that he had \$9.50 in his pocket in silver; that he had \$9 in his overcoat pocket; that he took the money out of his overcoat pocket, and put it in his pants pocket behind, and, afterwards, after making some change, put \$7 in silver money in his front pants pocket; and that defendants made a violent assault upon him, and Cunningham tripped him up and threw him down, and Almand ran his hand in witness' pants pocket, and, when he did so, witness felt Almand's hand getting his money. The witness was asked whether he did not tell McEwing on the train that he had been robbed of \$9 or \$9.50, and denied having done so. Error in admitting, over defendant's objection, the statements of Starks made to W. H. M. Austin some time after the crime was alleged to have been committed. It was not stated in this ground what objection was made to this evidence when offered. Error in permitting Starks to state that the woman holloed, and told him not to go up the road behind them fellows, that they would kill him, but to go down through a sort of little alleyway there, and come up by a little bit of swamp where the spring was. It was not stated in this ground what objection was made to this evidence when offered. Error in admitting the following evidence of Tude Harris, over objection of defendant: "After that, Hennie told this man not to go up the street, that these boys would hurt him, and she told him to go around by Mrs. Travis, and come up by the water tank; and he went that way. Mr. Harper came down there, and wanted to know what we were rowing about." It was not stated in this ground what objection was made to this evidence when offered. Error in admitting the following evidence of W. H. M. Austin, over objection of defendant: "Robert Starks came to me, and made complaint: 'Are you the marshal? I want you to go down the street with me. Two fellows down here robbed me, and tried to kill me.' And I asked if he knew who they were, and he said he didn't know their names, but one of them they called Henry. I went down there. This fellow Starks described the knives. He said one was a long, keen-bladed knife that one of them had, and the other was a sorter hawked-bill knife, a new-looking knife; and he told which one had the new-looking knife, and which one had the other. When we got them up to the court-house, we searched them, and found such knives as Starks had described on the men." It was not stated in this ground what objection was made to the evidence when offered. In a note to the ground of the motion as to the offered testimony of McEwing,

the court states: "McEwing was offered as a witness at the beginning of the trial. The witnesses were put under the rule. It was admitted by the witness that he had been in the court room, and had heard witnesses testify. Exercising the discretion allowed by the law, the court refused to allow the witness to testify."

G. W. Gleaton and Glenn & Irwin, for plaintiff in error. J. S. Candler, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

(97 Ga. 258)

CARSON v. MAYOR, ETC., OF FORSYTH.
(Supreme Court of Georgia. Aug. 5, 1895.)

CERTIORARI—APPLICATION FOR.

Under section 4057 of the Code, as amended by the act of 1889 (Acts 1889, p. 84), in order to authorize the issuing of a writ of certiorari, it must be "applied for" within 30 days from the date of the judgment complained of; and if this is done, and the sanction obtained, then, under section 2920 of the Code, which was not amended by the above-recited act, the petition may be filed at any time within three months from the date of the judgment sought to be reversed.

(Syllabus by the Court.)

Error from superior court, Monroe county; J. J. Hunt, Judge.

Certiorari at the suit of H. J. Carson against the mayor and council of Forsyth. The writ was dismissed, and plaintiff in certiorari brings error. Reversed.

The following is the official report:

A case was tried in the mayor's court of Forsyth on May 4, 1894. On Monday, June 4th, defendant presented a petition for certiorari which was sanctioned, but the petition was not filed until the next day. A motion to dismiss the writ was made, because the petition had not been filed within the time required by law, and was sustained. On the hearing of the motion, the following appeared: On June 4th, at 10 o'clock, counsel for defendant sent to Judge Hunt, at Griffin, a telegraphic message, viz.: "Have important papers for you to sign. This last day. When can I see you?" The message was received by the judge, and, at 11 o'clock, he answered by telegraph: "Will meet you at cars to-night." Counsel went to Griffin, reaching there about 6 o'clock that evening, presented the petition for certiorari to the judge, and asked him to examine and pass upon it, stating that, as it was the last day, he desired to return to Forsyth. The judge took the papers, saying he would examine them, and pass on them, and bring them to Forsyth the next morning. Counsel insisted that he then examine and sign the same, and the judge replied that he would pass on the application that day, and bring the papers down on the next, and that he would protect defendant in his rights in so far as the same related to the time of the signing. Nothing

was then said to the judge about filing the petition. All counsel asked was that it be sanctioned on June 4th. On the next day the judge went to Forsyth, carried the application, and called attention to the fact that he had not granted the certiorari, nor signed the same, but would do so as of June 4th, as it was then tendered. Counsel for both parties were then in court, and the judge then and there delivered the application and order granting the certiorari to defendant's counsel, when the same was at once delivered to the clerk of the superior court, who made and signed thereon an entry of filing, dated June 5th. When counsel were so notified in open court by the judge that he was about to sanction the petition for certiorari, counsel for defendant in certiorari objected, on the ground that it would not then be sanctioned within the 30 days, as required by law. The court overruled the objection, and ruled that the application had been presented in time, that counsel for the applicant had discharged his duty, and done all he could to comply with the law, and that the judge held the papers for his accommodation, and thereupon sanctioned the application as of June 4th.

J. P. Carson and Stone & Clark, for plaintiff in error. Berner & Bloodworth, for defendant in error.

PER CURIAM. Judgment reversed.

(96 Ga. 786)

DANIELS v. WESTERN & A. R. CO.

(Supreme Court of Georgia. Aug. 16, 1895.)

CARRIERS — DUTIES TO PASSENGERS — ACTION FOR INJURIES — SUFFICIENCY OF EVIDENCE.

1. It is the duty of a railway company to carry its passengers safely to their destination, stop a sufficient length of time to allow them to leave the train in safety, and provide a suitable place for their so doing.

2. If, under any circumstances, a railroad company is under a duty to render an infirm passenger physical personal assistance in alighting from a train, yet, as the evidence in the present case fails entirely to show such a state of facts as would require the rendering of such assistance to the plaintiff, the verdict was right upon the substantial merits of the case; and, if the charge complained of was in that respect erroneous; it is not, in this case, cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Nancy Daniels against the Western & Atlantic Railroad Company for personal injuries. Defendant had judgment, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Nancy Daniels sued the railroad company for damages from personal injuries. The testimony for plaintiff was to the following effect: In January, 1893, she bought a ticket from Dalton to Ringgold. Being infirm and

weak in her hands, they being drawn with rheumatism, her son Ed helped her on the train, and the colored porter on the train helped her on the car. Ed Daniels told this colored porter that his mother was going to Ringgold, and was sick, and would need help in getting off the cars at Ringgold. The porter said he would help her off; that it was his or the road's business to do this. Ed tried to notify the conductor, but failed. In getting off the cars at Ringgold, plaintiff fell, and was injured. No one helped or offered to help her off. It was, according to plaintiff's testimony, two or three feet from the steps to the ground; according to the testimony of others, from fourteen to twenty inches. The ground was smooth. For the defendant, it appeared that neither the conductor, his flagman, nor the baggage master knew anything about the infirmity of the plaintiff, none of them but the conductor knowing she was on the train, and he only seeing her as she handed him her ticket. The place was a safe place to alight. The flagman testified he saw her attempting to get off; that she seemed to have hold of the railing, and to step off; that her foot gave way, and she fell on her left side, etc. The court charged the jury, among other things, as follows, to the giving of which charges plaintiff excepted: "The only duty on the defendant in this case, placed there by law, was to safely carry the plaintiff to Ringgold, and allow her a reasonable time to get off the train, and to furnish a safe place to get off the train." "If you find that plaintiff or her son notified the porter of the condition of plaintiff's health, and that the porter agreed to assist her off the train, this promise would not affect defendant's liability in any way." "It is not incumbent on defendant to assist infirm persons in getting on or off the train. The defendant is bound to receive every person offering to go and to pay the usual fare; but it is a duty outside of a contract, of a person needing assistance, to get such assistance outside of defendant's employes." There was a verdict for the defendant.

B. Z. Herndon and W. K. Moore, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 311)

THOMAS v. STATE.

(Supreme Court of Georgia. June 10, 1895.)

INDICTMENT FOR LARCENY — OWNERSHIP OF PROPERTY.

It is indispensable to the maintenance of a conviction for larceny that the indictment allege the ownership of the property stolen, or that the owner thereof is unknown; and, the indictment failing to allege either, a motion in arrest of judgment should be sustained.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. H. Callaway, Judge.

John Thomas, having been convicted of larceny, brings error. Reversed.

Chas. A. Picquet, for plaintiff in error. W. H. Davis, Sol. Gen., and Felder & Davis, for the State.

ATKINSON, J. The defendant was indicted for the offense of simple larceny. The indictment charged that on a given day, in a certain county, he wrongfully and fraudulently took and carried away, with intent to steal the same, one brindle cow, with crumple horns, of the value of \$10, Jesse Collier, then and there, contrary to the laws of said state, etc. After conviction, he moved in arrest of judgment, upon the ground that the indictment failed to allege the ownership of the property alleged to have been stolen, which motion the court overruled, and, exception being taken thereto, we are now to inquire if the judgment complained of be erroneous. Larceny is defined to be the wrongful and fraudulent taking and carrying away the personal goods of another with intent to steal the same. That the goods taken and carried away should be the property of a person other than the one so taking and carrying them away is as essential to the commission of the offense of larceny as the taking and carrying away itself. This is one of the essential ingredients of the offense inhering in the very definition of larceny. And the reason of the general rule that the indictment should either allege the ownership of the property or that the owner is unknown is to the end that the court may judicially determine that the property alleged to have been stolen was not in fact the property of the person accused, and therefore that the taking and carrying away were wrongful. Under the peculiar requirements of our statute, providing, among other things, that the indictment for larceny of cattle should so describe the animal as that it would be capable of being identified by the owner, another reason arises why the ownership is necessary to be alleged. The capability of identification by the owner is the test of the sufficiency of the descriptive averments, and it might become important in the course of a trial to test its sufficiency by the testimony of the owner. Therefore, in this kind of a case, there is, as stated, another reason why the indictment should point out the person to whom this test is to be applied. In this particular case the indictment fails to make any allusion whatever to the ownership of the property, and it is therefore wholly and hopelessly defective. It is no such defect of form as is curable by verdict, but it is a defect of substance that goes to the very gist of the offense. Without it, the indictment fails wholly to allege the violation of a public statute punishable as a criminal offense. A judgment pronounced thereon

is unsupported by the record, and the motion in arrest of judgment should have prevailed. Let the judgment of the court below be reversed.

(96 Ga. 307)

BRANHAM v. STATE.

(Supreme Court of Georgia. June 10, 1895.)

RULINGS ON INDICTMENT—REVIEW—SWINDLING—WHEAT CONSTITUTES.

1. Exceptions pendente lite to the overruling of a demurrer to an indictment cannot be considered by the supreme court when no assignment of error has been made thereon either in this court or in the bill of exceptions by which the case is brought here for review.

2. One who obtains a loan of money by representing that he has been employed by a named person of known solvency and credit, and has thus earned a sum of money which that person will shortly pay to him, and by promising to repay the loan out of that sum when collected, all of these representations being utterly false, and they and the promise being deceitfully made for the purpose of obtaining credit with the lender, and defrauding him out of the money loaned, is guilty of being a cheat and swindler, under section 4587 of the Code.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Ichabod A. Branham was convicted of being a cheat and swindler, and brings error. Affirmed.

J. H. Blount, Jr., for plaintiff in error. W. H. Felton, Jr., Sol. Gen., and Harrison & Peeples, for the State.

LUMPKIN, J. 1. The practice is well settled in this state that when exceptions pendente lite to any ruling or decision of the trial court are filed the same will not be considered or passed upon by the supreme court unless there is an assignment of error thereon. Under section 4250 of the Code this may be done in the supreme court after a case reaches here. It would answer the same purpose to make such assignment in the main bill of exceptions by which the case is brought to this court.

2. Under the facts summarized in the second headnote, the accused was, under the provisions of section 4587 of the Code, properly convicted of the offense of being a cheat and swindler. According to that section, if any person, by falsely representing his wealth, obtains a credit, and thus defrauds another person of anything of value, he shall be deemed guilty of this offense. The word "wealth," as used in this section, does not import a great fortune or vast possessions, as is frequently implied from its ordinary use, but its real meaning is the possession or ownership of such means or property as would reasonably entitle one to expect and receive the credit he seeks to obtain. Indeed, this word is at least a mere relative term. Among millionaires, a man worth only \$100,000 is poor indeed; while in some localities a man worth \$5,000 over and above

all his liabilities would be considered a very wealthy citizen. In principle, and very properly, this section applies to one who, by falsely pretending and representing that he owns, or has earned and will receive, something of value, which he neither owns nor is entitled to, thus defrauds another of his property, whether the amount involved be large or small. See *Hathcock v. State*, 88 Ga. 91, 13 S. E. 959, and the authorities there cited. Judgment affirmed.

(97 Ga. 209)

WELLS v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

CRIMINAL LAW — OBJECTIONS NOT RAISED BELOW
—RULINGS ON EVIDENCE—CONSTRUCTION
—CORPUS DELICTI.

1. Exceptions alleging error in overruling a motion to rule out evidence which had been admitted without objection will not be considered by this court unless it appears that some ground or reason for excluding such evidence was stated to and passed upon by the trial judge at the time the motion to rule out was made.

2. It does not affirmatively appear that the court erred in rejecting a letter offered in evidence (apparently admissible upon proper proof of its execution), addressed to the accused, and purporting to have been signed by a witness for the state, to whom the letter was exhibited while on the stand, and who testified positively that he did not sign it, but was unable to state whether he had caused it to be written and sent to the accused or not; there being no other proof as to the execution of the letter, and it being strongly inferable from all the facts in evidence that this witness was illiterate, and that the contents of the letter were not made known to him. Nor was there any error in refusing to allow the accused to read this letter as a part of his statement to the jury.

3. The charge of the court, as a whole, was a clear and admirable presentation of the law applicable to the issues involved, and it fully covered all the requests to charge, in so far as they were legal and pertinent.

4. The corpus delicti was not clearly and satisfactorily proved; and though the evidence relied upon by the state to connect the accused with the alleged offense, it being entirely circumstantial, was consistent with the guilt of the accused, it was not inconsistent with every other reasonable hypothesis; nor was it, as a whole, sufficiently strong and conclusive to show his guilt beyond a reasonable doubt.

5. A new trial should have been granted on the merits.

(Syllabus by the Court.)

Error from superior court, Monroe county; J. B. Williamson, pro hac Judge.

Alexander Wells was convicted of arson, and brings error. Reversed.

The following is the official report:

Wells was indicted for arson in burning "the church building of the Wright's Grove Baptist Church and the congregation worshipping there, and under the control of said Baptist Church and the deacon of said Baptist Church, one Peter Porch." He was found guilty, and, his motion for new trial being overruled, he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in refusing to rule

out and withdraw from the jury, on motion of movant's counsel, the following entries in a World Almanac for 1893, introduced by the state for the purpose of showing the hour the moon rose on the night the arson was committed, to wit: "July, 1893. Sat. First. Moon rises and sets 9:25,"—alleged to be error because the solicitor general failed to prove that said almanac was a correct calendar, and gave the correct time as to the rising and the setting of the moon on the night the crime was said to have been committed, and the almanac did not contain the name of Georgia at all in its reckoning of the time of rising of the moon; further, because, under the law, the time of setting of the moon can only be shown by Stern's United States Calendar, without other proof to sustain it. Movant contends that said testimony was damaging to his case, because the jury relied on it largely in connecting him with the crime, and the absence thereof would have resulted in his acquittal. As to this ground it appears that the almanac was tendered to defendant's attorney, and then admitted without objection. While the state's counsel was making the concluding argument, defendant's council moved to withdraw and rule out the almanac, which motion was overruled. Error in refusing to charge the following written request of movant: "The defendant insists, among other things, that he is not guilty, for the reason that he has proven an alibi; that is, when Wright's Grove Baptist Church was burned, that he was in another place, and therefore he could not and did not commit the crime with which he stands charged. On this issue I charge you that, under the law, before the defendant [can] avail himself of this defense, he must satisfy you that, at the time the burning occurred, it was a physical impossibility for him to have committed the crime, for the reason that he was at another place, and could not have been at the scene of the crime, at the time it was committed,"—alleged to be error because the evidence entitled him to have this principle of law submitted to the jury, as it was one of the defenses relied upon, and embodied the law; error, further, in not submitting the request in the language thereof, and as a distinct principle disconnected from others, and the reference made by the court in the general charge to this branch of the defense was not as full and explicit as the request, and, being connected with the general charge, did not impress the jury as if given separately, as was requested. Error in refusing to charge the following written request of movant: "I charge you that, to establish this defense [alibi], the law only requires the same character and quantity of evidence that it does to establish any other material fact for defense in this or any other criminal case,"—alleged to be error because the request was law and applicable, and because, having charged that defendant's evidence must satisfy the jury that it would

have been impossible for defendant to have been at the scene of the crime, the jury may have been confused as to the amount and character of the evidence necessary to establish an alibi, whereas, if said omitted charge had been given, it would have been clear on that subject, especially as the evidence on that subject was conflicting. Error in refusing to charge: "I charge you that it is incumbent upon the state to satisfy you beyond a reasonable doubt, by competent evidence, which may be positive or circumstantial, that Wright's Grove Baptist Church was feloniously or illegally burned by some person. For and until this was done, no violation has been shown; and the law presumes that the burning was the result of accident, or that it was the result of providential causes. If you are satisfied, beyond a reasonable doubt, that the evidence shows that the church was illegally burned by some person unknown, then, before you would be authorized to find the defendant guilty, the defense (?) must connect the defendant directly with the perpetration of the crime; and this may be shown by any competent legal evidence which is satisfactory to your minds,"—alleged to be error in not giving this request as an isolated proposition applicable to the case, and because it would, if given as requested, have made a deeper impression upon the jury, and they would have fully comprehended its pertinency to the case, and especially would it have been plainer to the view of the defense set up by the defendant. Error in refusing to charge the following written request: "I charge you that the fact that the Wright's Grove church was actually burned by some one must be proven to your satisfaction and beyond a reasonable doubt, for, so long as there exists a doubt, there can be no certainty as to the agent or person, nor that same was burned illegally, nor could there be a legal conviction of defendant, though the evidence might satisfy you that he was at or near the church at the time it was burned,"—alleged to be error because applicable under the facts, and because it made a distinct issue in defendant's evidence, and because the evidence utterly failed to show the church was feloniously burned, and was therefore peculiarly applicable to the case and necessary to defendant's proper defense. Error in refusing to charge the following written request: "I charge you that, when the guilt of defendant depends upon circumstantial evidence alone, the rule is that each separate fact or link which goes to make up the chain of circumstances from which the deduction of guilt is sought to be drawn must be clearly proved; and a fact not clearly proven should not be considered in the chain of circumstances, but should be rejected by the jury; and the circumstances proven must not only be consistent with the defendant's guilt, but they must exclude every other reasonable hypothesis than that of the defendant's guilt. If any one or more of the cir-

cumstances relied upon by the state is not clearly proved, and for this reason you reject one or more of the circumstances relied upon by them, you will inquire whether the remaining circumstances proved, if they are clearly proved, are consistent with the defendant's guilt. All necessary facts and circumstances necessary to show the commission of the crime, and connect the defendant therewith as the party committing the act, must be proved,"—alleged to be error because authorized by the evidence and the law, and because, not being given as requested, it deprived defendant of the benefit of each separate fact or hypothesis tending to establish his innocence; further, because the jury could not understand and appreciate the fact that he was entitled to the benefit of any fact or hypothesis in both branches of the defense that would tend to establish his innocence or establish a reasonable doubt as to his guilt. Error in putting hypothetical cases throughout the charge favorable to the state's theory, and not giving to the jury any hypothetical illustrations favorable to the defendant, as required by the law when the court undertakes to charge hypothetically.

Peter Porch being on the stand for the state, counsel for the defendant exhibited to him a certain letter signed by Peter Porch, addressed to defendant, and dated May 16, 1893, when he stated that he did not write a letter to Wells in May, 1893; he did have several letters written to him; would not state that he did not have the letter presented to him written and sent to Wells. The letter was as follows: "Colliers, Monroe Co., Ga., May 16, '93. To the Rev. A. W. Wells—Dear Sir: I am not so well pleased with you, and I am blood mad with you, and don't you come down here any more to preach, for you is in my way, and I am going to get you out of my way. I have asked you to get out of my way 8 or 10 times, and it don't seems to do any good, and so I will now get you out myself; and so now, Wells, you must not cross my road any more. But now, sir, I will cite you, and what I have already stated to [you], sir; and so now, sir, you may look out, for I shall make you smoke. And I told Henry Phinizee to tell you to look out, and to go to the office and call for a letter, and you will get one from me that will stop you; and if this letter will not stop you, sir, I will stop you myself. I am the man that will sure you, and go now. I don't want to see you again in this life, and if God will give me life, I will put an end to you. Good bye. I have no more to say to you at all. Peter Porch, Deacon of Wright's Grove Church." After the state closed its evidence, the letter was tendered by the defendant, whereupon the court repelled it,—alleged to be error because the letter was sufficiently identified by Porch having examined it, and testifying as above stated, and not repudiating the signature to the letter, the letter being material to the defense. The defendant, Wells, being on

the stand, making his statement, said the letter was received by him by due course of mail, and had been in his possession ever since; whereupon the defendant's counsel again offered to read said letter as evidence, and the court repelled the same. Defendant insists that said ruling was error, for the reason that said letter was fully identified by defendant's statement, and was not disputed by state's evidence, therefore it was a question that should be left to the jury; and because the defendant had a legal right to have the jury to pass on the identity of the letter, under the charge of the court. While Wells was on the stand, making his statement, he offered to read said letter to the jury as a part of his statement, whereupon the court ruled that the defendant could not read said letter as a part of his statement; and defendant says that the court erred in said ruling, for the reason that the contents of said letter were germane to his defense, were a part of the case, and showed the animus of the prosecution, and were material to his defense. The defendant was entitled, under the law, to submit it to the jury, for them to consider and give it such weight as they might desire in reference to it.

Stone & Clark and Persons & Persons, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Harrison & Peeples, for the State.

PER CURIAM. Judgment reversed.

(96 Ga. 309)

MOORE v. STATE.

(Supreme Court of Georgia. June 10, 1895.)

CERTIORARI—APPLICATION FOR.

Where a person, upon being found guilty of a misdemeanor by a jury in the county court of a given county, sued out a certiorari which was made returnable to a regular term of the superior court of that county, the case became a superior court case, and it was the duty of the solicitor general of the circuit embracing that county to represent the state upon the trial of such case. Therefore, according to the principle announced by this court in *Butts v. State*, 16 S. E. 96, 90 Ga. 450, it was essential that notice of the sanction of the writ of certiorari, and of the time and place of hearing, should be given to that officer, instead of to the solicitor of the county court, and there was no error in dismissing the certiorari for want of such notice.

(Syllabus by the Court.)

Error from superior court, Bullock county; R. L. Gamble, Judge.

Certiorari at the suit of Molly Moore to review a conviction before the county court. To a judgment dismissing the writ, defendant brings error. Affirmed.

H. B. Strange and J. A. Brannen, for plaintiff in error. B. D. Evans, Jr., Sol. Gen., and Felder & Davis, for the State.

LUMPKIN, J. Under sections 302 and 303 of the Code, a writ of certiorari from a con-

viction in a county court is not necessarily returnable to a regular term of the superior court; but the superior court judge may require the county judge to certify and send up to the former a complete history of the case, and the certiorari may then be heard and determined at any time, after 10 days' notice to the accuser. It can hardly be doubted, however, that the judge of the superior court has the right to make the certiorari returnable to a regular term of the superior court, if he sees proper to do so, and this, we understand, is the usual practice observed in such cases. At any rate, this seems to have been done in the present instance. We therefore think the certiorari became a regular superior court case. It was undoubtedly a criminal case, to which the state was a party. This being so, it was, under the constitution (Code, § 5160), the duty of the solicitor general of the circuit to represent the state upon the trial of the case in the superior court. Therefore, according to the principle announced by this court in *Butts v. State*, 90 Ga. 450, 16 S. E. 96, he should have had notice of the sanction of the certiorari and of the time and place of hearing; and the notice as to these matters which was served upon the solicitor of the county court was ineffectual. We are not now called upon to decide whether or not notice to the accuser would have been sufficient had the certiorari been made returnable before the judge of the superior court in vacation.

Judgment affirmed.

(97 Ga. 233)

MULLALLY v. CULVER.

(Supreme Court of Georgia. July 29, 1895.)

CONFLICTING EVIDENCE—REVIEW.

The determination of this case depended entirely upon the opinion entertained by the jury of conflicting evidence. This being so, and the evidence for the plaintiff being amply sufficient to warrant the verdict in his favor, and that verdict having been approved by the trial judge, this court, as it has heretofore announced in cases without number, will not reverse the judgment overruling the motion for a new trial, based on the general grounds that the verdict was contrary to law and evidence.

(Syllabus by the Court.)

Error from superior court, Hancock county; W. F. Jenkins, Judge.

Action by E. B. Culver against W. T. Mullally. Plaintiff had judgment, and defendant brings error. Affirmed.

T. M. Hunt and R. H. Lewis, for plaintiff in error. Jordan & Burwell, F. L. Rozier, T. L. Reese, and Jas. A. Harley, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 249)

PARKER v. COCHRAN et al.

(Supreme Court of Georgia. Aug. 5, 1895.)
**PLEA AS TO PARTIES—MISJOINDER—INJUNCTION—
 SUFFICIENCY OF PETITION.**

1. A demurrer to an equitable petition on the ground that it "has not all the proper parties to it" is defective, in that the demurrer fails to state the name of any person who should be made a party.

2. Upon the facts alleged there was no misjoinder of parties, and the plaintiff's petition was not multifarious. There was equity in the petition, and it was error to dismiss it as to some of the defendants, and as to another defendant to dissolve the restraining order previously granted, and, without hearing evidence, to refuse the injunction prayed for, on the ground that the petition was without equity.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by Etta Parker against W. C. Cochran and others for an injunction. The petition was denied, and plaintiff brings error. Reversed.

The following is the official report:

Mrs. Parker brought her petition in the nature of a bill in equity against W. C. Cochran and M. M. & C. C. Phillips & Co., to which Franklin Parker, husband of plaintiff, was afterwards made party defendant. A demurrer was interposed, and the demurrer was sustained, and the petition dismissed as to M. M. & C. C. Phillips & Co., and a restraining order previously granted as against Cochran was dissolved, and the distress warrant for rent, in question, ordered to proceed.

The petition alleged: Mrs. Parker owns and is possessed of lots 401 and 402 in the Third district and Third section of Paulding county, in her own right, as appears from a deed from her husband to her, attached, dated March 8, 1886. On September 19, 1892, her husband was in possession, under a contract of purchase from M. M. & C. C. Phillips, of lots Nos. 403 and 402 in the same district and section, and held their bond for title thereto. On her land there was then about 60 acres well suited for cultivation. A short time before September 19, 1892, she authorized her husband to rent her land for 1893 for standing rent, and he did rent her land, together with his own, above mentioned, to Echols & Johnson, for \$150, valuing the rental of her land at \$100 and of his at \$50, and taking the notes of Echols & Johnson, payable to him or bearer, for \$75 each, due December 1, 1893. On January 3, 1893, Cochran fraudulently persuaded and coerced her and her husband to make and deliver a note payable to Cochran for \$65, due November 15, 1893, ostensibly in settlement of a suit then pending in Paulding superior court of Cochran against her husband for alleged damages in hiring employes of Cochran, when in fact the note was also to be in settlement of two indictments pending in the same court, wherein Cochran was prosecuting her husband for enticing away employes of Cochran, and for using opprobrious words,

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etc. Her husband was fraudulently induced and coerced to give Cochran said note by the promises and threats of Cochran that, if she and her husband would give the note, Cochran would settle the civil suit, and would also stop the criminal cases, and would throw the latter out of court at the costs of the state; and that, if they did not give the note, he would not only prosecute the criminal case, but would prosecute them for perjury in a case which had been tried against Cochran in the same court for carrying concealed weapons; and that he, Cochran, could make Eliza Martin swear to anything he wanted her to. Petitioner was fraudulently induced to sign said \$65 note by a verbal message sent her by Cochran, by her husband, that if she would sign the note Cochran would stop the criminal cases against her husband, and, if not, he would prosecute the criminal cases, and indict her and her husband for perjury; and that he could make Eliza Martin swear anything. While she was not guilty of perjury, and does not believe her husband was, for fear of being harassed by Cochran, and that the indictments against her husband, which was not done by Cochran, might be stopped, she signed the note. If the allegations in Cochran's suit for damages and for the settlement of which the note was only apparently given were true, the note was a nudum pactum as to her, because the allegations, if true, would constitute a tort for which her husband would alone be liable. By the false, illegal, and fraudulent means aforesaid, Cochran induced her husband to transfer to Cochran, as collateral security for said note, the two rent notes above mentioned. For the purpose of collecting the \$65 note, although it was not due until November 15, 1893, on September 29, 1893, Cochran sued out a distress warrant in the name of Parker, for his use, without her authority, for one of the rent notes, which was levied on a bale of cotton and — bushels of cotton seed and — pounds of cotton in the seed and in the field. When this levy was made, M. M. & C. C. Phillips & Co. became sureties on the replevy bond of Echols & Johnson, and the distress warrant case is now pending on appeal in the superior court of Paulding county. The entire cotton crop grown on her land by Echols & Johnson in 1893 (2 or 3 bales of cotton and 60 bushels of cotton seed), as well as that raised on the land of her husband by Echols & Johnson in 1893 (about 2 bales of cotton and 50 bushels of cotton seed), has been turned over to M. M. & C. C. Phillips & Co. by the constable of the district in which the distress warrant was sued out. M. M. & C. C. Phillips & Co., well knowing that she was the owner of lots 401 and 402, and that Echols & Johnson were due her rent therefor for 1893, and that she under the law had a lien on said crops for the rent, nevertheless, to collect certain debts they held against Echols &

Johnson, who are insolvent, in disregard of her rights, and greatly to her injury, on October 18, 1893, brought suit in the magistrate's court, which suit is now pending, in trover, against Echols & Johnson for said cotton crop of the value of \$100, grown by them in 1893 on the lands of her and her husband, on said pretended claim, unknown to her. She could not foreclose her lien for rent and have it levied upon the cotton, because the cotton had been turned over, as above stated, to M. M. & C. C. Phillips & Co., before the rent became due. Cochran and M. M. & C. C. Phillips & Co. have confederated to secure the payment to Cochran of the \$65 note, and then to apply the balance from said crops to the claims M. M. & C. C. Phillips hold against Echols & Johnson, and thus fraudulently and unjustly deprive her of her rents. Because of the facts above mentioned her damage would be irreparable, and to avoid multiplicity of suits, waiving discovery, she prayed for injunction against defendants, and also against the magistrate, restraining Cochran from proceeding with the collection of the \$65 note or the two rent notes and with the distress warrant, and Phillips & Co. from the prosecution of their action of trover, and the magistrate from further hearing and determining the action of trover, until further order. Also, that Cochran be compelled to deliver up and cancel the \$65 note, and deliver up the rent notes, and that her landlord's lien be enforced, and that Cochran's suit for damages be reopened if Cochran desire it. Also, that Phillips & Co. be required to pay into court any money they have received from said cotton or cotton seed, and any cotton or cotton seed they may have received, to abide final decree. Also, for general relief and process.

By amendment she alleged: Cochran knew that she had an interest of \$100 in the rent notes when he induced her husband to transfer said notes; and Phillips & Co. knew the same thing, and that she was not to furnish Echols & Johnson any supplies or stand for supplies for them, long before Phillips & Co. sold them or her husband any supplies for 1893, and before any transaction between them and Echols & Johnson and her husband had taken place about their furnishing Echols & Johnson any supplies.

The demurrer was upon the grounds: The petition has not all the proper parties to it, and there is a misjoinder of parties defendant. There is no equity in the petition. Plaintiff has a complete and adequate ground at law for enforcing any right set out in her petition, and is not entitled to the extraordinary relief for which she prays. And the petition is multifarious.

J. O. Gartrell, for plaintiff in error. J. J. Northcutt, for defendant in error.

PER CURIAM. Judgment reversed.

(96 Ga. 791)

RAPE v. GUNN.

(Supreme Court of Georgia. Aug. 12, 1895.)

EJECTION OF TENANT—SUFFICIENCY OF EVIDENCE.

While, under the evidence, the relation between the parties was somewhat uncertain, there was enough testimony to warrant the jury in finding that the defendant was the tenant of the plaintiff, and accordingly to render a verdict in the latter's favor; and such verdict, after its approval by the trial judge, will not be disturbed by this court.

(Syllabus by the Court.)

Error from superior court, Dooly county; C. C. Smith, Judge.

Proceedings by distress warrant by U. M. Gunn against F. T. Rape. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

A warrant to dispossess F. T. Rape as a tenant at sufferance on the plantation of U. M. Gunn, known as the "Thomas Place," in Dooly county, was issued on January 11, 1893. Counter affidavit was filed by Rape. There was a verdict in favor of Gunn for \$700 and interest. Defendant's motion for new trial upon the general grounds alone was overruled, and to this ruling he excepted.

Upon the trial Gunn testified: "At the time the warrant was sworn out Rape was in possession of my John Thomas place, and had been since January, 1891. He remained in possession until February, 1894. The place was worth \$500 or \$600 per year rent. He agreed to pay \$400 per year rent, but has never paid but \$100 rent on it, and he had it for three years. He went into possession of it under a contract to give me his rent note for \$400 rent, but never complied with his contract. We first made a contract of purchase, and he first went on the land under that contract, and he was to give me his note for \$400, which was the interest on a \$5,000 loan that I had on the land. I gave him the notice as required by law. He was to have signed the papers, but refused to do it. He went on the 1st day of January, 1891. He paid me about \$100. In 1892 he paid about \$100 on the original contract, which left \$300 behind. This \$400 at first was to be the interest charged on the loan of \$5,000, which he was to pay, but he could not give the security for the \$400 interest so charged, and when he could not do so said to me, if it is necessary to have security, to take a note for \$400 for the interest charged, and he would make one for rent, and give me a \$400 rent note, and that would be superior to any other lien that any one might have against him. He agreed to that in January, 1891, and was to sign the note on Saturday night at my house. I was to take the notes for rent for \$400, payable in the fall of the year, and other notes for \$216 that was due on the interest. He said Mr. Haygood would furnish him the \$5,000 to pay off the loan, and that was the understanding when he went on the land. The \$5,000 was a part of the purchase price of the land, and he was to pay it when the

paper fell due, which was in January, 1892. We were to fix up the papers, and he was to sign them, but he never carried out his agreement, and absolutely refused to sign any papers and to pay the \$5,000 principal, as he had agreed to do; and he was to give notes for \$400. Afterwards he was to give his notes for \$400 a year, and he was to provide for \$5,000 loan. That was the way he went in, and in the fall of 1891 he said that Mr. Haygood could not let him have the money. I was to give him bond for titles, but he never gave me his notes, and in the fall of 1891 I saw his cloven foot. Then it was he said that 'I will have to turn it over to you.' I tried to collect interest or rent in the fall of '91, and he said that he wouldn't make the purchase money. He told me the same thing in the spring of '92. He never did surrender the place to me until I took out these proceedings, and then did so after he had exhausted his capacity to give the bond. He was to pay the \$5,000 in '92, but did not do it. When I went down there, and when he refused to sign them papers, and carry out his contract, in '91, I saw that he was going to give me trouble, and I said: 'Rape, I want this thing understood. I want you to give a rent note before you hold over for the year '92.' He said that 'I am the tenant, because I can't pay the \$5,000.' I said, 'Before you go in possession for '92, I want your notes for rent; at least for \$300.' He never did make the notes which he promised to give me, nor comply with the contract by which he went into possession. At the time he said he was a tenant he had not surrendered the place up to me. I had a letter from him, telling me to come down, and aid him in collecting the rent from a subtenant, which I turned over to my counsel, Judge Whipple." Judge Whipple testified that the letter had been turned over to him by Gunn, but he could not find it; that he thought he remembered pretty correctly its contents; that it was a letter from Rape to Gunn, asking Gunn to come down and take proceedings against property which a subtenant of Rape seemed to be running off, saying that, "If you protect me, it will enable me better to pay you rent;" that the letter was dated in the fall of 1892, had the name of F. T. Rape signed to it, and witness thought the signature compared with that on the bond in this proceeding, and from that believed it was Rape's signature, but was not acquainted with the handwriting of Rape except from having seen the bond. He further testified that he did not remember whether the word "cropper" was not used in place of "subtenant," and that he only gathered that it was a person living on the same place, and that Rape wanted to collect what he owed him. Plaintiff further testified: "I had a talk with Rape about that letter, and about the subtenant, as well as my claim against him. The letter was in relation to his 'leaving' one of his tenants. He said in the letter, 'If you

expect me to pay, you must come and help me to collect from the subtenant, as he was running off his goods.' My understanding was the man was there with Rape, and Rape wrote me, saying, 'If you don't help me to collect from my subtenant, I cannot pay you as your tenant.' My recollection is that Rape called him a subtenant. I did not swear in a case in the magistrate's court—a proceeding against Rape by me for the first year's rent—that Rape went on the place as a purchaser. I testified about his pretended purchase, and that he did not carry out the sale contract." For the defense, Rape testified: "The paper [afterwards introduced] is the contract with Mr. Gunn by which I went into possession of the place. We made a trade some time in January, 1891. In the latter part I bought the place from Gunn for \$5,000. There was some two hundred and odd dollars he owed for interest from January to December, which made \$5,200 and something due in June, 1892. The understanding was that I bought the place straight out. In the trade he asked me for security for the \$400 interest. The place would stand for the principal, but he wanted security for the \$400 interest. I told him I could secure with a mortgage on stock I had. He said that a mortgage was not a good collateral, and that he would protect me in it, and for me to give him a \$400 rent note, and he would use it for collateral. The \$400 rent note was the interest at 8 per cent. on the \$5,000 principal. I never was a tenant on the place, never had the conversation that he testified about, and his testimony is not true. I have no recollection of such a letter as he testified about. I never had any subtenant. The one he mentioned worked there as a cropper, and the others for wages. I have paid the \$400 interest and \$25 for the first year, but nothing else, only the payment that I made for some perishable property I bought in the spring. I heard Gunn testify at the magistrate's court, and he swore positively that I went on the land as a purchaser, and was to pay \$400 interest the first year. I paid the \$400 rent or interest in oxen, wagons, log carts, and sawmill. Gunn did not get the sawmill. We agreed upon the price for it, as it was incumbered with a claim for \$108 purchase money, and Gunn bought the mill with full knowledge of the incumbrance. I sent the oxen and wagon to him at Macon, and he received it in payment of the \$400 interest. It was not for the first year's rent, but was for the interest, but was called 'rent' for the reason above stated. I sent him \$25 over when I sent the stock and wagon to him at Macon, which he was to pay back, but never did. I never did execute my notes to him, because he never wrote the papers right, and when they came down they did not speak the contract. I told him, when we made the trade, that I didn't know whether I could meet the debt and pay the back interest or not, and he said if I could not make the pay-

ments he would give me further time, and the bond for titles did [not] speak the contract in that way, and that was the reason that I did not sign the notes. The notes spoke the truth. The amount—\$5,000—is correct. That was the principal, and the \$216 was the interest. That was correct. I refused to sign the notes because the bond did not speak the contract. He was to give me five years in which to pay it, and if I could not pay it then I was to have six. In the fall of '92 he came down there, and said he wanted a mortgage or a showing of some kind, and said, 'You just go ahead; you have had bad luck.' I had lost a number of horses, mules, and colts in two years. He said that he was sued, owed \$18,000, and couldn't pay a cent of it; that he was going to stave off the judgment as long as he could, and would try to redeem the place if he could sell any real estate to any advantage, and was to give me further time if he could sell any real estate to any advantage. The night before he distrained for his rent, he told me that I went in there as a purchaser, that I had a good thing of it, that he wished he had an interest with me, that if he was able he would take an interest in it, and that I was there as a purchaser. The next morning I told him I wished to have a settlement with him, and surrender the place to him; that I wanted him to pay me for the improvements, and have a final settlement, and surrender the place to him; and he said: 'You are not entitled to pay for the improvements. You are here as a purchaser. You are a beneficiary of the improvements;' and that it would work out all right." Another witness testified for the defense that he was the magistrate before whom the case in the magistrate's court above referred to was tried; that he did not remember all about it, but remembered there was something said in regard to Rape being there as a purchaser; that that was about the statement Gunn made; that he made a payment in some shape. Another witness testified that he was present at said trial; that Gunn swore that Rape went in there as a purchaser; that he thought Gunn said Rape never complied with his contract; that Gunn said Rape owed him \$100, but witness does not know what for. Another testified that he got the papers (afterwards introduced) from Gunn, and carried them to Rape under instructions from Gunn; that he carried some personal property to Macon to Gunn for Rape,—two yoke of oxen, two mules, and a wagon,—for the purpose of a payment from Rape, and heard Gunn say he was to send Rape back \$25, and that this was in September, 1891. Another testified that he was at Rape's in the fall of 1892, before the distress warrant was taken out, and Gunn was there, and heard Gunn say that Rape had a good thing of it, and, if he were able, he would buy the land back from Rape, but didn't have the money; that the improvements were worth a good deal, and that he

had put up a house that was worth \$150 or \$200. Defendant introduced a paper in the form of a bond for titles from Gunn to Rape, but not signed or dated. It was conditioned to make title to Rape in fee simple to certain land therein described in Dooly county upon the payment by Rape of two promissory notes for \$5,616.65, to become due as follows: "One rent note for \$400, due November 1, 1891, and one promissory note for \$5,216.65, due June 14, 1892. It being understood that time being the essence of this trade." Also two unsigned notes, each payable to Gunn or bearer, —one for \$400 "rent" due November 1, 1891, and dated August —, 1891; the other, of the same date, due June 14, 1892, for \$5,216.65. Also a letter from Gunn to Rape, dated Macon, Ga., August 17, 1891, stating: "The boys arrived safely with the stock and wagon, which I accept as full settlement of the cash feature of our intertrading. Sign the above notes, and mail them and the bond for titles back to me, and will send them by registered letter the bond properly signed, when I get the notes. The \$216.65 is the last interest installment on note. Trusting that the Lord will bless you in this venture."

Busbee, Crum & Busbee, for plaintiff in error. D. L. Henderson and J. H. Hall, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 241)

WOODBURN v. SMITH.

(Supreme Court of Georgia. May 13, 1895.)

RECEIVERS — RESTRAINING INTERFERENCE WITH PROPERTY PENDING CONFIRMATION OF SALE.

Where, under an order granted upon an equitable petition, a receiver takes possession and makes a sale of property, subject to final confirmation by the court, to which property there is an adverse claim by a person not a party to such proceeding, such property, until confirmation in accordance with the order directing the sale, though delivered to the actual possession of the purchaser, is nevertheless, in contemplation of law, still in the hands of, and subject to the control of, the receiver; and if his possession, by or through such purchaser, is interfered with or disturbed by the adverse claimant of such property, the receiver, as against such person, may file a petition for injunction. If such a petition be filed, an order of dismissal, upon general demurrer thereto, is erroneous. (Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by J. B. D. Woodburn, receiver, against Allen W. Smith. The petition was dismissed on demurrer, and plaintiff brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Reversed.

The following is the official report:

The petition of Woodburn, as receiver of Laurance & Jackson, against Allen W. Smith, was dismissed on demurrer, and plaintiff excepted. He alleged that he was appointed receiver in the case of J. G. Laurance v. Laurance & Jackson, accepted the appointment,

and is still acting as receiver. The assets of which he took charge consisted principally of a sawmill outfit,—engine, machinery, land, and leases of timber privileges in certain lands, all in Wilcox county. He held possession until May, 1892, when, by proper order of the court appointing him, he was directed to make sale of all said assets to Smith, Thomas & Co., which he did, and delivered possession of the property to said purchasers, who, upon the faith of the sale, by order of court took possession, and commenced to operate the sawmill, obtaining timber for that purpose from the land so sold, and from the land of which the leased timber privilege was also sold, of all of which they had taken quiet and peaceable possession. According to the terms of sale, the property was divested of all liens, so far as parties to said litigation were concerned, and such liens, if any, were to attach to the proceeds of the sale, in order that the property might bring as large a per cent. as possible; and all parties claiming priority were left to make such claims against the fund arising from the sale and in the hands of the receiver. Among the property so sold to Smith, Thomas & Co. was a leasehold interest in all the timber on about 700 acres of land (giving the numbers of the lots), said lease having been made by Allen W. Smith, and being held at the time of the sale by petitioner as part of the assets of Laurance & Jackson. He is informed that the lease was verbal, and not written, but has been partly performed on the part of both parties, as follows: The lease was in consideration of \$1,050, of which a certain part was to be paid in advance, a certain part shortly after the lease was executed, and the balance of \$350 was to be paid at the expiration of the lease; that is, after all the timber had been cut. The original lessee paid Smith \$500, which was accepted by Smith as full compliance with the verbal contract as the cash payment to be made, and the lessee took possession of the land, whereby the contract became fully performed, and binding on the part of both parties thereto. Afterwards said lessee tendered Smith \$197, which was the second payment according to the contract, but which Smith refused to accept, and claimed a rescission of the contract. He now claims the timber sold in said lease as his own, and threatens to drive Smith, Thomas & Co. from the land, and refuses to allow them to go upon it to obtain the timber, and threatens to use force and violence to keep the land, and to resort to litigation. Under the order of sale the title to the property was reserved in the receiver until full payment of the purchase money, the purchasers having, until such full payment, only the right to possession and use in order to get timber with which to operate the sawmill. The purchasers made a cash payment of \$500, and the balance of the purchase price, \$3,500, is payable in installments of \$500 every 90 days. If they are deprived of

any of the property purchased at the sale, they will claim an abatement of the price to the extent of such property, which will greatly damage all parties and creditors interested in the litigation, and would damage the assets of said firm in the hands of the receiver, the value of the lease interest in the timber. If the timber leases belonging to the sawmill business are not good, it would greatly damage the business, as it is necessary to have timber to operate the mill. The lease has not expired, and will not expire until the lessee or his assigns shall have cut all the timber from the land. Petitioner is advised that the only rights of Smith are to claim the balance of the purchase money for the timber leases, which balance (except the \$197 mentioned) is not due. The litigation of Laurance & Jackson was commenced for the purpose of settling the affairs of said partnership in equity. The suit was filed for the benefit of all creditors, who were asked to come into the suit, and prove their claims, in order that the partnership affairs might be fully and finally administered; and Smith has an adequate remedy to obtain all his rights by coming into the litigation, and proving his claim as a creditor; and he has no right whatever to claim a rescission of the lease, or to interfere with said purchasers. They have defaulted in the payment of several of the purchase-money notes. It is the receiver's duty to protect their possession by litigation or otherwise; and, whatever may be the rule in cases of ordinary judicial sales, he is advised that such rules do not apply under the circumstances of this case. He prays that Smith be restrained from interfering with the possession of Smith, Thomas & Co. and their agents and servants, and that the lease be decreed to be valid and binding against him. Attached to the petition is a copy of the order of sale, the contents of which sufficiently appear from the foregoing recital, except that it was provided therein that, if any of the property sold should be in litigation, the court would order the receiver to hold up a sufficient amount of the purchase money to indemnify the purchaser against any loss he might sustain by reason of the loss of such property; which amount, in the event of such loss, should be returnable to the purchaser, without interest.

E. H. Cutts and D. B. Nicholson, for plaintiff in error. L. C. Ryan, for defendant in error.

ATKINSON, J. To a correct understanding of the questions made in this case it is only necessary to refer to the official report, and to emphasize mentally the fact that under the terms of the sale of the property in pursuance of the decree authorizing the same the title to the property was reserved in the receiver until the full payment of the purchase money. It will be observed that the property claimed by this defendant, having

been in the possession of the receiver as a part of the assets of Laurance & Jackson, was in fact sold by the receiver, under an order of the court, the receiver reserving title until the purchaser had fully paid the purchase money, and until confirmation of his sale by the chancellor. The possession of the purchaser then was, to all intents and purposes, the possession of the receiver. It was the duty of the receiver to maintain the possession of his vendee, and in furtherance of that duty it was his right to apply for an injunction in order to protect that possession. The remedy of a person claiming title to property adverse to a receiver, is not to regain it by an act of trespass, but to apply to the court for redress, or for leave to sue the receiver. And in thus restricting claimants or third parties from interfering with the receiver's possession without leave, the rule is applied regardless of whether such persons claim paramount to or under the right which the receiver was appointed to protect. It is frequently necessary for a receiver to pray for an injunction to restrain any unauthorized interference with the property in his possession, and the granting of such an injunction in such cases is a necessary incident to the power of appointing receivers. High, *Inj.* §§ 140, 747; *Marshall v. Lockett*, 76 Ga. 289. We are not advised by the record upon what ground the judge rested his judgment dismissing this petition upon demurrer, but upon a careful consideration of its terms it appears to state fully such facts as entitle this receiver to the relief he prays at the hands of the court. Let the judgment of the court below be reversed.

(96 Ga. 340)

DONOVAN et al. v. SIMMONS et al.

(Supreme Court of Georgia. June 10, 1895.)

JUDGMENT—LIEN—PRIORITY OVER DEED.

1. The registry act of 1889 (Acts 1889, p. 106), providing "when transfers and liens shall take effect as against third parties," does not create a new competition between deeds of bargain and sale and the liens of judgments. Its scope is to fix the time when and the manner in which liens acquired by contract or obtained by operation of law are to take effect, and to settle their priorities. Inasmuch as the word "lien," as used in the phrase "who may have acquired a transfer or lien binding the same property," occurring in the first section of that act, applies only to liens acquired by contract, and not to those obtained by judgment, the consequences of a failure to record a deed of actual purchase are exactly the same now as they were prior to the passage of that act; and accordingly, while the failure to record such a deed might operate to defeat the conveyance as to one who purchased subsequently of the same vendor without notice of the prior conveyance, a judgment obtained against the grantor subsequent to the conveyance, but entered upon the general execution docket prior to the record of the deed, would not, merely by virtue of such entry, become a lien upon the property previously conveyed.

2. In view of the principles above announced, it is immaterial whether the claimants were or were not after their purchase in actual pos-

session of the lot levied upon, since their unrecorded paper title was of itself sufficient to support the claim as against the plaintiffs' judgment.

3. When the trial judge renders a correct judgment, even if in his opinion filed therewith a wrong reason therefor is given, and a general exception is filed to the judgment, this court will look to the record and sustain the judgment, if right, notwithstanding the reason assigned therefor by the trial judge may have been erroneous.

(Syllabus by the Court.)

Error from superior court, Fulton county; A. C. King, Judge pro hac.

Action between W. O. Donovan and others and T. J. and N. R. Simmons. From the judgment, W. O. Donovan and others bring error. Affirmed.

The following is the official report:

An execution against T. J. James was levied upon a parcel of land to which a claim was interposed by T. J. and N. R. Simmons. The case was submitted to the court upon an agreement as to the facts, without the intervention of a jury, and judgment was rendered for the complainants. The facts agreed upon were as follows: The lot was bargained to be sold on April 9, 1890, by James to claimants, for \$3,000, at which time they paid \$2,668 of the purchase price and took bond for title. The lot had a fence on both sides and at the back end. There was a cut across the front, and there was no fence there. There was a small one-room house on the lot on April 9, 1890, which was occupied by a tenant paying some small amount per month as rent. He attorned and paid rent to claimants, and remained in the house about one year. After that it was unoccupied. Claimants made no improvement, nor erected any fence on the lot, nor did they live on it. On the 11th day of May, 1891, claimants finished paying for the lot, and T. J. James made and delivered to claimants a deed by which he conveyed said lot to them in fee simple under a general warranty of title. In the month of January, 1893, claimants placed the lot in the hands of Goode & Beck, real estate agents, for sale, and about February 12, 1893, Goode & Beck put up in a conspicuous place on the lot a board sign having on it the words, "For sale by Goode & Beck, corner of Peachtree and Marietta streets." There was nothing else on the sign. The board sign remained up several months. Neither plaintiff in *fi. fa.* nor his counsel had any notice of any of the above-stated facts until about November 22, 1893, when the deed from James to claimants was filed for record. The lot levied on and claimed in the above-stated case is on West Peachtree street, about one-half mile outside of the city limits, and contains about four acres. The title of this lot was believed by plaintiff in *fi. fa.* and his counsel to be in T. J. James before suit was brought on the note on the 19th day of August, 1892, such belief being founded on the fact that T. J. James was shown to be the owner by the deed from

J. S. Johnson of June 3, 1884, and of record in the office of the clerk of the superior court of Fulton county, in Deed Book UU, at page 576, and the records showed no conveyance of said lot by James after he bought it from Johnson. On April 11, 1891, T. J. James made a note for \$3,744.71, payable January 1, 1892, to plaintiff in *fi. fa.* Suit was brought on that note in the city court of Atlanta on August 19, 1892, and judgment rendered thereon on April 18, 1893, and execution issuing on said judgment was entered on the general execution docket in the clerk's office of the superior court of Fulton county, on April 19, 1893. Execution so issued was levied on said lot, together with other property, on October 14, 1893, and after advertisement by the sheriff the property was exposed for sale on the first Tuesday in November, 1893, but no sale was made as there were no bidders. The property was again advertised to be sold by the sheriff under the *fi. fa.* on the first Tuesday in December, 1893, and on December 1, 1893, the claim was filed.

H. B. Tompkins and Alston & Palmer, for plaintiffs in error. J. L. Hopkins & Sons, for defendants in error.

HART, J. The facts are sufficiently set forth in the official report. This case was tried before the Honorable Alex C. King, judge *pro hac vice* in the court below, without the intervention of a jury, on an agreed statement of facts. In deciding the case the judge viewed it from two points of observation: First, as to the general rule of law determining the status of judgments; and, secondly, as to how the facts affected the application of the rule in this particular case. From the legal standpoint he ruled favorably to the contention of the plaintiffs in *fi. fa.*, and, nothing else appearing, would have subjected the land to the execution; but, viewing it from the second point of observation, he thought the facts prevented the application of the general rule, and held the land not subject to the execution. The question of law arises on the inquiry whether, by the act of 1889 (Acts 1889, p. 106), a judgment against the maker of an unrecorded deed, and junior in date to such deed (the execution issuing from the judgment having been duly entered upon the general execution docket provided for by the act), becomes, by reason of the failure to record the deed, a lien upon the property thereby conveyed, the vendee not having gone into actual possession. This is the precise question made for our review by the plaintiffs in error, who were the plaintiffs in *fi. fa.* in the court below. For convenience of expression, a judgment, the execution issued from which has been duly entered, as above stated, will hereinafter be designated as a "recorded judgment." The judge below held the property levied on not subject to the execution, but, in his written opinion, which was made

a part of the record of the case here, he held that, in a contest between the deed and the judgment, the latter, although younger, would, because recorded, have become a lien on the land conveyed in the elder and unrecorded deed but for the fact that the evidence in the case showed the vendees went into actual possession of the land before the rendition of the judgment, which, in his opinion, served to dispense with the necessity of its record. In other words, the judge held that, under the first section of the registry act of 1889, a recorded junior judgment against the vendor in an unrecorded deed became operative as a lien upon the property previously conveyed, unless the deed was saved from the necessity of record by actual possession of the vendee thereunder. Having found that claimants were in actual possession of the land, by reason of which fact the law charged notice, the judge concluded that the lien of the judgment was, in consequence, impotent, because not acquired by persons designated in the act as "third parties acting in good faith and without notice." He accordingly held the land not subject, and for the reason alone that the possession of the claimants at the time of the rendition of the judgment against the defendants in *fi. fa.* was fatal to the right of the judgment to subject the property. We have been thus explicit in stating this question, and particular in reference to the written opinion of the judge in the court below, to enable us more fully to discuss the act of 1889, the construction of which we recognize as being of vast importance to the bar and to the public.

The plaintiffs in error bring this case here on four assignments of error, as follows: First, the court erred in finding in favor of claimants, T. J. and N. R. Simmons; second, in not finding against claimants, and dismissing the suit at their cost; third, in not finding for plaintiffs in *fi. fa.*, William O. Donovan and S. C. Evans, on all the issues involved; fourth, in finding that the agreed statement of facts showed the plaintiffs in *fi. fa.* had any notice of the claimants' title. The first, second, and third assignments of error are simply three different ways of saying the same thing, and we will so treat them. This brings us to the construction of the act of 1889, entitled "An act to provide when transfers and liens shall take effect as against third parties." This act—one branch of it—was before this court for construction in two cases, reported together in 93 Ga. 768, and 21 S. E. 77, namely, the case of Bailey v. Bailey and the case of Heard v. Hubbard,—Justice Lumpkin delivering the opinion of the court. The question now before the court, namely, whether or not the lien of a judgment against the grantor in a deed, obtained subsequently to the deed, but entered upon the general execution docket prior to the record of the deed, attaches to the property conveyed by the deed, was not involved in either of these two cases. In them the precise point ruled (as

assisting now in the further construction of the act) was that, though in each the claimant's deed was not recorded before the rendition of the plaintiffs' judgment, yet, as they were recorded before the plaintiffs' executions, respectively, were entered upon the general execution docket, the liens of the judgments did not attach to the property conveyed, and that this would be true even though the grantees in the deeds recorded them with notice of the subsequently acquired judgments against their grantors. This proposition would seem unquestionably correct. The vendee who purchases land of his vendor and takes his deed, but fails to record the deed until his vendor has been sued by some one, and a judgment entered up, stands in a very different attitude from that of the vendee who buys land knowing of the existence of a judgment against his vendor, but seeks to protect himself because of a failure to record that judgment. The last vendee would not be a "third party acting in good faith and without notice," and the judgment lien would attach to the land whether he did or did not record his deed. But why should the vendee who purchases land of the person who owns it at the time and has a right to sell it, but who subsequently has a judgment rendered against him, be defeated of his prior purchase? Is it sufficient to say his laches in failing to record his deed is to be charged with such a penalty? Had he permitted his vendor to remain in possession of the land, thus making the possession and the ownership harmonious so far as the record disclosed, and third parties were induced to contract with the apparent owner on the assumption he was the true owner, then it might be right to visit upon the careless vendee the consequences of his negligence, rather than upon an innocent person. We do not think the act of 1889 creates any new competition between deeds of bargain and sale and the lien of judgments. The law as to deeds of this character is unchanged by it. The danger of a failure to record a deed is the exposure of it to defeat by a subsequent vendee without notice of the prior purchase. The only change made in the law by the act of 1889, so far as deeds are concerned, is to fix their time of going into effect and becoming operative, relatively to the interests of certain persons. The first section of the act declares "that deeds, mortgages, and liens of all kinds, which are now required by law to be recorded in the office of the clerk of the superior court of each county within a specified time, shall, as against the interest of third parties, acting in good faith and without notice, who may have acquired a transfer or lien binding the same property, take effect only from the time they are filed for record in the clerk's office." It is evident the word "lien," as here used, has reference exclusively to liens acquired by contract. "Lien" is a generic term, and includes both liens acquired by contract and by operation of law; but the

context clearly indicates it is used here in its restricted sense, as applicable only to contractual liens. To say a judgment must be acquired in good faith and without notice, to be a valid lien upon the debtor's property, would be to ingraft a new condition upon judgments. It matters not after judgment with what kind of faith a creditor was prompted to sue his debtor. It may be the creditor's motive was to obtain judgment, so that he might levy upon the home of his debtor, and turn him and his family into the streets to gratify a fiendish desire to see them in beggary and want; yet this would furnish no valid, legal reason to defeat the judgment. In other words, the motive which prompts a creditor to sue his claim to judgment is buried when a judgment is reared in his favor. The motive dies when the judgment is born. Again, to hold that a judgment acquired shall be a lien upon land conveyed in a prior unrecorded deed would be to hold that a judgment shall be a lien upon other than the defendant's property. The sale of land, although the deed may not have been recorded, as between the parties to the contract, and, indeed, as to all the world, is a parting of the right, title, and ownership from the grantor to the grantee; and to hold that an after-acquired judgment against the grantor shall become a lien upon the property conveyed would be to add to judgments a quality never possessed heretofore, and to take from a deed a condition heretofore always recognized. We cannot think that the legislature intended to do these things, and we do not think the language used requires any such construction. There are many hundreds of unrecorded deeds in Georgia to-day upon which the purchase money of lands has been paid, and the grantors therein have subsequently become insolvent, and we believe it would be violative of every sense of right and justice, as well as of the law, to hold that the creditors of these grantors can subsequently obtain judgments and levy upon the property previously conveyed, and subject these homes to the satisfaction of their judgments so obtained. We therefore think that the judge below erred in the conclusion reached, "that a recorded judgment against the grantor became, by operation of the act of 1889, a lien upon property previously conveyed in an unrecorded deed."

Secondly. The principles announced in the second and third headnotes need no enlargement. From the foregoing, while we are of the opinion that the judge below properly held the land not subject, we have thought it advisable, for the reasons given, to comment at length upon his written opinion touching the legal aspect of the case, and, while we think his reasoning was at fault, we agree with him in finding the property not subject, but we think it entirely immaterial in this case whether the claimants were in actual possession or not.

Judgment affirmed.

SIMMONS, C. J., being disqualified, JOHN C. HART, judge of the Ocmulgee circuit, was designated to preside in his stead.

(97 Ga. 340)

GLAZE v. BOGLE et al., Commissioners.

(Supreme Court of Georgia. July 29, 1895.)

INJUNCTION.

Taking into view all of the evidence contained in the record, it does not appear that there was any error in refusing to grant the interlocutory injunction prayed for; certainly there was no abuse of discretion in denying the same.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Action by Lydia Glaze against Joseph Bogle and others. There was a judgment in favor of defendants, and plaintiff brings error. Affirmed.

The following is the official report:

Lydia Glaze, by her petition, filed April 26, 1889, alleged: She owns a life estate in lot 147 in the Twelfth district and Third section of Whitfield county. She has been informed there was once a public road through the land, but, if there ever was, it has been abandoned as such by the county. Pursuant to an act of the legislature of 1870, regulating the public roads of the county, the road authorities, on October 14, 1870, passed an order specifying what roads of the county were first class, what second and what third class, and the road through petitioner's land, if it ever existed, was not included in said classification. At the January term, 1871, an order was passed, reciting "that, various and many roads of the county having been discontinued as public roads, after due publication, the same shall remain as private ways." Said board of commissioners of roads and revenues afterwards refused the petition of Henderson et al. to establish a road from the Dalton & Varnell road to the road here in question, on the ground "that it intersects with no public road." Said road had been used through petitioner's farm as a private way by people in the settlement, by permission of her husband in his lifetime, and of herself since his death, and as a favor to those using it, she keeping gates where the road enters and leaves her farm. In the spring of 1892, J. M. Copeland and a number of others petitioned the board of commissioners for the establishment of a public road over the line occupied by said private way. Petitioner made objections, on the ground that said road would be of no public utility, and that the establishment thereof would largely damage her, as it would require her to build and keep in repair two lines of fence nearly a half mile long, and would cut her off from any place to water her stock, and prayed that, if the road should be established, the damages for the opening of the way should be assessed, and paid to her. Thereupon, by order of the commis-

sioners, the sheriff was commanded to summon a jury of freeholders in the district, to view and assess said damages. After due notice, and after viewing the ground and hearing the testimony, this jury found in favor of petitioner \$345 as damages for opening the road. This verdict having been returned with the papers in the case, the board of commissioners adjudged that the damages arising from the opening of the road exceeded the utility of the road, and refused to open it. Attached as an exhibit is the petition of Copeland and others, the answer of the present petitioner, the appointment of three commissioners, and their report that the proposed road would be of public utility, the direction to the sheriff to summon a jury, the return of the jury, the order of the board of commissioners thereon, etc. The petition further alleged: Since that time said way has been used as a private way, and if those desiring to use it will still pass through without leaving her gates open, or otherwise injuring her, she is willing that they do so. But a number of those using the road claim that they have a right to pass through, and that she has no right to close it with gates, and some of them do pass through, and leave the gates open wantonly, allowing stock to get into her farm, to her damage. Her son-in-law, Calloway, who is in charge of her farm, has been notified by the road commissioners of the district to remove said gates at once (a copy of the notice being attached), and she fears that, unless restrained, they will proceed violently to take the gates down. The remedy given her by law to sue for damages is not adequate, because a great many of the parties so violating her rights are insolvent, it will be very difficult to estimate the damages, and they would have to be sued separately, and in many instances she would be unable to show who left open her gates. Her property cannot be taken or damaged for public use without due and just compensation being first paid, and the county having first refused to pay the amount of damages as set by the jury above mentioned. The parties defendant named were the commissioners of roads and revenues of the county and the road commissioners of the North Dalton district; and she prayed that they be restrained from removing or interfering with the gates, for general relief, etc.

The defendants answered: In 1841, the inferior court of Murray county, which county then embraced the part of Whitfield county where plaintiff's land lies, laid out a public road through the land, which is the same road now there, as proof of which a certified copy of the proceedings of said inferior court is attached. Said road has never been abandoned, but has been constantly used, and occasionally worked out under the direction of the county authorities. An act was passed on October 26, 1870, authorizing a classification of roads in the county into first, second, and third class, but nothing was ever done

by the road authorities under that act. The road commissioners held a meeting on October 14, 1870, and classified certain roads in the county, but no authority of law existed for it; and in their action, so far as can be distinguished, there was no reference to the road in controversy, or action in relation to it. An order was passed by the ordinary of Whitfield county in January, 1871, but not with the recitals as set out in the petition. After diligent search of the records, nothing can be found to show upon what it is based, or to justify it. This order states that, many "publications" having heretofore been entertained and decisions made thereon, it is the opinion of the court, and is so ordered, that all the roads heretofore existing as public roads, and having been published in due form of law to be discontinued and annulled as such public roads, be, and the same are hereby, left as private ways, and not to be closed in any manner save in terms of the law. Henderson was denied the road asked for, and part of the reason for the denial is set up to be "that it intersects with no other public road," but the further reason given in the order is, "in view of the numerous highways to be kept in repair in said county," and defendants insist that was the controlling reason; but, under any view of that action, it was not sufficient to deprive any portion of the public of the use of a highway dedicated to the public, and this was done soon after the war, and while the demoralization incident to it still existed, and many useful highways were practically dormant. There has been much temporizing from time to time with the husband of petitioner about this road, but defendants deny that it was ever used as a private way by the inhabitants of that section, but always as a public way duly established, and that the authorities of the county permitted, by not acting at all, gates to be stretched across the highway, and the public submitted to the inconvenience without action. Defendants believe that on account of this forbearance petitioner's husband claimed that the road was used as a matter of grace from him, and petitioner inherited the same idea with the land. Out of deference to the views of Glaze, Copeland et al. did petition as set out, and the action was had in pursuance of it as stated, but this was done to pacify Glaze, and keep down a neighborhood disturbance; but, whatever prompted it, said petitioners were not the whole public, and these defendants represent the public, and their declining to pay the amount found by the jury, for something the public had a legal right to already, is no bar to the assertion of the right of the public to have the obstructions removed out of this highway of 54 years' standing, and to assign hands to work the same. On December 5, 1893, application was made to the board of commissioners of the county, by petition duly filed, to have the road opened and worked as a public road of long standing, and at the

March term, 1894, this application was passed upon after a full judicial investigation, embracing all the matters set up in the present petition, the plaintiff in this petition appearing at said term by the same counsel who filed this petition, and it was adjudged that the petition be granted, and the road commissioners have the road opened up and worked out. To the passage of this order Lydia Glaze sued out a writ of certiorari, which was answered by the board of commissioners, and in the superior court the certiorari was overruled. The original petition for the opening of the road, the judgment thereon, the petition for certiorari, the answer, and the judgment thereon are attached to this answer. Said decision, covering the same question, stands unreversed, and is an absolute bar to the relief asked against these defendants. For many years, from time to time, Bluford Glaze, petitioner's son, and owning adjoining land, was made overseer on the road in controversy, and had it marked as such. The records of the road commissioners for the district show this to be true in 1881 and the years following. Petitioner, and those under whom she claimed, knew these facts, and that her husband bought and went into possession of the land long after the road was where it now is, and took the land with this right in the public, obtained by the order of the inferior court of Murray county, above mentioned, and said Glazes never had the land except as incumbered with this right of the public. Upon the hearing for temporary injunction the cause was submitted upon the petition, answer, and exhibits and the testimony of witnesses as reported in the certiorari attached to the defendants' answer. Injunction was refused, to which refusal Lydia Glaze excepted.

The testimony of the witnesses as set out in the answer to the petition for certiorari, which does not appear to have been traversed, was: Testimony for the petitioners for the opening of the road was to the following effect: This road is a public road. Witness M. T. Dyer knows this from having seen a certified copy of the order establishing it as a public road. The order was dated in 1840. He saw it at a trial had before the board of county commissioners about four years ago, of a petition to have the gates taken out, and the commissioners refused to remove the gates. He worked this road in 1866, 1868, and then from 1878 till about four years ago, working under Ault, Lester, and Bluford Glaze, as overseers, the latter being overseer from 1870 till witness quit working the road. The gates were put in about 1870, and have been there ever since. The road has been changed in several places since 1860. It has been changed in Ledford's place and in Glaze's place. Witness does not know by what authority. John Dyer worked the road just after the war, and it was then a public road. He saw the order sworn to by M. T. Dyer, and it was as M. T. states. The

road has been changed once between 1866 and 1870 and once between 1880 and 1885. Sam Stinson worked the road in 1887 and 1888 under M. T. Dyer as overseer. The road has not been worked since then. Shultes worked the road in 1881, and Bluford Glaze was then overseer. Another Dyer worked the road from about 1878 till about 1890, under Glaze, Calhoun, and Dyer as overseers. He saw the copy of the order establishing this road, at the last trial. Plaintiff introduced the road book for the Dalton district, in which was the apportionment of hands for 1881, giving certain hands to the Bluford Glaze road, a second-class road, Bluford Glaze, overseer. It was admitted that the road records of Whitfield county from its establishment up to 1870 were lost. Defendants introduced the order of October 14, 1870, as to the classification of the roads of Whitfield county, above mentioned. Also, the order passed at the January term, 1871, of the court of ordinary, above mentioned. Also, the petition of Henderson to have a road established to a point on the road now in controversy, and the order of the court of ordinary refusing the petition on the ground that "it intersects with no public road." Bluford Glaze testified: "I have known the road in controversy all my life. It was abandoned about 1868. No work was done on it till about 1878. About this time we got up a petition to the ordinary to establish a public road there, with gates on it. He refused to do this on account of the gates which had been put there by my father in 1870. When he so refused he told me, who was then road overseer, to take some of the road hands, and work it as a sort of settlement road, which I did; and while the hands were worked by me it was with this understanding. I had the road worked in this way until 1889 or 1890, when the board decided this was not a public road, and told me to take the hands off of it, which I did. The road was not worked from the time it was abandoned, about 1868, till I had it worked as I have said. There have been a great many changes in the bed of the road. We always made them when and where they were convenient, without order or permission from the ordinary or commissioner." It was admitted that two other persons would swear what Glaze did, had they been present. Calhoun testified that he had the road worked out when he was road overseer, without a commission from the road commissioners, and it was always understood that the work done on it was irregular, and that it was just a settlement road; that it has been changed in many places, and the greater part of it is now on rougher ground than formerly. Ashworth testified that the road has been worked off and on since the war, and the roadbed has been changed in many places.

The petitioner for certiorari assigned as error the decision overruling the objection to any testimony as to the contents of the copy

of the order originally establishing the road, and the order granting the petition of the petitioners Dyer and others, on the ground that said order was contrary to law, evidence, etc.

R. J. & J. McCanny, for plaintiff in error.
Jones & Martin, for defendants in error.

PER OURIAM. Judgment affirmed.

(97 Ga. 340)

MECASLIN et al. v. HARRALSON et al.
(Supreme Court of Georgia. Aug. 16, 1895.)

TEMPORARY INJUNCTION.

Upon a general review of the pleadings and evidence submitted to the trial judge, it does not appear that any error was committed in passing the interlocutory order, portions of which are excepted to by both sides. By the injunction granted, the existing status, except as to one matter, is preserved; and in that matter the plaintiffs are sufficiently protected by the undisputed solvency of the one defendant against whom the injunction was denied.

(Syllabus by the Court.)

Error from superior court, Fulton county;
J. H. Lumpkin, Judge.

Action by M. Harralson and others against J. H. Mecaslin and others for an injunction. A temporary writ was ordered, from which both parties bring error. Affirmed.

J. L. Hopkins & Sons and Glenn, Slaton & Phillips, for plaintiffs. N. J. & T. A. Hammond and Rosser & Carter, for defendants.

PER CURIAM. Judgment on both bills of exceptions affirmed.

(97 Ga. 341)

WILLIAMS et al. v. CHEATHAM.
(Supreme Court of Georgia. July 29, 1895.)

APPEAL—RECORD.

One of the main purposes of the supreme court practice act of 1889 was to aid this court in the transaction of the vast volume of business coming before it, by saving its valuable time. Accordingly, where it appears affirmatively from an inspection of the bill of exceptions that a case was not brought to this court as required by law, for the reasons that the evidence was neither briefed nor incorporated in the bill of exceptions, but that, instead of so doing, counsel for the plaintiff in error attached to the bill of exceptions copies of various records, deeds, affidavits, notes, and other documents which are unnecessarily set forth in full, since they contain much irrelevant and superfluous matter which might have been omitted altogether, and these records, etc., being, as to the material portions of the same, capable of much condensation, which was not even attempted, this court will not undertake the greatly-increased labor of examining closely this mass of evidence for the purpose of ascertaining whether errors were committed or not, or whether the court below did or did not abuse its discretion in granting an interlocutory injunction.

(Syllabus by the Court.)

Error from superior court, Madison county;
Seaborn Reese, Judge.

Action between B. B. Williams and others and Elizabeth Cheatham. To the judgment

rendered, Williams and others bring error. Affirmed.

J. J. Strickland and W. M. Howard, for plaintiffs in error. H. H. Carlton, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 328)

CENTRAL RAILROAD & BANKING CO. v. MURRAY.

(Supreme Court of Georgia. July 29, 1895.)

EVIDENCE—TESTIMONY TAKEN ON PRIOR TRIAL—RAILROAD COMPANIES—FIRES.

1. Where, from extreme old age and both physical and mental infirmity, a witness has become incompetent to testify as to facts once within his knowledge and memory, and it appeared that he was likely to remain in this condition or grow worse, there was no abuse of discretion in admitting in evidence his testimony introduced at a former trial of the same case, when he was not so much afflicted with these infirmities.

2. The law of this case, as announced by this court in 20 S. E. 129, and 93 Ga. 258, was substantially administered at the trial now under review. If any errors were then committed, they could not have resulted in any material injury to the defendant, and are not of such weight and importance as to require a new trial. There was evidence sufficient to warrant the verdict; and there having been already three trials of this case, each resulting in a verdict for the plaintiff, this court will not control the discretion of the trial judge in refusing to set the last one aside.

(Syllabus by the Court.)

Error from superior court, Houston county; J. L. Hardeman, Judge.

Action by J. J. Murray against the Central Railroad & Banking Company. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

J. J. Murray sued the railroad company for damages which he alleged he sustained by the setting fire to, by sparks negligently thrown out from defendant's train, and the consequent burning of, growing timber, fencing, leaves, and litter upon his land, etc. He obtained a verdict for \$1,428. Defendant moved for a new trial, which was granted, and the granting of which was affirmed by this court. 90 Ga. 83, 15 S. E. 645. The case was again tried, and resulted in a verdict for plaintiff for \$700. A new trial was denied, and defendant excepted to this ruling and to the overruling of a demurrer. This court held that the declaration was sufficient, but that a new trial should have been granted. 93 Ga. 256, 20 S. E. 129. The third trial resulted in a verdict for plaintiff for \$1,079.68. Defendant's motion for a new trial was overruled, and it excepted.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc.; and, further, that it was ex-

cessive, and contrary to certain specified portions of the charge. Further, because the court erred in ruling as follows: H. W. English, a witness for plaintiff, having testified: "I don't recollect of Mr. Murray selling any oak cordwood. I couldn't say of my own knowledge that he every sold any. Don't know that he ever had any offer for it, and don't know what the demand for cordwood was at that time. I do know of a demand for wood just as it stood on the land; that is, there is a demand now,—buy it just as it stands; buy it, and then cut it off. There was a demand for it in 1890, just as it stood on the land. I only know this because I had men to tell me so. I never sold any myself. A man living close to me sold some,"—he was asked, "You didn't see him do it? You only know from what he told you?" and answered, "No, sir." After the witness had thus testified, plaintiff proposed to prove by him that there was a market value for timber standing on the land, and also that plaintiff could have gotten 50 cents a cord for his timber standing on the land, as near to Macon, as plaintiff's. Defendant objected, on the ground that the witness had stated he had never sold any timber that way, and never saw any sold, and could only speak from what others told him, and therefore the matter about which it was proposed he should testify appeared to be not within his own knowledge. The objection was overruled, and the witness permitted to testify that plaintiff could have gotten 50 cents a cord for his timber standing, to which ruling defendant excepts. Plaintiff proposed to prove by John Murray that the wood alleged to have been injured and destroyed by fire was, in the witness' opinion, worth 50 cents per cord standing on the ground before it was burned. Defendant objected, on the ground that plaintiff could only show the value of the timber in its then state on the land by evidence as to what he could have realized from it by appropriating it to use himself, to the extent of any demand for it made by his own wants at and about the time of the fire, and by selling it to others to the extent of any demand that then existed for it; defendant contending that it was incompetent to show witness' opinion as to what the wood was worth per cord, without requiring the witness to show that such demand existed and the extent to which it existed, and then confining his testimony to its value as ascertained from the extent of such demand. The objection was overruled, and the witness was permitted to testify that he thought the wood standing on the ground before it was burned was worth 50 cents per cord. To this ruling defendant excepts. Plaintiff proposed to prove by John Murray that about 100 rails would make a cord of wood. Defendant objected to this line of testimony, on the ground that the value of the timber destroyed in the rails as cordwood was not a proper measure of the damages

for the destruction of the rails. The court permitted the testimony, holding it admissible simply for the purpose of fixing the value of the rails. Thereupon plaintiff, after proving by the witness that it would cost 50 cents per hundred to cut and split rails, and another 50 cents to haul them and put them up, proved by the witness that the timber in said rails was worth at that time, in the opinion of the witness, \$1.50 per cord, or, leaving out the cutting and hauling, would have been worth for cordwood to sell in the market at that time 50 cents a cord. Thereupon defendant moved to rule out the testimony, contending that it was inadmissible and did not come up to the court's ruling. The court overruled the motion, and to this ruling defendant excepts. Error in ruling: Upon the trial of said case, plaintiff, over defendant's objection that the same was irrelevant, proved by John Murray, a witness for plaintiff, that his father was 86 years old, and mighty feeble, and was not able to come to court, and had not been from home in 18 months, and that the witness did not think that he would be able mentally and physically to give testimony in said case on account of his age and physical condition; and also, by M. G. Murray, another son of plaintiff, that plaintiff had been just as feeble as could be for the last year, and in bad health, that his mind had been much impaired, and that in respect to his memory he was getting worse every time the witness went to see him, and that his mind and memory were such that he could not testify about passing events. Said witness testified, also, that he did not live with his father, but his brother, John Murray, did. Thereupon plaintiff offered the testimony of J. J. Murray as a witness on the former trial of said case, as taken down in a brief of evidence filed with a former motion for a new trial. Defendant objected to the admission of said testimony, on the ground that such admission would be illegal, and that no case was made out such as would authorize the admission of such testimony, under the provisions of law for the admission of testimony of a witness on a former trial. The court overruled the objection, to which ruling defendant excepts. Plaintiff proposed to prove by Jeff Williams that the destruction of the top soil on plaintiff's place affected the renting of the place to witness, as follows: "When I first moved there, Mr. Murray told me he would let me stay there as long as I wanted to, and that year, after the fire burned over the land, I saw no way to pay the rent, because I expected the top soil to help me pay the rent; and so, after all of the top soil had been burned off the land, I told Mr. Murray I couldn't pay the rent;" and that, as a result of his inability to get top soil for fertilizing, witness moved from said place after the first year. Defendant objected to the testimony, upon the ground that it was irrelevant and inadmissible, and that the damages

thus sought to be proved were speculative and too remote, and were different from any damages laid in the declaration, and different from damages properly recoverable in the case. The objection was overruled, and to this ruling defendant excepts. Plaintiff, as preparatory to an effort to impeach J. A. Everett, one of defendant's witnesses, by showing previous contradictory statements, as a purported foundation for such impeachment, questioned such witness as follows: "Q. When you testified here before, your recollection was fresher as to what transpired? A. Yes, sir; I suppose so. Q. Well, wasn't this what you asked Mr. Murray when you rode up to his house: 'We didn't go out into the woods at all. I didn't know Mr. Murray went up there. Then I came around to his house, stated our business, and asked him if he could go with us, and he said, "No." I then asked him if he had some one to go with us, and he called a young man 15 or 16 years old, and asked where we wanted to go, and I said around the fence [that] was damaged most, around that pasture; and the young man got on his horse, and we were in our buggy. He told us it was pretty rough, and we went around the fence where [he] said it was burned, and we saw the continuation of the fence, and we went on around up the road, and that is as far as we went in the woods.' A. Yes, sir. Q. You told him then that you just came out to look into the damage done? A. Yes, sir; I may have said that. Q. Mr. Austin went with you? A. Yes, sir. Q. Didn't you hear Mr. Austin testify here before? A. Yes, sir. Q. Mr. Murray on that day was sick, wasn't he? A. He was out at the well when we got there. Q. Don't you remember that the old man had his head tied up, and said he had a headache? A. I don't remember that. Q. Well, any way, you just rode up to that old fence? A. Yes, sir. Q. You didn't get out? A. Once or twice we got out. Q. Mr. Everett, didn't you testify before that there was one eight-inch tree that was so burned that it fell down? A. Well, there was one there about six or eight inches. Q. Your attention was especially called to that? A. Yes, sir." No other questions were asked said witness by plaintiff or his council which in any way called said witness' attention to the time, place, person, and circumstances attending the former statement, nor was said statement shown to the witness or read in his hearing. Afterwards, during said trial, plaintiff offered in evidence the following portion of the testimony of said J. Abb. Everett, on a former trial, in order to impeach said witness by showing contradictory statements: "We didn't go out into the woods at all. I didn't know Mr. Murray went up there. I came around to his house, stated our business, and asked him if he could go with us, and he said, 'No.' I then asked him if he had some one to go with us, and he called a young man, fifteen or sixteen years

old, and asked where we wanted to go, and I said around the fence that was damaged most, around that pasture; and the young man got on his horse, and we were in our buggy. He told us it was pretty rough, and we went around the fence where he said it was burned, and we saw the continuation of the fence, and we went around up the road, and that is as far as we went into the woods." Said statement was offered from the brief of the testimony in said case on a former trial. Defendant objected to the admission in evidence of said alleged contradictory statement, on the ground that the foundation had not been sufficiently laid, and that the mind of the witness had not been sufficiently directed to the circumstances and the contents of said alleged contradictory statement. The objection was overruled, to which ruling defendant excepted.

Stood & Wimberly and John R. Cooper, for plaintiff in error. Hardeman, Davis & Turner, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., not presiding.

(97 Ga. 206)

ROBERTSON v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

VACATING CALL OF SPECIAL TERM—LARCENY—
VARIANCE.

1. A judge of the superior court has, under section 3245 of the Code, the authority in vacation to call a special term for the trial of criminals. This authority, by the act of December 24, 1890, was extended to the calling and holding of special terms for the disposition of civil business.

2. While it is not essential, in an indictment for the larceny of an animal, to describe it by earmarks, yet, if this be done, the description must be proved as laid. *Crenshaw v. State*, 64 Ga. 449. Consequently, where an indictment for the larceny of a hog alleged that it had a crop off the left ear and a split in the right, and the prosecutor testified that the hog stolen from him had a crop off the right ear and a split in the left, there was a fatal variance; and this variance was not cured by the evidence of another witness who testified that the stolen hog had a crop off one ear and a split in the other, but did not state which ear had the split and which had the crop.

(Syllabus by the Court.)

Error from superior court, White county; J. J. Kimsey, Judge.

W. H. Robertson, having been convicted of larceny, brings error. Reversed.

The following is the official report:

On May 21, 1895, in vacation, the judge of White superior court passed an order convening a special term of that court to be held on Thursday, May 30, 1895, for the trial of criminals and for civil business. An indictment had been previously found against W. H. and J. W. Robertson, charging them with having stolen, on April 1, 1895, from W. C. Alley, a black hog with white feet, smooth crop off the left ear, and a split of the right ear, about 16

months old. During said special term this case came on for trial, W. H. Robertson being put upon trial. He was found guilty, and, his motion for new trial being overruled, excepted. The motion was upon the general grounds alone. In his bill of exceptions he also excepted to the calling of said special term in vacation, and alleged that the court had no jurisdiction or authority to call said special term in vacation, that the order convening said term was and is null and void, and the whole trial and conviction null and void. It does not appear from the bill of exceptions or record whether objection was made before trial. The evidence for the state tended to show the following: Alley lost a hog, marked as described in the indictment, and about 16 months old, in White county, in February, 1895. He lived about three-quarters of a mile from defendant at the time the hog was stolen. The hog would weigh about 100 pounds. The hog had been missing three or four days, possibly, before a search warrant was taken. Alley's hogs used the range over near defendant's house. When the officer with the search warrant went to defendant's house, and told defendant what he had come for, defendant said: "All right, you will find no meat there except what I have bought and paid my money for." The officer got a light, and defendant opened his cupboard, and showed the officer the meat. The warrant called for a hog weighing 100 pounds, and Hix, who attends to Alley's hogs and was with the officer, said: "That is not it, and you had better not bother with the meat." Defendant went to shut the door, and the officer said, "Hold on," and looked over there, and there was a large piece of meat which was skinned. The officer said to defendant, "Here is a larger piece;" and defendant said that was all right, he could prove where he got that. The officer stepped back, and went through the house to the side room, and found blood on the floor, and an ax, bench, gambling stick, gall, and the fat off of the paunch, and arrested defendant. Defendant said he got the meat, the first time, in Gainesville; and the officer asked him how he came to skin it, and he said he got it dusty, and his wife skinned it, and made soap out of the skin. He said he got the other meat in Lumpkin or Dawson county, and gave his daughter a piece, and could prove it. It would be a hog of 100 pounds or better to make a ham of that size. The officer also found the joints of more than two hogs there. There was a big ham and a big middling and two small shoulders, but one was larger than the other. One had a middling to it, and the other did not. The two shoulders could not have come off of the same hog, and the shoulder could not have come off of the larger hog. From this the officer thought there were three hogs. The largest least shoulder had the middling to it, and the other small shoulder had the middling to it; and the largest skinned shoulder had no middling, and then the little

ham had no middling to it. The officer found a piece that looked to be the same piece at one of defendant's sons', and a skinned ham and a skinned middling and a hock of a shoulder, just like the meat at defendant's, at the house of another son of defendant. It did not appear to have been killed more than 24 or 36 hours. There were black hairs sticking to the meat, and black hair in the room, but no evidence of any hot water being used or any vessels. The little meat was very dry, and appeared to have been killed first. Four white feet were found at defendant's, which came off of the same hog. The officer tried one of the feet to the skinned ham, and it fit exactly. There were no ears found. The meat was piled in a box with the little meat on top, and the little meat had evidence about it that it was the meat of a black hog. There were spots of hair on it. That meat had not been skinned. The hair the officer saw on the large meat, he could not tell whether it came off of the large hog or the small one. The little hogs had been scalded in the ordinary way, and there were patches of hair on them. The small shoulders were cut off with the shoulders, beef fashion. At the committing trial, defendant said he got the meat from C. W. Oakes, and bought it from the pole; that some of it was skinned, and some was not; that the cause of that was, in hauling it home, it got solled in the wagon; and that the hog weighed about 90 pounds. He only accounted for one hog. There was further testimony for the state: Oakes never sold defendant a hog during January, February, or March, or at all in 1895. He keeps hogs at his store to sell from the pole. His clerk sold defendant some meat in December. It had not been skinned, but was shoulders, salted. The clerk has not sold defendant any meat in 1895. At the committing trial, defendant's daughter testified that her father bought the meat from Oakes; that they hauled it home in the wagon; that they skinned part of it, and made soap out of the hide, because it got solled in hauling it; that the hog was not cut up, but they hauled it home, and cut it up; that her father bought a pig from Lumpkin county, and killed it in the front room, and took part of it to Lumpkin, and left part of it there. Defendant's house is in White county, and the hog was taken in White county.

J. W. H. Underwood, J. B. Estes, and H. H. Dean, for plaintiff in error. Howard Thompson, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

(97 Ga. 211)

NIX v. STATE.

(Supreme Court of Georgia. July 29, 1895.)

CRIMINAL LAW—REASONABLE DOUBT—NEW TRIAL—EVIDENCE.

1. There was no legal merit in that ground of the motion for a new trial which alleged er-

ror in the failure of the court to charge the jury "that they must be satisfied beyond a reasonable doubt that the defendant did voluntarily make tracks in the presence of the witnesses, and did voluntarily pull off his shoe and let the witness put it into the tracks that they found going to and from the burnt house." Carr v. State, 10 S. E. 626, 84 Ga. 255 (4); McDuffie v. State, 17 S. E. 105, 90 Ga. 786; Delk v. State, 17 S. E. 269, 92 Ga. 453.

2. This court cannot consider the ground of the motion for a new trial alleging that the trial judge erred in not ruling out certain evidence, it not appearing upon what, if any, ground the motion to rule out was based.

3. The evidence against the accused, consisting almost entirely of testimony as to tracks found near the burnt building and traced to his home, which closely resembled tracks shown to have been made by him, and there being some evidence of his good character, and no satisfactory evidence showing any motive on his part to commit the crime alleged, the case at best was an exceedingly weak one, and if the conviction was justified at all it was barely warranted. This being so, and the newly-discovered evidence strongly suggesting a highly-probable cause of the fire entirely consistent with the innocence of the accused, the ends of justice require that there should be another hearing.

(Syllabus by the Court.)

Error from superior court, Early county; J. L. Sweat, Judge.

Jerry Nix was convicted of arson, and brings error. Reversed.

The following is the official report:

Jerry Nix was charged with arson in burning a school academy in Arlington, Ga. He was convicted and sentenced to the penitentiary for life. His motion for new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court failed to charge the jury specially that they must be satisfied beyond a reasonable doubt that the defendant did voluntarily make tracks in the presence of the witnesses, and did voluntarily pull off his shoe and let the witnesses put it into the tracks that they found going to and from the burnt house; the question being made on the trial of the case that the defendant was under arrest and in the custody of an officer, and was carried from John Harrison's house, in Calhoun county, to the place where the house was burned and the tracks were found, against his will, and that he was ordered and required by the officer to pull off his shoe, so that it could be fitted to the tracks. The court did give the general charge that the jury must be satisfied beyond a reasonable doubt of the guilt of the accused before he could be convicted. Further, because the court erred in not ruling out part of the evidence of W. D. Cowdry, in which he testified that defendant was a carpenter by trade, and followed no other work that he knew of, and that there was not much carpentering work,—not at that time. Defendant's counsel moved to rule out this testimony at the time it was offered, but the ground of such motion does not appear. Further, because of newly-discovered evidence. In support of this ground movant produced the affidavit of

Joseph Tolliver that, on the night of December 26, 1894, the night the academy was burned, he passed along the road near the academy about dark, and there were some children around the house shooting firecrackers or cannon crackers, and that he never told defendant or his attorney about these facts until since defendant's trial. Also, the affidavit of Hardy Webb that he was in Arlington on the evening of December 26, 1894; passed by the academy about dark, and saw some children around the academy and on the piazza of the academy, shooting firecrackers and other fireworks; that early in the night it turned very cold, and the ground was frozen over hard next morning, and that it would have been impossible for one to have made a deep impression by his tracks; and that he never told defendant or his attorney about these facts until after his trial. Also, the affidavit of Jake Holmes that, on the night the academy was burned, it turned very cold early in the night, it having rained in the evening; that he was out that night and found that, about 10 or 11 o'clock, the ground was frozen hard, and one walking or running could not have made a track impression on the ground; and that he did not inform defendant or his attorneys of these facts until after the trial. Also, affidavits of defendant and his attorney as to their ignorance of the evidence above stated until after the trial.

R. H. Powell & Son, for plaintiff in error.
H. C. Sheffield, Sol. Gen., W. M. Harper, and
J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment reversed.

(96 Ga. 818)

COBB v. PREFERRED MUT. ACC. ASS'N
OF NEW YORK et al.

PREFERRED MUT. ACC. ASS'N OF NEW
YORK et al. v. COBB.

(Supreme Court of Georgia. Aug. 5, 1895.)

ACCIDENT INSURANCE—CAUSE OF INJURY.

1. Where an accident insurance policy insured the person to whom it was issued "against bodily injuries effected through external, violent, and accidental means," and on the trial of an action thereon, predicated upon the loss of an eye, it appeared from the evidence that the plaintiff, while in an emaciated and feeble condition, after safely alighting from a train, carried his baggage, weighing from 60 to 80 pounds, a distance of about 50 yards, and "injured himself in some way or other" in so doing, so that, soon after putting the baggage down, a defect in the vision of one of his eyes became apparent, which finally resulted in a total loss of sight as to that eye, and it also appeared that the plaintiff had not fallen or received a blow or jar or shock of any kind, and that there was nothing unusual in his manner of carrying the baggage or in his locomotion while so doing, no case for a recovery was made. Even if the plaintiff's injury was attributable to the carrying of the baggage, it was not effected by "external," "violent," or "accidental" means, in the sense in which these words are used in the policy.

2. Without regard to other questions made in the record, the judgment of nonsuit was, for the reasons above indicated, rightly rendered.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Action by W. A. Cobb against the Preferred Mutual Accident Association of New York and others. To a judgment of nonsuit, both parties bring error. Affirmed.

The following is the official report:

The petition of Cobb alleged: The Preferred Mutual Accident Association is indebted to him \$650, besides interest, damages, and attorney's fees, upon a policy of insurance, copy of which is attached, issued to him May 18, 1888, whereby it undertook to insure him in divers sums in the policy mentioned, during a time covering and including May 11, 1891, against bodily injuries effected through external, violent, and accidental means, and particularly in the sum of \$650 against loss, by external, violent, and accidental means, of an eye. On May 11, 1891, without fault on his part, without extra exertion or unusual risk, and in the performance of his usual and customary duties as a traveling salesman, carrying trunks and packages, he undertook, from necessity incident to his duties, to move and place said trunks and packages from off and near the track of the Arlington Branch Railroad, in Dougherty county; and, from his effort to do so, the retina of his right eye was by accident ruptured and injured, from the effect of which the vision thereof was within 90 days from said date totally lost and destroyed. Immediately thereafter, as soon as said accident and loss was ascertained, defendant was furnished with full written notice and proof of said accident and injury, and with full particulars of the same; and thereafter, at a time when he had a right to demand payment of it for said loss, he did demand payment of it for the same, which it then refused to pay, and has ever since, and for more than 60 days, failed and refused to pay him said sum of \$650; so that he sues not only for said sum and interest, but also for damages and attorney's fees. Among the conditions of the policy was the following: "Immediate notice of any accidental injury for which claim might be made must be given in writing, addressed to the secretary of the association at New York, with full particulars of the accident and injury, and failure to give such immediate written notice shall invalidate all claims under this insurance; and unless affirmative and positive proof of injury and duration of disability, and that the same resulted from bodily injuries covered by this insurance, shall be furnished to the association within six months of the happening of such accident, then all claims based thereon shall be forfeited to the association." Defendant demurred to the petition upon the following grounds: (1) The allegations therein are not

sufficient to entitle plaintiff to recover. (2) It nowhere appears therein that the injuries were effected through external, violent, and accidental means. (3) The manner in which the alleged injury was effected is not sufficiently set forth in the declaration to entitle plaintiff to recover. (4) It does not appear from the declaration that plaintiff has complied with the conditions precedent required of him by the policy of insurance, to entitle him to recover. This demurrer was overruled, to which ruling defendant excepted *pendente lite*, and as to it assigns error in its cross bill of exceptions. After the introduction of the evidence for plaintiff, the defendant moved for a nonsuit, because the evidence submitted did not entitle plaintiff to recover. The motion was granted, to which ruling plaintiff excepted.

Plaintiff testified: "On May 11, 1891, I was on train going from Albany to Arlington,—a freight train. About two miles from Albany, the conductor told me he could not carry me unless I had a mileage book. I did not have such book, and got off the train, and my baggage was taken off by the porter. I was then, as I had been for several years, a traveling salesman, and carried my samples and baggage, which weighed from 60 to 80 pounds. There was no violence used to put me off the train. I got off, and landed all right on the side of the track. After the train had been gone about two hours, I carried my baggage over to the guano factory, forty or fifty yards, and put it in the office. It was a very warm day. I was trying to get my baggage to a place of safety. I injured myself in some way or other in carrying it over to a place of safety. Immediately on leaving the room I carried it to, I commenced catching at an object hanging on my head, and continued to catch at things that way until my vision was entirely gone. I then went back to Albany, and remained there five or six hours. I walked back to Albany, after waiting some two hours for a negro to bring a hack that I sent for. I then went to Arlington. I had a physician in Albany the next day,—Dr. Brown. He simply prescribed for me. I went to my place at Flat Rock, and was there for a few days only, and then returned back to my territory. I found that my vision was gone, and went then to see Dr. McIntosh for treatment, and, finding he was in Europe, called in Dr. Tullis, who treated me for three weeks, and notified me he could not do anything for me. On July 7th I came to Dr. Bullard, from Thomasville, and, after an examination, he informed me that my eye was hopelessly gone. That was the first information I had that my sight was hopelessly gone. I went to Atlanta, and was examined by Dr. Crawford, who is with Dr. Calhoun. He simply confirmed Dr. Bullard's statement. I notified the company of the loss of the eye on July 26th, and made this claim. I had given them notice

before that time, to wit, on July 14, 1891. I had lifted the same baggage often when I exhibited samples. I had moved the same baggage before, and had no injury from it. My baggage consisted of a sample case and a valise (telescope). I had been carrying around the telescope the whole length of time and this same baggage. I have carried other baggage besides. I received letter from the company of August 22, 1891. Had been engaged as a traveling salesman six or seven years. I was emaciated from having been down in Florida and South Georgia some six or eight weeks, probably longer, and was rather debilitated. I did not fall down on my way to where I placed the baggage. There was nothing unusual about my locomotion. After placing my baggage in the office of the guano company, I walked back to Albany. Cannot tell how long I was walking back. I was unconscious when I got to the hotel. Was very much fatigued by the walk. My unconsciousness came on me about the time I got to the hotel. Was aroused at four o'clock, and pursued my journey to Arlington. I saw Dr. Gambettie, a dentist. Dr. Bullard said the vision was lost and the eye affected from a detached retina. I notified the company, and it refused to pay the claim, and refused to send me blanks to make out claim for loss." Dr. Gilbert testified: "I have been a practicing physician for several years. Plaintiff has been my patient, and I have examined his eyes occasionally. Would say from examination which I made that the cause of the loss of his vision was paralysis of the optic nerve; that is, the retina. He had no disease when I treated him that would produce it. The injury to the retina 'is usually done from a jar or strain.' It could likely be done by accident,—a sudden shock, that may cause rush of blood to the eye or brain. The retina is an optic nerve, but they are all attached. The retina is a nerve that runs right back to the ball of the eye. The optic nerve is a nerve that runs back of the head, and connects the brain. The retina is connected with the optic nerve and all the paraphernalia of the eye, more or less; and the real trouble is the detachment of the retina. A man falling down is liable, or a knock in the head, or something of that kind, brings it on. When a person is debilitated, it affects his whole nervous system, more or less." Plaintiff put in evidence a letter from defendant to him, dated New York, August 22, 1891, in answer to a letter of plaintiff of August 1, 1891. Defendant's letter stated: "No sufficient explanation is given of your omission to notify the association of the injury to your eye, in accordance with the terms of the policy. You state in your letter of the 1st inst.: 'I knew on May 11 that I was injured, but did not know until June 20 that it would result in destroying the sight, but on that day vision was entirely gone.' Having this knowledge, you

then waited until July 14th, between three and four weeks after being aware, as you state, that 'vision was entirely gone.' If the policy, by its terms, obligated the association to recognize valid claims, it likewise obligated the insured to give notice of injury as therein required, inasmuch as this policy was issued to and accepted by you subject to its conditions, as stated in the first clause thereof. Notice of the injury might readily have been given by you or by some one on your behalf; and, in absence of any sufficient explanation for your omission so to do, we are obliged to disallow the claim." Plaintiff also put in evidence the policy sued on.

C. J. Thornton and Morgan McMichael, for plaintiff. Goetchius & Chappell, for defendants.

PER CURIAM. Judgment affirmed. Cross bill of exceptions dismissed.

(97 Ga. 335)

BARNHART v. HALL et al.

(Supreme Court of Georgia. Aug. 5, 1895.)

NEW TRIAL—DISCRETION OF COURT.

The verdict being strongly supported by the evidence, and no error having been committed by the judge, either in his instructions to the jury or in the admission of evidence, his discretion in refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Greene county; W. F. Jenkins, Judge.

Action by V. S. & G. A. Hall against G. R. Barnhart on an account. Plaintiffs had judgment, and defendant brings error. Affirmed.

The following is the official report:

V. S. & G. A. Hall sued Barnhart upon an account. (The declaration is not in the record.) There was a verdict for plaintiffs, the amount of which does not appear in the record or bill of exceptions. Defendant moved for a new trial, which motion was overruled, and to this ruling he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in not granting defendant's motion for nonsuit, made upon the ground that plaintiffs' evidence did not make a cause of action, but showed at most only a verbal promise to answer for the debt, default, or miscarriage of another, which, under the statute of frauds, was not actionable. Because the court erred in admitting the following testimony of V. S. Hall: "The first I knew of the hands [meaning those on defendant's plantation] obtaining any supplies, was when I saw our bookkeeper, W. L. Barnhart, the son of defendant, selling them, who said that he would stand for the hands that month, till his father could come and make some arrangement to have them run,"—the objection of defendant being that no agency or other privity between W. L. Barnhart and

defendant was shown. Because the verdict was contrary to certain specified portions of the charge. Because the court erred in charging: "If the jury believe from the testimony that the plaintiffs refused credit to the hands, and did not agree to supply them until the defendant promised the plaintiffs that he would see the debt paid, and that plaintiffs should not lose anything, and thereupon the plaintiffs supplied the hands on the faith of said promise alone, then the defendant is responsible for the debt." Alleged to be error, because not warranted by the evidence, and because it makes the previous refusal and subsequent granting of credit the sole test of whether the promise was original or collateral, when they should be treated merely as circumstances to aid in the determination; and, further, because such a test permits the promisees to regard the promise, otherwise of doubtful construction, as original, when the promisor may never so have intended it, the court nowhere charging that the consent of both parties was essential to the creation of an original liability. Error in charging: "If you find that there was a contract, and that the understanding or intention of the parties was that the undertaking was to be an original one, and not a collateral one,—that is, if the credit was extended to him,—he, the defendant, would be liable, and you should so find." Alleged to be error, in that it makes the giving of credit by plaintiffs to defendant the test of whether the undertaking was original or collateral. In the order overruling the motion for new trial it is stated that the motion was overruled, plaintiffs' attorney having written off from the verdict and judgment the principal and interest of the account for the first month.

Hart & Sibley, for plaintiff in error. H. T. Lewis, for defendants in error.

PER CURIAM. Judgment affirmed

(97 Ga. 329)

WHITAKER v. NEW ENGLAND MORTGAGE SECURITY CO.

(Supreme Court of Georgia. Aug. 5, 1895.)

EJECTMENT—SUFFICIENCY OF EVIDENCE—MESNE PROFITS—INSTRUCTIONS.

According to the principles laid down by this court in *Jackson v. Mortgage Co.*, 15 S. E. 812, 88 Ga. 756, and in *Stansell v. Trust Co.* (decided at his term) 22 S. E. 898, the evidence on the question of title demanded a finding in favor of the plaintiff for the premises in dispute, and the court did not err in so instructing the jury; and, it not appearing that there was any error in the finding as to mesne profits, this matter having been properly submitted to the jury, the motion for a new trial was rightly overruled.

(Syllabus by the Court.)

Error from superior court, Baldwin county; W. F. Jenkins, Judge.

Action by the New England Mortgage Security Company against James O. Whitaker

to recover land. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

The New England Mortgage Security Company sued J. C. Whitaker for 1,300 acres of land in Baldwin county, described, known as the "James Whitaker Plantation." Among the deeds mentioned in the abstract of title was a deed from William E. Haygood to Charles L. Flint, dated February 26, 1883. Defendant pleaded the general issue. Also, that the deed from Haygood to Flint was void for usury, because made to secure the payment of notes in New York with 8 per cent. interest, which, under the New York law, annulled the entire contract, including notes and deed; and because the sum borrowed by Haygood from Flint was only \$4,000, whereas the secured notes for the same were for \$5,000, with 8 per cent. interest thereon,—a mere device to evade the usury law and reserve 10 per cent. upon the sum borrowed. There was a verdict for plaintiff for the premises and for \$162 mesne profits. Defendant's motion for new trial was overruled, and he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court limited the inquiry before the jury to the sole question of the amount of mesne profits to be found against defendant; that the court directed the jury to find the premises sued for for plaintiff. Further, because the court refused to charge the jury "upon the principles of law arising upon the facts submitted and proved." Upon the trial, plaintiff introduced: Deed from H. Blizzard to James C. Whitaker, dated August 23, 1884; deed from Murray, assignee in bankruptcy of J. C. Whitaker, to Waitzfelder & Co., dated June 22, 1869; deed from Backer, assignee in bankruptcy of Waitzfelder & Co., to Samuel Walker, dated January 16, 1877; deed from Samuel Walker to L. N. Calloway, dated January 3, 1879; deed from L. N. Calloway to W. E. Haygood, dated January 20, 1883; deed from W. E. Haygood to Charles Flint, dated February 26, 1886; and deed from Flint to plaintiff, of the same date. These deeds were all made in Georgia, except the last, which was made in Massachusetts. The deed from Haygood to Flint recited that it was made by Haygood to secure a loan of \$5,000 made him by Flint, under the condition of a bond to reconvey executed by Flint, made part of the deed, and the deed and bond executed to conform to section 1969 et seq. of the Code of Georgia. Plaintiff also introduced Haygood's note for \$5,000 principal, with interest coupons annexed, bearing 8 per cent. interest, dated February 26, 1886, executed at Milledgeville, Ga., and payable to the order of Flint at the office of the Corbin Banking Company, New York, N. Y., which note embodied the debt secured by the deed of Haygood to Flint. J. C. Whitaker testified for plaintiff that the premises, when he first knew them, were

owned by and were in the possession of his father, J. C. Whitaker, and so continued until they were sold by his father's assignees to Waitzfelder & Co., who were in possession until they were sold by the assignee of Waitzfelder & Co., and purchased by Walker, who sold to Calloway, who was in possession until he sold to Haygood, and Haygood went into possession and was in possession on February 26, 1886, when he conveyed the land to Flint, and remained in possession until witness bought the land at sheriff's sale in February, 1890, since which time witness has been in possession; that witness' only claim of title is the conveyance to him by the sheriff; that witness knew of the negotiation between Haygood and Robinson for the \$5,000 loan made by Flint to Haygood, and that Haygood had conveyed the land to Flint to secure the loan before the judgment was obtained under which the sheriff sold and witness purchased in 1890; that the lands were worth an average of about \$220 per year rent, but this is more than witness has received from them; that the lands are worth between \$4,000 and \$5,000; that witness supposes he saw the papers which passed in the loan transaction, and he never saw any bond to reconvey from Flint to Haygood; and that Haygood was a resident of Baldwin county, Ga., when the \$5,000 note was made. Defendant introduced deed from plaintiff to Haygood to the premises, dated September 27, 1889, and recorded November 19, 1889, reciting that it was made to enforce lien of judgment upon the \$5,000 note, under section 1970 of the Code. Also, order of court dismissing the levy of fi. fa. of plaintiff against Haygood, issued from said judgment, dated February 11, 1891. Also, two Baldwin superior court fi. fas., January term, 1888, in favor of J. C. Whitaker (defendant in the present case) against W. E. Haygood, levied on the land in dispute December 3, 1889, with entry of the sheriff that the land was sold under said execution February 4, 1890. Also, an execution from the same court at the same term and between the same parties, with the same entries by the sheriff, and two justice court executions, January term, 1888, between the same parties, with like entries. Also, sheriff's deed to the land to said Whitaker, February 4, 1890. Also, the New York usury statute, showing the highest rate of interest allowed by the laws of New York to be 6 per cent. per annum, and all contracts reserving a higher rate to be void. W. E. Haygood testified: "I applied to Robinson for \$6,500 loan, contracted for \$5,000, and received \$4,000, giving the note for \$5,000, above mentioned, before getting it. I never received any bond for titles. I paid what interest I did pay on this debt to the Corbin Banking Company by checks on New York. I signed the agreement employing Nelson & Barker as my agents to negotiate the loan for me, and agreed to pay 20 per cent. commission to them out of the loan. I do not

know how much money Flint paid to the Corbin Banking Company for me. I signed the receipt for the money, reciting that I had received the \$5,000 from the Corbin Banking Company, less commissions as agreed; and also signed the application for the loan." In rebuttal, plaintiff produced the application for the loan, and Haygood's agreement with Nelson & Barker, making them his agents to negotiate the loan for him, and agreeing to pay them 20 per cent. commissions, to pay 8 per cent. interest on the loan, etc. The application for the loan contained a description of the land offered as security, and a statement that Haygood understood that, if the application were negotiated by Nelson & Barker, it would be upon the representations therein contained, which were true, and were made by him to be used by Nelson & Barker as his agents in procuring the loan. Also, the receipt of Haygood, above mentioned, for \$5,000. Plaintiff introduced other testimony, to the effect that the business of Nelson & Barker, a firm of Atlanta, Ga., was the negotiation of loans for such persons as employed them; that they were employed by Haygood to negotiate the loan; that through the Corbin Banking Company as intermediary they negotiated the loan with Flint, who was then president of plaintiff; that the Corbin Banking Company then sent them a check for the \$5,000, less 10 per cent., the amount of the commissions of said banking company; that neither Nelson nor Barker nor the firm had any interest in or connection with Flint or his company, and, when they forwarded application for their customers to the Corbin Banking Company, did not know who would accept the same; and that the commissions which Haygood agreed to pay were divided between Nelson & Barker, the Corbin Banking Company, and Robinson, the local agent of Haygood. The clerk of Baldwin superior court, who was clerk in 1886, testified: "The deed of reconveyance from plaintiff to Haygood, dated September 27, 1889, and recorded November 19, 1889, was filed in my office for record by plaintiff. It was not delivered to Haygood by me, nor has he paid me any part of the debt for which the \$5,000 note was given."

O. P. Crawford, for plaintiff in error. Wm. E. Simmons, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 270)

McCLUNG v. AMOS et al.

(Supreme Court of Georgia. Aug. 5, 1895.)

SUFFICIENCY OF PETITION—DISMISSAL.

It appearing from the allegations of the plaintiff's petition that he set forth no cause of action, equitable or otherwise, there was no error in dismissing the same on demurrer.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by S. J. McClung against George W. Amos and others. The action was dismissed on motion, and plaintiff brings error. Affirmed.

The following is the official report:

The case of Mrs. S. J. McClung against George W. Amos et al. coming on to be heard, the defendants moved to dismiss the petition for want of equity. The motion was sustained, and to this ruling plaintiff excepted. The petition alleged: On December 23, 1888, petitioner's father, Samuel Amos, died intestate, leaving a considerable estate of realty and personalty, worth some \$4,000. He left as his only heirs at law his widow, Elizabeth; his children, George W. Thomas, Jennie McDaniel, and petitioner, all over 21 years old except Thomas, who was about 20. At the time of her father's death she lived some distance from him, but went to his house. She had been about home, for a considerable time, but little; had a very imperfect knowledge of his effects, and was wholly dependent on her mother, her brothers and sister, and her sister's husband, George McDaniel, for any information as to his effects. Soon after his death they all assembled, and determined then and there to divide his estate without any administration, and within less than a week after her father's death entered into an agreement to so divide, and called to their assistance S. M. Brannon to draft a written agreement therefor, who drew up the paper, copy of which is attached. Petitioner, relying on the heirs above named, and expecting them not to seek any advantage of her alone, acted in the matter as they said, being totally unaccustomed to business. She, together with them, signed the paper, believing and being informed at the time that the property set apart as the share of her mother was for her use during her life. She avers that was the agreement and that she was to have the use of the property so set apart as her share in the agreement for life, and that at her death the same was to be divided between the children of Samuel Amos; and petitioner signed the agreement believing it was so expressed therein, and never would have signed it if she had known it was as it appears. In pursuance of said agreement, Bird, McCullough, and Brannon, on December 23, 1888, proceeded to make said division, as will appear by exhibit attached. Immediately afterwards all the heirs went into possession of the property set off to them, respectively, the several children having bid off what they received, and said Elizabeth taking the portion set off to her as her share, without sale. Bird, McCullough, and Brannon in said division decided that petitioner had received more than an equal share, and was due to George W. Amos \$74.25, for which she gave him her note. She bought and received in the division the west half of lot 212 in the ——— district of Harris county. Soon after she went into possession

of said land, a fl. fa. against George W. was levied on his interest in said west half, and was, under the levy, sold by the sheriff, and bid off by ——. She is informed and believes that Jennie McDaniel was the bidder; at any rate, that she holds a deed either from the sheriff or from the purchaser at said sale, and now claims at least a one-fifth of the land so received in said division by petitioner. Some two or more months after said division, the said heirs at law concluded it was best to have the estate administered; that they would do away with the agreement and division made thereunder; and that Brannon should be the administrator. Brannon applied for letters, and citation was duly published, but for some reason Brannon failed to get letters. Under said last agreement petitioner called on George W. to deliver up the note she gave him, and he did so. Since then he has sued her for the \$74.25, obtained a judgment, and levied the fl. fa. on said west half of lot No. 212. Brannon, in drawing up the first agreement, in and by which said Elizabeth received the home place in Talbot county, consisting of land, furniture, two mules, a horse, wagon, buggy, live stock, etc., also lot of land 206 in Harris county, and five bales of cotton, [knew] it was the intention of the several heirs to give her all of said property for life, and that at her death so much of it as was not consumed by her in her support should be divided share and share alike between the other heirs. By mistake or fraudulent design on the part of Brannon, the same was given her in said written agreement as hers absolutely. The second agreement, canceling said first agreement, and by which the estate was to be administered, completely canceled the first, and put the property the several heirs had received back in the estate to be administered, and also canceled all notes given to equalize said division, and especially the note given by petitioner to George W., and in compliance with which he surrendered the note. Notwithstanding said facts, said Elizabeth, George W., and Thomas refused to stand up to the last agreement, and each obtained all they had received from the estate, and George W. is trying to force a sale under his judgment, notwithstanding his interest in the west half of lot 212, received by petitioner, has been sold to pay off an old execution against it. Petitioner prayed for injunction against said other heirs, restraining them from further using and holding any of the estate of Samuel Amos; and restraining George W. from further proceeding with his said judgment and fl. fa. Also, for decree that the estate of Samuel Amos be taken charge of by some proper administrator, to be appointed, and duly administered and divided under the law. Also, for decree that Jennie McDaniel surrender up all claims she may have to the interest bought by her or those from whom she claims title to lot 212, for general relief, and for sub-

poena against said other heirs, Thomas being now 21 years old.

J. H. Worrill, for plaintiff in error. Henry Persons & Son, J. L. Willis, and J. J. Bull, for defendants in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 301)

ATLANTA & W. P. R. CO. v. THORNTON.

(Supreme Court of Georgia. Aug. 5, 1895.)

RAILROAD COMPANIES — KILLING OF ANIMALS — SUFFICIENCY OF EVIDENCE.

The plaintiff's evidence, aided by the legal presumption, making a prima facie case for a recovery, the verdict in his favor, after its approval by the trial judge, will not be disturbed. Although the testimony of the defendant's main witness may, when taken alone, have been sufficient to establish due diligence on the part of the defendant, there was other evidence warranting the jury in discrediting the testimony of this witness.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Action by J. P. Thornton against the Atlanta & West Point Railroad Company. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

Thornton sued the railroad company in an action of damages for killing stock, and obtained a verdict for \$100. The motion for new trial made by defendant, on the general grounds alone, was overruled, and it excepted. Allen Hogg testified: "I was standing near the railroad at the crossing, and saw the train strike the cow and bull, and knock them off. The train was running 30 or 35 miles per hour. I showed Mr. Ragsdale where they were struck, and he and I measured up to the point of curve. The engineer blew his whistle before striking the stock. The train did not slack its speed. I also measured the distance with Mr. Thornton from where the cattle were struck to where he decided they could have been seen. It was 750 feet to the point where they might have been seen. When I measured with Mr. Ragsdale, they stopped at the point of the curve." Plaintiff testified: "I saw the place where the stock was killed. The train knocked the cattle about 150 feet. The place where they were struck was about 387 yards before reaching the public crossing. Could see a man about — yards up the track at the place where the stock [were]. I think a man elevated as high as one would be on an engine could see from a distance of some 400 yards before reaching the place where the cattle was killed. The cattle was worth \$100. It is up grade in the direction they were going." Ragsdale testified: "I visited the place of killing the stock, and Allen Hogg showed me the place where stock was killed, and it was 140 yards from the point where they were struck to the point of the curve.

The stock was struck outside of the blow post. The posts are 400 yards from the crossing. At least, I placed it that distance. If it has been moved, I do not know it." Another witness testified that the stock were struck just outside the blow post; that the blow post was 400 yards from the crossing; and that it was 140 yards from the point where the stock were struck to the point of the curve. For the defendant, Sam Foster testified: "Was engineer on the train which killed the stock. It was a passenger train. It was running about 25 or 30 miles an hour. Everything was in good order. I saw the stock as they struck the straight. After looking around the curve, I saw them as soon as it was possible to see them; and, as soon as I saw them, I undertook to stop the train, and did all I could to stop it. I put on the air brakes, and blew the cattle alarm. I could do no more. I did not reverse, for it would not help me. I was somewhere about 100 yards from them when I first saw them. I did all I could, and it was impossible to stop. It could not be stopped in that distance." On cross-examination this witness was asked if he did not testify before Judge Turner (Judge of the county court, before whom the case was first tried) that he did see the stock about 140 yards, that they were on the track coming towards him, and that he thought they would get off the track, and that he could stop his train in 100 yards. This statement he denied having made. Judge Turner testified that his recollection was not distinct about the matter, but that, to his best recollection, Foster testified that he saw or could have seen the cattle about 160 yards, and that he could stop his train in 100 or — yards; that he was on the convex side of the curve, and could only see the cattle about 160 yards from him; that he could either have stopped the engine or have saved the cattle if one or two things did not occur. Witness could not say what he said was the trouble. He said the engine, boiler, and smokestack, etc., obstructed his view, and that a man on the inner side of the curve could see cattle easier or quicker, as the engines are built so high and large; that he thought the cattle were crossing the railroad, and turned on and pursued the track. T. H. Whitaker testified: "I, as counsel, questioned Engineer Foster in county court. He never did say he could have stopped his engine; swore he tried to stop it as soon as he could see the cattle of Thornton. His testimony is substantially here now as it was then, and I remember it. He then used word 'feet' in stating these distances; as, he was 300 or 400 feet from cattle, where now he says about 150 yards, or, as last there stated, 140 yards. The distance he gives in about same words,—feet and yards changed, and figures changed to correspond. I remember well that I tried to emphasize it in county court that Foster was swearing there that he did all he could to stop engine, and took no chances, but tried to

avoid a collision with cattle, for it endangered himself, and that he once was ditched and had an arm broken by striking cattle with his engine." Plaintiff further testified that Foster, in his evidence before Judge Turner, swore that he did see the cattle on the track crossing towards him about 140 yards; that he thought they would get off the track; and that he could have stopped his train in 100 yards; that the fireman, Heard, swore before Judge Turner, that he was standing at the window, looking out, when he first saw the cattle; the curve was a very gradual one from the point of the curve,—200 yards; there were only 6 feet out of line; and that he measured it.

T. H. Whitaker and Dorsey, Brewster & Howell, for plaintiff in error. Longley & Longley, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 255)

WOODS v. ALMAND et al.

(Supreme Court of Georgia. Aug. 5, 1895.)

MORTGAGE FORECLOSURE — SUFFICIENCY OF PLEA OF PAYMENT.

Although it was probably intended by the plea to allege that the mortgage sought to be foreclosed was given only as collateral security for the payment of an open account which the defendant contemplated contracting with the plaintiff at the time the mortgage was executed, and that this account was afterwards fully paid off and discharged, the plea in fact falls too far short of distinctly and plainly making these allegations to render it good against a demurrer alleging that it did not clearly and distinctly set out any matter of defense.

(Syllabus by the Court.)

Error from superior court, Butts county; J. J. Hunt, Judge.

Action to foreclose a mortgage by Almand & Moon against J. A. P. Woods. To a judgment for plaintiffs on demurrer to his plea, defendant brings error. Affirmed.

The following is the official report:

Almand & Moon brought their petition against Woods, alleging: That on February 9, 1892, he executed and delivered to them a mortgage note, which became due on October 1, 1892, for \$492.21 principal. That defendant fails and refuses to pay the principal and interest due thereon, though often so requested. That to secure said principal and interest and other items that might become due and owing to them said Woods mortgaged to plaintiffs "the following described property: 'One hundred acres of land, being and lying in the 616th dist., bounded as follows: North, Fincher & Wilson; south, by John Thompson; east, by Lindsay Woods; west, by J. W. Welch;' and other personal property in said mortgage named. That the real estate so mortgaged lies and is situate in the county and state aforesaid. That the personal property is of little or no value," etc. Plaintiffs prayed for rule nisi to foreclose the mort-

gage. In defendant's answer to the rule nisi he alleged that his "obligation as to said mortgage has long since been entirely discharged; that said mortgage was given as security only, and for the purpose of trading on an open account"; that he "has paid plaintiff in full of all indebtedness whatever"; that he "owns no land as described in the petition, nor did he dictate any such description"; and "that he is not indebted to plaintiff in any manner or form whatever." This plea was sworn to by defendant. It was stricken on demurrer, because it did not clearly and distinctly set out any matter of defense. Defendant excepted, alleging that this decision was contrary to law; that he or his attorney never had notice of said demurrer (which was heard when reached on call of docket); and that said demurrer was made on the day next to the last day of court, and passed on the same day.

Ray & Ray, for plaintiff in error. Y. A. Wright, for defendants in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 337)

TILLMAN v. GEORGIA LOAN & TRUST CO.

(Supreme Court of Georgia. Aug. 12, 1895.)

EXECUTION—INTERVENTION—EVIDENCE—INSTRUCTIONS.

It does not appear from the record that any error was committed in admitting or in rejecting testimony; and, in view of the issues involved and of the evidence introduced, there was no error in qualifying, as the court did, the plaintiff's requests to charge, nor in giving the charges complained of. The verdict was amply supported, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Stewart county; W. H. Fish, Judge.

To property levied on at the suit of W. L. Tillman against Thomas W. Lott, the Georgia Loan & Trust Company interposed a claim of ownership. To an adverse judgment, plaintiff brings error. Affirmed.

The following is the official report:

An execution in favor of W. L. Tillman against Thomas W. Lott being levied upon certain land, a claim was interposed by the Georgia Loan & Trust Company. The execution and levy are not set out in the record, nor are any pleadings set out therein. It appears that the *fi. fa.* of Tillman was a mortgage *fi. fa.* upon the land; that, after Lott had given the mortgage to Tillman, he gave another mortgage upon the same land to the Georgia Loan & Trust Company, which mortgage was foreclosed, the land sold under the foreclosure, and the Georgia Loan & Trust Company became the purchaser, and went into possession; and that, after this sale, Tillman had his mortgage *fi. fa.* levied. There was a verdict finding the property not sub-

ject, and, Tillman's motion for new trial being overruled, he excepted.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc.

Also, because plaintiff objected to the testimony of R. F. Watt, upon the ground that there were no pleadings which authorized its admission, that his testimony sought to set up an equity in favor of claimant, but there was no pleading which authorized it, and that there was no equitable issue filed in the case, which objection was overruled.

Because plaintiff offered the original letters of Watts & Hickey to Tillman, copies of which were attached, to the admission of which claimant objected, but upon no special ground. The court sustained the objection, and ruled out the evidence. In a note to this ground the court states: "When these letters were offered, they were objected to by claimant's attorney; and the court, thinking they were not relevant, asked plaintiff's attorney how they were admissible. He replied: 'Judge Watts claims there was a mistake in this debt. I want to show that this matter was set down by Mr. Tillman in 1888. I want to corroborate Tillman's testimony.' Upon this statement, and inspection of the letters, the court ruled them inadmissible. It appears from the letters that they were addressed to Tillman by Watts & Hickey, and stated, in substance, that interrogatories for Tillman in his case against Lott were inclosed for execution; that the affidavit of foreclosure made by Mr. Hickey was defective, in that he made a mistake in the calculation, but the acts of 1887 would allow an amendment, and for Tillman to make the calculation up to the time of foreclosure (November 25, 1887), in a manner directed, and return papers without delay.

Also, because plaintiff objected to the following testimony of R. F. Watts, upon the ground that there were no pleadings in the case which authorized it, and no equitable issue tendered or filed in the case to warrant the admission of the testimony: "I know the application of Thos. W. Lott, to a company that I represented, for a loan. There was a lender of money in Hartford, Connecticut, whose name was Jas. H. Tillman. The Georgia Loan & Trust Company was a company that I represented in a manner that correspondent lawyers represent these loan companies. I held myself forth in the community as a person who would examine property, make abstracts, and make loans. Thos. W. Lott recognized my business in that line, came to me, and presented his situation. That was about the first of the year 1884, if I mistake not. I examined Mr. Lott's condition, looking at the record, and discovered a record of a large mortgage upon this property in favor of Tillman; also, a *fi. fa.* or mortgage—I believe it was a *fi. fa.*—in favor of T. T. Mathis. I summed up what appeared to be due on these papers, and inform-

ed Lott I would not lend him the money, that he would have to go on further by indulgence, and pay down, until his property would have such a proportion to his debts that I could lend him the entire sum, and discharge his indebtedness. In January or February, 1886, he told me: 'I have now about paid down to where you can reach me.' I asked about the Tillman matter. He said he had paid Tillman some money,—had paid him down to where I could reach him (Lott). I said I would have to write to Tillman, and get from him what was due, and see the other parties. I wrote to Tillman, and received a communication from him, stating specifically what was due him, principal, interest, and cost. After Tillman's letter had served the purposes, making the loan and sending Tillman his money, I destroyed it. I could not state exactly, but I think he stated Lott owed him, principal and interest, on that *fi. fa.*, \$550. What the amount was that he named I inclosed to Tillman, under a sealed letter directed to W. L. Tillman, Columbus, Ga., and gave it to Lott. Tillman, in a trial later on, in a case where he sought to foreclose the identical mortgage he has here, acknowledged on the stand that I had written them a postal card, and he produced it on the trial of the case against Lott. The letter he had written me was not produced; it had been destroyed. He acknowledged that he had received from Lott the sealed package I sent him to pay off that debt, and said that at that time he thought it was paid off, and that he found out, of course, from his clerk, a year or so later, that he had made a mistake in giving that information to me. He knew whose money it was. It was the money of the mortgagor, the lender of the money, the Georgia Loan & Trust Company. I sent the money under seal to Tillman, and stated, in his presence, that information I gave Lott; and he said he had received that money. I represented the lender in the matter. When he owed so much before that I would not lend it to him, I declined on account of the existence of that mortgage. I would not have lent the money except that the mortgage was to be discharged, and Tillman knew it. Some two years later, I met Tillman, and he mentioned that the mortgage had not been paid. That was not exactly the first time I had heard of it. He sent a paper down here claiming that there was an error in his calculation on the mortgage, and that Lott still owed him \$60. The lender had then parted with his money. The lender acted upon what I informed him. I sent Tillman the money in January or February, 1885. Tillman knew I was representing these long loans, and would have to have a clear record. I don't know that he knew whose money it was. He knew that I was sending him the money, I think I wrote him, but will not absolutely be certain. Lott borrowed the money. I loaned it to him on the property in the mortgage, and he got the money himself. When Tillman fore-

closed the mortgage, Lott set up a plea of payment. I was a witness in that case. There was a firm of Watts & Hickey doing business here in Lumpkin in 1888, and Tillman sent the mortgage to them to foreclose. R. F. Watts represented the case of Lott. It was in February, 1886; and in November, 1886, the partnership of Watts & Hickey was formed. The matter of Tillman was sent down to Watts & Hickey. Hickey usually did the writing of the firm, and, upon receiving the papers, he had no knowledge of this transaction at all, and, having no knowledge of it, he wrote the letters of April 10, April 16, and July 16, 1888, from Watts & Hickey to Tillman (above mentioned). When Hickey called my attention to it, I told him there was something wrong about it, and would [not be] a party to it to enforce the claim against Lott, and have never been a party to it. Lott is in possession of it as tenant of the Georgia Loan & Trust Company. Can't say what rent he paid. We took his obligation at the time of the foreclosure of mortgage of the Georgia Loan & Trust Company. The suit of Tillman to foreclose his mortgage was pending, and was pending at time of sale under foreclosure of the mortgage of the Georgia Loan & Trust Co." The objection to the evidence was overruled.

Because plaintiff requested the court in writing to give the following charge: "If you believe from the testimony that Thomas W. Lott, the defendant in *fi. fa.*, obtained from the Georgia Loan & Trust Company \$500, and he took the money to W. L. Tillman, the plaintiff, and paid a portion of it for a mule, and the balance had credited upon his debt to Tillman, and did not make it known to Tillman that he had brought the money to discharge and settle the mortgage which he owed to Tillman, then it would not be a discharge of the mortgage lien of Tillman, and the company would be subject,"—which charge the court gave, but added the following: "Provided, you should further believe from the evidence that Tillman had made no representation to Watts as to the amount that Lott was due him (Tillman) on his mortgage, and upon which representation of Tillman, Watts, representing the Georgia Loan & Trust Company, had acted, to the injury of the Georgia Loan & Trust Company." To the addition to the request, plaintiff excepts.

Because plaintiff requested the court, in writing, to give the following charge: "If you believe from the evidence that Thomas W. Lott borrowed from the Georgia Loan & Trust Company \$500, and they gave it to him, it was his money, and he could use it for whatever purpose he desired; and if he paid it to W. L. Tillman, upon his indebtedness to him, as a part payment of his indebtedness to him, then that did not discharge the lien of the plaintiff's mortgage any further than the amount paid on it, and the property would be subject." The court

gave this charge, but added the following qualification to it: "I give you the same proviso that I did on the other: Provided Tillman had made no representation to Watts as to the amount that was due by Lott on his (Tillman's) mortgage, upon which representation Watts had acted, to the injury of the Georgia Loan & Trust Company. In the event that Tillman made such representations to Watts, by which Watts was induced to make the loan, what I have already given you in charge would be applicable." To the addition and qualification, plaintiff excepts.

Error in charging: "I charge you, if you believe that Lott applied to Watts, who was the representative of the Georgia Loan & Trust Company (if the evidence shows you that he was), for a loan on this land, and that Watts, representing the Georgia Loan & Trust Company, declined to make the loan until he should ascertain from Tillman what amount was due upon the mortgage which Lott had given Tillman upon this land, and if Watts inquired of Tillman, either by letter, postal card, or otherwise, how much Lott was due on his mortgage, and if Tillman, in reply to such inquiry, stated to Watts how much was due, and if, upon such statement and representation of Tillman, Watts proceeded to make a loan for the Georgia Loan & Trust Company to Lott and take a mortgage on this land, then Tillman could not subject the land in the hands of the Georgia Loan & Trust Company for any greater sum than the amount he represented to Watts was due him on his mortgage, he could not enforce his mortgage so as to interfere with the rights of the Georgia Loan & Trust Company, under such circumstances, for any greater sum than he (Tillman) represented to Watts was due him by Lott on this mortgage; and if the Georgia Loan & Trust Company foreclosed its mortgage, and had the land levied upon and sold, and bought it in for its debt, and took the sheriff's deed to it, if that was true, then the land is the land of the Georgia Loan & Trust Company, and would not be subject to, and could not be made subject, under Tillman's mortgage, for any greater amount than the sum that Tillman represented to Watts was due, except as to what indebtedness may have accrued from the time of the representations made by Tillman to Watts on the account that Tillman represented to Watts was due." "I charge you that, if Watts had not sent enough to pay it off, then the property would be subject for the difference between the amount that Tillman represented to Watts was due on his mortgage and the amount Watts sent, provided Tillman knew that this money came from the Georgia Loan & Trust Company for the purpose of paying off the amount which Tillman represented to Watts as being due on his mortgage." "I charge you, if Watts sent money to Tillman by Lott, and he sent enough to pay off the amount which Tillman had represented to Watts was due on the

mortgage, and if Lott paid Tillman enough to pay off that amount, then that mortgage would be extinguished, so far as the claimant is concerned, whether Tillman knew where the money came from or not." "I charge you, if Tillman did not know where the money came from, and Lott did not pay him a sufficiency to pay the amount which Tillman had represented to Watts was due him on his mortgage, then the land would be subject for the difference between the amount that Tillman had represented to Watts and the amount that was actually paid Tillman by Lott. In other words, if Watts gave the money to Lott to carry to Tillman, and Lott carried it there, and Tillman did not know where it came from, then Tillman would have the right to consider it as Lott's money, and Lott would have a right to make such use of it as he pleased; and he and Tillman could enter into any arrangement that they desired, and if Lott wanted to pay for a mule, or to pay some other debt, or dispose of it other than as Watts had directed, Tillman would have the right to have had such appropriation made,—he would have had a right to have considered it Lott's money; and if Lott paid part of it for a mule, or took part of it and paid it on some other debt, Tillman, if he did not know it had been sent by Watts for the purpose of paying off the amount that he represented to Watts was due, Tillman would have the right to foreclose and enforce his mortgage against this property for the difference between the amount he represented to Watts was due on it and the amount that was actually paid on the mortgage by Lott."

Because the court instructed the jury as follows: "In the event you should believe it was subject to amount, then the form of your verdict would be: 'We, the jury, find the property subject for so many dollars and so many cents, stating in your verdict whatever amount you find it subject to.'"

Clarke & Hooper and C. J. Thornton, for plaintiff in error. Olin J. Wimberly and Watts & Hickey, for defendant in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 326)

MAYOR, ETC., OF HAWKINSVILLE v.
ETHRIDGE.

(Supreme Court of Georgia. June 10, 1895.)

WRIT OF ERROR—WHEN LIES.

From a judgment of the superior court, overruling a motion to dismiss a writ of certiorari sued out to review a judgment of conviction rendered in the police court of a town against a person who had been accused in that court of a violation of a municipal ordinance, the city authorities cannot prosecute a writ of error to this court; and, a writ of error in such a case having been sued out, this court will not entertain jurisdiction thereof.

(Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

P. T. Ethridge was convicted of violating an ordinance of the town of Hawkinsville, and brings error. Dismissed.

L. C. Ryan, for plaintiff in error. Jordan & Watson, for defendant in error.

ATKINSON, J. The defendant in error was convicted before the police court of the town of Hawkinsville for the violation of an ordinance of that town, upon an accusation of the offense of draying in the corporate limits. He was sentenced to work upon the public streets of the city for 60 days, with the alternative of paying a fine of \$60 and the costs of the proceeding. To the judgment of the police court the defendant excepted, and took the case by certiorari to the superior court. When the case was called in the superior court, counsel for the corporation moved to dismiss the certiorari upon two grounds, neither of which appears to have any merit in it. The judge overruled the motion to dismiss, and to this judgment the mayor and council of Hawkinsville excepted, and, by writ of error, presents for review the judgment of the court overruling its motion to dismiss the petition for certiorari.

The one insuperable difficulty which we encounter in the outset is that this court has no jurisdiction to correct the error complained of, assuming even that one was committed by the court. Towns and cities, in the administration of those functions pertaining to the police department which by their charters are conferred upon them, represent, in a qualified sense, the sovereignty of the state. Its legislation, by ordinance, deals with those minor matters which are of local concern only, and respecting which the state empowers them to legislate. A great many of such matters affecting the local public interest, and over which the legislature has complete control, are necessarily, for the public convenience and economy, committed to municipal bodies. They may, upon proper occasion, impose a license tax on a great many occupations, and, for the pursuit of such an occupation without a license, impose appropriate penalties; and, in the exercise of those police powers by and through which they impose penalties upon their citizens for causes outside of those provided for by the general laws of the state, they represent the sovereignty of the state. Hence it has been held that a municipal corporation, as a party to a criminal proceeding, stands in the place of the state. It has been held that, in such proceeding, such a corporation, from any inferior judicatory, cannot have a writ of certiorari or writ of error to review a judgment of discharge by those courts. See *Cranston v. Mayor, etc.*, 61 Ga. 572; *State v. Jones*, 7 Ga. 422; *State v. Lavinia*, 25 Ga. 311. Prosecutions under municipal ordinances are quasi criminal causes, and partake so far of

the nature of a criminal prosecution as must prevent a review of a judgment in favor of the defendant. *Commissioners v. Tabbott*, 72 Ga. 89. The Code provides, in express terms, that either party in a civil case and the defendant in a criminal proceeding in the superior court of this state may except to any sentence, judgment, or decree. The right of exception is limited to the defendant in criminal cases. This court can only review the judgment of the lower court by a bill of exceptions; and inasmuch as no provision is made by the law by means of which the state can present and have transmitted here a bill of exceptions in a criminal cause, if there were no other legal or constitutional impediment to the reversal of a judgment rendered in favor of the defendant in the court below, this one difficulty is insurmountable. The case of *Mayor, etc., v. Alexander*, reported in 86 Ga. 455, 12 S. E. 681, in no wise contravenes the ruling now made. In that case it will be observed that, though a motion to dismiss the writ of error was in fact made in this court, it was not then ruled upon, but the court expressly declared to the contrary, and put its decision upon the ground that, upon an inspection of the record, it appeared that the judgment of the court below was correct, and that it should be affirmed. Let the writ of error in this case be dismissed.

(97 Ga. 254)

WOODS v. ROBERTS.

(Supreme Court of Georgia. Aug. 5, 1895.)

MORTGAGE FORECLOSURE—STRIKING OUT PLEA.

To a proceeding to foreclose a mortgage under the provisions of the pleading act of 1893, a plea of not indebted, though supplemented by the allegation that the mortgage "was obtained by fraud on the part of the plaintiff," without alleging the particular fraudulent acts relied upon to defeat a recovery, is not such an issuable defense as prevents the granting of a rule absolute, and therefore the court did not err in striking such plea.

(Syllabus by the Court.)

Error from superior court, Butts county; J. J. Hunt, Judge.

Action to foreclose a mortgage, by T. L. Roberts against J. A. P. Woods. To a judgment for plaintiff on demurrer to the answer, defendant brings error. Affirmed.

The following is the official report:

Roberts brought his petition against Woods, to foreclose a mortgage on land. To the rule nisi defendant made answer "that he did execute said mortgage, but the same was obtained by fraud on the part of the plaintiff, and that he is not indebted to plaintiff in manner and form alleged." This was sworn to by defendant. On the call of the case, plaintiff demurred to the answer, on the ground that it made no issuable defense, in that it did not plainly, fully, and distinctly set forth in what the fraud consisted. The demurrer was sustained, and defendant excepted, because (1) the decision was contrary

to law; (2) defendant or his attorney never had notice of the demurrer (which was heard on call of docket); and (3) said demurrer was made on the day next to the last day of court, and passed on the same day.

Ray & Ray, for plaintiff in error. J. F. Carmichael, Y. A. Wright, and J. S. Boynton, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 342)

THORNTON v. MANCHESTER INVESTMENT CO.

(Supreme Court of Georgia. Aug. 12, 1895.)

DISMISSAL OF APPEAL—SUPERSDEAS—JUDGMENT ENFORCED.

This court will not entertain a writ of error sued out to a judgment refusing to enjoin a sale of land, when it appears from an affidavit of counsel for defendant in error, not denied by counsel for the plaintiff in error, that no supersedeas of the judgment below was obtained, and that the sale sought to be enjoined has actually taken place. See *Railroad Co. v. Blanton*, 6 S. E. 584, 80 Ga. 563.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Manchester Investment Company against H. A. Thornton, administrator. Judgment for plaintiff, and defendant brings error. Dismissed.

Garrett & Neufville and W. I. Heyward, for plaintiff in error. W. R. Hammond, for defendant in error.

PER CURIAM. Writ of error dismissed.

(96 Ga. 319)

CLEMENTS et al. v. EMPIRE LUMBER CO. et al.

(Supreme Court of Georgia. June 10, 1895.)

INSOLVENCY—MARSHALING ASSETS—AMENDING DECREE—COMPENSATION OF RECEIVER.

1. Where, in the administration by a court of equity of the assets of an insolvent corporation having numerous creditors, whose claims have been referred to and reported upon by a master, the court, in its decree rendered thereon, fixed the rights of a particular creditor, both as to the amount of his claim and the priority of his lien relatively to other creditors, and no exception to this portion of the decree was taken by any party to the case, although the decree in other respects may have been subsequently modified by the judgment of the supreme court, it was not thereafter within the power of the trial court, without notice to this creditor, to so amend the decree as to change the priority of his lien by subordinating it to the liens of those others over which it had originally been given a preference; and a motion to set aside such an amendment, filed at the next term after that at which it was made, was in time, and should not have been dismissed on demurrer.

2. In such case it was within the power of the court to render a final decree fixing and al-

lowing the compensation of the receiver, counsel fees, and other charges and expenses of administration. Every party to the entire case was bound to take notice of this action of the court, and it was too late, at any term subsequent to that at which such action was taken, to except thereto or move to set it aside for mere error.

(Syllabus by the Court.)

Error from superior court, Dodge county; J. J. Hunt, Judge.

Motion by J. C. Clements and others, administrators, to set aside an amendment to a decree. The motion having been dismissed, movants bring error. Reversed.

J. E. Wooten, for plaintiffs in error. De Lacy & Bishop and J. L. Hopkins & Sons, for defendants in error.

LUMPKIN, J. McAuthur filed in the trial court a motion to set aside an amendment to a decree which had been entered in "the Empire Lumber Company case." His motion was dismissed on demurrer, and he sued out a bill of exceptions to this court. While it was pending here, he died, and his administrators were made parties in his stead. This is another offshoot of the involved and complicated litigation which arose over the affairs of the Empire Lumber Company, several cases relating to which are reported in 91 Ga. 624, 17 S. E. 968; 91 Ga. 636, 18 S. E. 358; 91 Ga. 639, 17 S. E. 1012; 91 Ga. 643, 17 S. E. 972; 91 Ga. 651, 17 S. E. 1020; 91 Ga. 657, 18 S. E. 359. It appears from the record now before us that the master allowed the lien of McAuthur for a stated amount, to which finding exceptions were filed by the Empire Lumber Company, but they were afterwards abandoned, and dismissed by the court upon the hearing. No exception was taken to this action. Liens claimed by Lasseter and other parties were allowed by the superior court, and its judgment in so doing has never been excepted to nor reversed. In the decree fixing the rights of the parties above mentioned, the lien of McAuthur was given a priority over those of the other persons mentioned. This same decree, which covered a multitude of matters, was in some respects modified by the judgment of this court; but, in so far as it established the rights of McAuthur relatively to Lasseter and the other creditors referred to, it has in no wise been changed. We therefore think that McAuthur was fully authorized to assume that the court had finally and definitely settled the priority of his claim over these other creditors, and that he was not bound to follow up and take notice of future proceedings in the case, in order to prevent an amendment of the decree which would give to his claim a lower rank. Accordingly, when, upon the return of the remittitur in the other cases from this court, the trial judge, without notice to McAuthur, amended the decree by changing the priority of his lien, and subordinating it to the liens of Lasseter and the other creditors, over which it had originally

been given a preference, as stated, this action was, as to McAuthor, unauthorized, and it was his right to correct the error thus committed against him by filing a motion to set aside the amendment by which his lien had thus been deprived of its priority. As he had no hearing upon the propriety of ordering such amendment at the term at which it was made, his motion was in time at the next term, and should not have been dismissed on demurrer.

There were, however, in the main case, various other matters of which it was the duty of the judge to dispose, as to which he had the power to render a final decree, and in which every party to the entire case was necessarily interested. The matters now referred to are those relating to fixing and allowing compensation to the receiver, counsel fees, and other charges and expenses of administration. All the parties must have known that, as to these things, it would be incumbent upon the court to take appropriate action before the final disposition of the case, and they were therefore bound to take notice of what the court did with reference to the same, and present their objections to any action thereon which they conceived to be unlawful or detrimental to their rights in the premises. This being so, it was too late, at any term subsequent to that at which such action was taken by the court, to except thereto, or to move to set it aside for mere error. Our conclusion, therefore, is that so much of McAuthor's motion as alleged error in changing, as above stated, the priority of his lien, was meritorious, and as to this matter his motion was filed in due time; but, as to so much of his motion as sought to undo the court's decree in fixing and allowing the final charges and expenses of administration, his motion was too late. The general rule, that exceptions to the decision of a court for mere error cannot be taken at a subsequent term, is stated by this court in *Railway Co. v. Greene*, 95 Ga. 35, 22 S. E. 36. It is, however, recognized in that case that there may be exceptions to this rule, when fraud, mistake, irregularity, providential hindrance, or other like cause has intervened. The present case affords an illustration both of the rule and of the exception. McAuthor had his day in court as to the allowance of the claims referred to in the second head note, because he was bound to take notice till the end of the case as to what was done in these matters; and as he let the term pass at which the action of which he complains as erroneous was taken, he could not except thereto at a subsequent term. As to the action of the court with respect to the matter indicated in the first headnote, we think there was an irregularity in setting aside the priority of McAuthor's lien without notice to him, and for this reason that branch of his motion came within one of the exceptions to the rule above stated.

Judgment reversed.

(97 Ga. 266)

WEATHERS v. McFARLAND et al.

(Supreme Court of Georgia. Aug. 5, 1895.)

SUFFICIENCY OF DECLARATION—CONCLUSIVENESS OF JUDGMENT OF ORDINARY—WILL—VALIDITY.

1. If a declaration be fatally defective, in that it wholly fails to allege a right of action in the plaintiff, or it alleges facts showing a want of jurisdiction in the court to grant to the plaintiff the relief sought, a motion to dismiss, made at the trial, should prevail, as though in the first instance a general demurrer had been regularly filed.

2. A judgment of the court of ordinary, rendered after due notice, admitting a will to probate in solemn form, until reversed or set aside in that court, is conclusive as to all questions which are involved in and arise out of the execution of the will itself, and is not subject to collateral attack raising such questions in any other court.

3. There was no such allegation of fraud, either in the execution of the will or in the rendition of the judgment of the court of ordinary admitting the same to probate, as would authorize a court of equity to grant the relief prayed for, even if long acquiescence in the probate of the will by the plaintiff after the attainment of his majority did not bar his right to call in question either the validity of the will or the regularity of the probate proceedings.

(Syllabus by the Court.)

Error from superior court, Talbot county; W. B. Butt, Judge.

Action by D. R. Weathers against Jane McFarland, administratrix, and Ada McCrary. To a judgment for defendants on demurrer, plaintiff brings error. Affirmed.

The following is the official report:

The case of D. R. Weathers against J. McFarland, administratrix, and Ada McCrary, coming on to be tried, defendants demurred orally to the petition. Plaintiff objected to the demurrer being entertained upon the ground that it came too late. The objection was overruled, to which ruling plaintiff excepted. The demurrer was sustained, to which ruling also plaintiff excepted. The petition alleged: Plaintiff is the son of Francis T. Weathers, by his wife, Rachel H. Weathers, who was a daughter of Terrill Barksdale, of Talbot county, deceased. While plaintiff was a small child his parents separated, and continued to live separate, and after separation were legally and totally divorced. Plaintiff was taken by his father, and lived with him, but frequently visited his mother, who always showed great interest in and affection for him. After the divorce his mother married M. C. McCrary, now dead. Before said marriage Terrill Barksdale had made a writing as his last will, duly executed and witnessed. By the eighth item of this will testator gave to his said daughter, for her sole and separate estate, "during her natural life, and to her children and descendants of children that may be dead," certain negroes named, "this legacy not to vest until the children shall attain the age of twenty-one years." After so making this will, Barksdale made, signed, etc., another written instrument, to be a codicil thereto, in which he made the following bequest: "I

give and bequeath to my daughter Rachel H. Weathers lot number 130, minus three-quarters of an acre in the northwest corner; also, thirty-five acres, more or less, taken from lot number 123, and lying in the north and northeast corner of said lot; also, six acres lying and taken from the southwest corner of lot 159, all of said land lying and taken from the southwest corner of lot 159,—all of said land lying and being in the Sixteenth district of originally Muscogee, now Talbot, county." It was the intention of said Barksdale that his said daughter should take and hold the same estate and title to the land that she had and took in the eighth item of the will. Barksdale died, and the will and codicil were each duly proved in the court of ordinary, and letters testamentary issued to the executors therein named; and under the will and codicil said Rachel received the property, and the will and codicil gave her all the right that she ever had in any of the property therein given her. Immediately after her marriage to McCrary, he moved on the land, and lived there until his death in 1881. After said marriage, said Rachel became severely afflicted with a cancer, and, believing this affliction would terminate in her death, desired to make a will. It was her purpose to give in her said will most of her said property to petitioner, who is now and was then her only child, at the same time giving McCrary something. To that end she called in certain persons to witness the same, and called on McCrary to write it, who told her she must write it herself, which she did, and while so writing, or making preparations to do so, a conversation arose between them as to how it should be made. When she indicated a desire to give petitioner the plantation known as the "Terrill Barksdale Place," whereon they then lived, she was told that she must give McCrary the land. She then remonstrated against doing so, and told him if she did there would be nothing left for her child, when McCrary stated that her entire property was not worth more than \$500; that she could give the property to him, and he would pay petitioner the \$250; that she could will petitioner \$250 and give McCrary the property, and he would pay the same to petitioner. Under his dictation she signed, sealed, and published her said will, a copy of which is attached, which after her death was proved in solemn form before the court of ordinary. The statement so made by McCrary, that her entire property was worth only \$500, was false and fraudulent, made to deceive her, and to induce her to change her mind from giving petitioner the Terrill Barksdale plantation, and to will it to McFarland and leave to petitioner only \$250 and a bed and bedding, as specified in her will. At the time said statements were so made, and with the effect aforesaid, said effects, including said plantation, were worth \$2,500, and the pain and suffering of said Rachel were so great, and

her dependence on her husband for comfort and attention so entire, and her condition such as to demand most fair, honest treatment from him. But for said statements she would have given at least half of all she had to petitioner. She died on September 8, 1874, and soon after the will was proved in solemn form, and McCrary qualified as her executor. In ignorance of said fraud, petitioner received from, and receipted McCrary for, the small sum left him in his mother's will, and he remained in ignorance of said fraud, without any fault on his part, until about August 8, 1891. McCrary, as executor, held all said property and effects of said Rachel from her death to 1881, of the annual value of \$250. Before his death he married Jane Foster, who bore him a child named Ada, now a minor. Said Jane was duly appointed administrator of McCrary's estate, and as such now has all the property held by said Rachel; also all ready money left by McCrary, to wit, \$1,500 cash, for the rents and profits of said estate for six years. Said Jane has the entire estate of said Rachel, and has held it for about 10 years, since McCrary's death to the present time, and has used and received the entire profits thereof, of the annual value of \$250. Since McCrary's death she has married Robert McFarland. Of the rents and profits so received by her and by McCrary, she has lately invested a large amount in certain land described, and, instead of taking title to the estate of said Rachel, has taken it in her own name, and is claiming it as her own property, and with her present husband now resides on the land, which is of the value of some \$3,000. Petitioner is now 21 years old, and is entitled to take as his property the property left in the eighth item of the will and in the codicil. If it should be considered by the court that for any reason he does not take the property so given in the eighth item, and that said Rachel held and owned her said estate by any other title, then the same was hers, to be disposed of as she saw proper by will. By the fraud practiced on her by McCrary, she was deceived as above stated, and he is entitled to recover at least \$1,000, with interest thereon from 1876, or one-half her estate, with the rents and profits thereof for the last 14 years; and he asks that the decree of the court may be so molded that he may get all his rights. Petitioner now tenders back to the estate of said Rachel the amount received by him, and asks that her entire estate be decreed to be his property, or such portion thereof as the court may determine he is entitled to, with interest, or that, in lieu of interest, an account be taken of the rents and profits of her estate, taking therefrom such amounts as he has heretofore received, with interest thereon, and that the land so purchased by Jane McFarland may be decreed to be sold to pay such sum as the court may adjudge he is entitled to, and that she be compelled to ac-

count for all the rents and profits arising from the estate of said Rachel that she has herself received since the death of McCrary, to the extent that the same has gone into her hands as administratrix of McCrary. Process was prayed against Jane McFarland, administratrix of McCrary, and Ada McCrary. The petition was filed February 17, 1891. The demurrer was upon the grounds of misjoinder of parties, misjoinder of causes of action, multifariousness, want of jurisdiction to set aside the judgment of the court of ordinary probating the will of Mrs. McCrary, that the will of Barksdale gave no title to plaintiff in the land sued for, and statute of limitation.

J. J. Bull, Henry Persons & Son, and C. J. Thornton, for plaintiff in error. J. H. Martin and J. L. Willis, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 818)

DILLARD et al. v. RICKERSON.

(Supreme Court of Georgia. Aug. 5, 1895.)

NEW TRIAL—BRIEF OF EVIDENCE—DISCRETION OF COURT.

1. One ground of error assigned in the bill of exceptions being that the court erred in refusing to dismiss a motion for a new trial, the motion to dismiss being "on the ground that no brief of evidence had been approved and filed as required by law," and it appearing from recitals in the bill of exceptions itself that orders, at the instance of the movant, were taken from time to time "continuing the hearing of said motion, and granting additional time in which to perfect brief of evidence, until the 5th day of November, 1894, when said motion was heard," and the record showing that the brief of evidence was in fact approved and filed on the day last mentioned, the court was right in refusing to dismiss the motion for a new trial.

2. It not appearing that the verdict rendered was absolutely demanded by the evidence, and this being the first grant of a new trial, the case falls within the rule on this subject which this court has established by a long-continued line of adjudications.

(Syllabus by the Court.)

Error from superior court, Morgan county; W. F. Jenkins, Judge.

Action by Dillard, Saye & Stone against M. E. Rickerson on a note. To an order granting a new trial after verdict for plaintiffs, the latter bring error. Affirmed.

The following is the official report:

Dillard, Saye & Stone sued Mrs. Rickerson on a promissory note for \$150, "for surgical operation and medical treatment until discharged." Defendant pleaded not indebted, and that the note was given by her in payment of a debt of her husband. There was a verdict for plaintiffs. Defendant moved for a new trial, which motion was granted, and to this ruling the plaintiffs excepted. The case was tried on September 9, 1893, and the motion for a new trial was heard on November 5, 1894, during an adjourned term of the September term of Morgan superior court. Upon the calling of the motion for hearing,

counsel for plaintiffs moved to dismiss it, upon the ground that no brief of evidence had been approved and filed as required by law. This motion was overruled, and to this ruling also plaintiffs excepted. The bill of exceptions recites that orders were taken from time to time continuing the hearing of the motion and granting additional time in which to perfect the brief of evidence, until the 5th day of November, 1894, and specifies, among other things, as material to be transmitted to this court, the respective orders continuing the hearing on said motion for a new trial. It appears from the record that the motion for new trial was made and filed at the term at which the case was tried, and the court passed an order stating that the motion had been made and the grounds thereof approved, and it was therefore ordered that the motion stand continued until the third week in September, 1893, and that movants have until said time to make out a brief of the testimony and file the same, without prejudice. The only other order continuing the hearing, in the record, is an order by consent postponing the hearing until September 28, 1893, and ordering that movant have until that time to perfect her brief of evidence. The brief of evidence was approved and ordered filed, and filed November 5, 1894. The motion for a new trial was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the jury found contrary to the following charge of the court: "If the contract for the services to be performed was made with Henry R. Rickerson, the husband of the defendant, then the note sued on, if given for such services, is null and void. The liability arises from the contract for the services, and not from the note; from the inception of the contract, and not from the making of the note. The law forbids a wife to assume the debt of her husband. If you, therefore, believe from the evidence that the contract for the services to be performed was made by plaintiffs, or either of them, with the husband of defendant, then you will find for the defendant, although you may believe that defendant signed the note, and although no price for said services was agreed upon between said plaintiffs and said H. R. Rickerson. If no price was agreed upon, the law would undertake to fix such price or compensation as the services were reasonably worth." Also, because the jury found contrary to the following charge of the court: "If you believe from the evidence that the consideration of the note sued on was medical or surgical [services], then you will look to the evidence, and see whether or not the person rendering such services was authorized by law to render the same and charge for them. If you find that they were not authorized by law to practice medicine and charge therefor, you will find for the defendant." In an amendment to the motion for new trial it is stated that the charge of the court set forth in the fourth ground of the original motion was

made on the written request of defendant. Both the two grounds last above mentioned are numbered four in the record. Also, because the court failed to instruct the jury as [to] the law regulating the practice of medicine, and failed to charge the jury as to the nature of the authority required by law to practice medicine, and further failed to charge the jury that it was necessary for plaintiffs to show that they were duly authorized to practice medicine in the manner pointed out by law before they could recover.

Foster & Butler, for plaintiffs in error.
Calvin George and Harrison & Peeples, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 256)

WILSON v. BURR et al.

(Supreme Court of Georgia. Aug. 5, 1895.)

CONTINUANCE — ABSENCE OF WITNESS — INSTRUCTIONS AS TO WITNESSES — CONFLICTING EVIDENCE.

1. It is competent for a judge of the superior court, in order to facilitate the transaction of business, to set cases for trial on particular days; and, in this connection, to adopt a rule of practice making it incumbent upon every party to notify his witnesses of the day upon which his case is set for trial. In a court where such a rule prevails, a party who does not comply with this requirement is not entitled, as matter of right, to a continuance because of the absence of a material witness who, though he had previously been duly subpoenaed, had not been notified upon what day his attendance would be necessary.

2. The charge relating to the number and credibility of witnesses, as qualified and explained by the additional charge given in this connection, was substantially in conformity to the rule upon this subject announced in *Dowdell v. Neal*, 10 Ga. 148, the real meaning of which is stated in *Corniff v. Cook*, 22 S. E. 47, 95 Ga. 61.

3. The evidence being conflicting upon the main questions of fact involved, and the verdict being sufficiently supported, and no material error (if any at all) having been committed, this court will not control the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Pike county; J. J. Hunt, Judge.

Action by H. C. Burr and another against C. R. Wilson. Plaintiffs had judgment, and defendant brings error. Affirmed.

The following is the official report:

Burr and Daniel sued out a warrant to dispossess Wilson, as a tenant holding over, of certain land in the First district of Pike county, "being 183 acres, more or less, off of lot No. 173, and all of said lot except 10 acres, more or less, of south part; 100 acres, more or less, of west half of lot No. 172; and all of said half except 10 acres, more or less, off of northeast corner; and 100 acres, more or less, off of west half of lot No. 149, and all of said half except 10 acres off of southeast corner; all lying in one body, and aggregat-

ing 383 acres, more or less." The affidavit for the warrant is dated March 7, 1893, and alleges that on or about the 1st day of January, 1892, Burr and Daniel rented said tract of land to Wilson for the year 1892, which term of renting expired on December 31, 1892, etc. Wilson made a counter affidavit, from which it appears that he claims Burr and Daniel have not, and never had, title to the dwelling house and premises occupied by him, containing about 20 acres, and that he does not hold, and never held, the same as their tenant. It appears from the evidence that in 1884 Wilson made a mortgage to Tallman upon land described as in the affidavit and warrant, to secure a loan; that the note and mortgage were transferred by Tallman to Arnold; and that the mortgage was foreclosed in 1889, and the land sold, under execution issued therefrom, to Burr and Daniel, who received a deed from the sheriff, dated December 11, 1889. Daniel testified: "Burr and I went to Wilson's house to rent him the land purchased by us at sheriff's sale. He offered to give us six bales of cotton for the rent of the place. We told him that, as the place we purchased had all of the improvements, including the dwellings, we should have more than the others. We rented the land to him for seven bales of cotton. I have lost the rent note which we sue on, but have another rent note for another year, which is a substantial copy of the one sued on. He owes us, for the year for which we took out dispossessory warrant, seven bales of cotton, and he never paid any part of the same. His term of rent had expired, and we made demand on him before suing out this proceeding, and he refused to give up the premises. I have a diagram here, drawn by his direction. He pointed out location of residence and land lines and reservation. I knew nothing about the lines and reservations, and drew this diagram by his direction. It places the reservation some distance from the house. At the time we were at Wilson's to get the first rent note, a few days after we bought the property, he stood at the house, and pointed out the reservations, and they lay some distance from the house, and did not include the house or other premises. When we were at his house he pointed out to us the ten-acre reservations, and they did not include his dwelling, but lay some distance from it. I never heard of the seventh bale rent, given for tax and insurance, until today. Wilson said nothing of the kind, but it was given for rent, because we owned the dwelling and improvements." R. H. Drake testified: "I had a conversation with Wilson before the sale, in presence of Burr. Wilson had a copy of the land advertised for sale. He said we ought to buy this tract, as it had the dwelling and improvements on it. He pointed out to us the reservations, and they did not cover the dwelling. I was present when a survey of these lands was made. Strickland, county surveyor, was present, ran

the line, and laid off the reserve. The line of the reserve was 250 yards from the dwelling of Wilson. Daniel's plat is substantially correct. One of the lines is too close to the house. We were standing on the property subsequently bought by Burr and Daniel, when Wilson said the dwelling and improvements were on their land, and pointed out the reservations, which were some distance from the dwelling and improvements. The survey we made ran the lines practically where Wilson told us they would run, before the sale. In making the survey, we started at a recognized corner. Strickland did not say the lines run or commenced would put the house on Wilson's land, and did not quit surveying on that account." Burr testified: "I had a talk with Wilson about this property before the sale. He had the advertisement, and told us about the ten-acre reservations, being, as he said, ten acres given to Rawls and ten acres to Clark Wilson. I had another conversation with him at his house, and he agreed to give us seven bales of cotton rent for the place we purchased, because this place included the dwelling and other improvements. I told him I was going to have dwelling insured. He knew I was going to have it insured in my name, and did not object. He never claimed that the residence was on the reservation until after we commenced these proceedings to dispossess him. We were standing on the property subsequently bought, and Daniel and I had gone there with a view of purchasing some of the land. Wilson pointed out the reservations, and said the dwellings and other improvements were on the land we afterwards bought, and were not on the reservation. In making the survey we started at a recognized corner. Strickland did not say the lines, if continued, would put the dwellings on Wilson's land, and did not quit surveying on that account. I never heard of my paying tax and insurance with the seventh bale until to-day; and it is untrue that it was given for that purpose, but was given for rent. I was present at the survey made by Strickland. The Daniel plat is about a representation. Strickland had the deeds when he made the survey. The 20 acres did not include the dwelling. The nearest line of reservation was 150 or 200 yards from the dwelling. Surveyor did not run around the entire tract of land, and no processioners were there." Plaintiffs introduced a note payable to them, signed by Wilson, dated December 13, 1889, and due October 1, 1890, promising to pay them seven bales of cotton for rent of lands described as in the affidavit and warrant. Wilson testified: "I never rented the houses and dwelling to Burr and Daniel. There were ten acres out of lots 149 and 172, southeast corner lot 149, and northeast corner lot 172, reserved. This makes 20 acres, and they come together, and my dwelling is on this reservation, and was not included in the mortgage, but was specially reserved by me. There is

a mistake in lot 173, and I called Burr's attention to the inaccuracy in his deed. He and Daniel said all they wanted was their money. The first survey the county surveyor told Burr that the reservations would leave the houses to Wilson. They then quit surveying, and would go no further. The lots are big lots and little lots. The surveyor cannot correctly run off the lots and mark the reservations unless he runs around the lots. I never told Burr, Drake, and Daniel that my dwelling was not on the reservation, but told them the houses were on the reservations. I asked Burr to insure the dwelling, but did not tell him to insure it in his name. I gave them seven bales rent, but the seventh bale was to cover insurance and taxes on the reservation. I had not owned the Clark Wilson and Rawls tracts in 14 years, and had no claim on them; but the reservations made by me covered my buildings. I had paid all the insurance on my buildings but \$20, and gave the extra bale rent to have Burr pay this balance and the taxes. I never directed the plat presented by Daniel. I gave him a diagram of the 1,200 acres. This plat introduced by him resembles my plat in only one particular,—where the land extends down on the river. The dwelling house and improvements are on the 20 acres in dispute." Dr. Owens testified: "Rawls has been in possession of his place [one of the ten-acre reservations on 172, as claimed by plaintiffs] since 1881, but it is not in the corner of the half lot. It is in the east half of the lot. The Clark Wilson tract of ten acres is not in the corner of the lot 149; and these two tracts are not in the reservations as claimed by defendant."

The grounds of the motion for new trial are:

(1) Error in refusing to continue the case, on defendant's motion, for the absence of Strickland, the county surveyor, who resided in Pike county, and for whom defendant had taken out a subpoena, and placed it in the hands of the sheriff 10 days before the sitting of the court, with instruction to serve it upon Strickland; the sheriff having sent the same by a reliable man who promised, if it was not served, to notify the sheriff of the failure, and he having received no such notice. Defendant testified that at the last term of the court the case was set for a particular day, and that day Strickland was not present; but he had not then been subpoenaed, and by some arrangement the case was postponed until another day of that week. Then defendant got a subpoena, and carried it to Strickland, brought him to court, and paid him two dollars per day, and kept him at court until the day last named for trial, when defendant learned that the case had been continued for the term by consent of counsel. He expected and would be able to prove by Strickland that, as county surveyor, and at plaintiffs' instance, he went with Burr to have the lines run around and between plaintiffs and defendant,—the prem-

ises in dispute; that he ran the line from the recognized corner dividing the two tracts, and when he had the line within a short distance of the end, and upon being asked by plaintiffs whether the dwelling and buildings of defendant would be on the 10-acre reservations, he said they would be, and Burr had him to stop the survey as being then run, and wanted him to run a different line from another point, so as to take defendant's dwelling and buildings, to which defendant objected; and then Burr and Strickland and the others left, came back another day, and ran another line from another point, which took defendant's dwelling and buildings, over his objections, and in his absence; that he tried to get Burr and Strickland to run around the entire tracts or lots, and then run a line cutting off the west half, and then lay off the two reservations as called for in the deeds and papers in the case; and Burr and Strickland declined to do this. These lots in this locality are all of irregular sizes. Whereupon defendant refused his consent to the survey, and left. The two reservations in the corners of the two tracts of 10 acres each would include defendant's dwelling and buildings as claimed by him, if the lines were run right. Strickland was not absent by his procurement or consent. The showing was not made for delay, etc.; and defendant expected to be able to procure the testimony of the absent witness by the next term. In a note to this ground the court states that at the previous term the case was passed, by the court's order, to enable defendant to procure the attendance of Strickland, and the case was set for another day towards the latter part of the session, on which day counsel for the parties agreed to continue the case, and set it for the first day of the term at which it was tried; and that under the rules setting cases, it is incumbent on parties to notify their witnesses of the day the case is set for trial.

(2) Defendant offered to prove by W. S. Whitaker that he was the attorney at law for Lawton & Smith, and made out the application to them for Wilson for the loan for which the mortgage was given, which is the basis of the foreclosure which is the basis of the execution which issued, and under which plaintiffs claim they bought the land in controversy; that defendant expressly reserved the dwelling house and gin house and 20 acres on which they were when he made the application for the loan, and witness so stated in a written application which he made out, and which was signed by defendant, and sent to Lawton & Smith, in Macon, for the purpose of procuring the loan which the mortgage was given to secure. It was also in proof before the court in this case, on the motion to continue, on the counter showing made by plaintiffs, that the original application in which the reservation of the dwelling and gin house and 20 acres were specified was lost or destroyed, and, after a

diligent search, it could not be found. This proof was made by Smith, of Lawton & Smith, the custodians of the application. And defendant also offered to prove the custody of the original application in which these reservations were made, by said Smith, and the loss or destruction of the original, and the search for and the failure to find the same, as required by law. And the court overruled both propositions, and declined to admit the testimony of either Whitaker or Smith, and ruled that the testimony was not relevant or admissible, which ruling and refusal are assigned as error.

(3) Error in admitting the rent note for 1890, over objection that it was not relevant, and had no bearing or connection with the rental of 1893, and had nothing to do with the case or any issue in it.

(4) Error in charging the jury: "In civil cases, where there is a conflict of evidence between the witnesses, the jury should be controlled in their finding by the preponderance of the evidence; and where the witnesses are equally credible, and one witness testifies to one thing on one side, and two testify to the contrary on the other side, the preponderance would be in favor of the side on which the two testified, and the side having the preponderance would be entitled to recover,"—this charge, without more, being calculated to mislead, and did mislead. The court should have qualified this charge by an instruction that the interest of the witnesses, their opportunities for knowing, their conduct in the trial and the case, their manner of testifying, and all the surrounding circumstances proved, may be considered, and, after weighing all these things, you may believe one witness in preference to more than one testifying against him, if you believe the one is telling the truth. In a note to this ground it is certified that the court did further charge the jury that, in passing on the credibility of witnesses, they would take into consideration their interest, the manner in which they testified, their opportunity of knowing facts about which they testified; and that, while they should make a verdict to accord with the preponderance of the testimony, it was for the jury, in doing so, to give such credit to witnesses as they deserved. After all, it was a question as to what was the truth, and the verdict should speak the truth.

(5) Verdict contrary to law and evidence, and without sufficient evidence to support it.

(6) Error in the decree rendered, because it went beyond the verdict, adding thereto the words, "including the dwelling house and improvements on said land," over objections of movant. The verdict was: "We, the jury, find for the plff." The judgment was that plaintiffs do have and recover of defendant the premises in dispute (describing the same as in the affidavit and warrant, with the addition of the words just quoted), that a writ of possession issue, etc.

Hammond & Cleveland, for plaintiff in error. R. T. Daniel and J. S. Boynton, for defendants in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 264)

HARWELL et al. v. FOSTER.

SAME v. REESE.

(Supreme Court of Georgia. Aug. 5, 1895.)

EJECTMENT—DESCRIPTION OF PREMISES—NONSUIT.

1. It is essential to the maintenance of an action of ejectment that the premises alleged to have been demised be described with such certainty as that, in the event of a recovery by the plaintiff, a writ of possession issued upon the judgment, and describing the premises as laid in the declaration, shall so identify the premises sued for as that the sheriff, in the execution of the writ, can deliver the possession in accordance with its mandate.

2. If the premises sued for be described as a certain number of acres embraced in a larger tract, which latter tract is accurately described, but there is no further description of the particular premises sued for, such description is too indefinite to be made the basis of a recovery; and if, upon the trial, the evidence for the plaintiff be as uncertain as the description laid, a nonsuit should be awarded; and even greater certainty in the evidence would not prevent a nonsuit, unless the declaration be amended so as to conform to the evidence.

3. Where, in an exactly similar case, there was a verdict for the defendant, the court rightly refused to set it aside; and this is true, irrespective of errors alleged to have been committed at the trial.

(Syllabus by the Court.)

Error from superior court, Morgan county; W. F. Jenkins, Judge.

Separate actions by Mattie V. Harwell and others against F. C. Foster, executor, and Seaborn Reese. Defendants had judgment in each action, and plaintiffs bring error. Affirmed.

The following is the official report:

Mattie V. Harwell and others, children of Littleton Manson Harwell, deceased, and grandchildren of Littleton T. P. Harwell, deceased, and the wife of Littleton Manson Harwell, sued F. C. Foster, executor of A. G. Foster, for 500 acres of land, part of 880 acres originally belonging to the estate of Littleton T. P. Harwell, bounded as follows: "By Kilpatrick and land of Seaborn Reese; on the west by the Seven Island road and Mrs. Godfrey; on the south by land originally belonging to Captain William Hearn; on the east by the estate of Frank Hearn and others." The abstract of title attached was the will of Littleton T. P. Harwell. The suit was brought January 30, 1893. At the conclusion of the evidence for plaintiffs, defendant moved for a nonsuit, upon the grounds that plaintiffs had not made out a case, that plaintiffs had not sufficiently identified the land sued for, and that the will had not been complied with, in that the 1,000 acres of land had not been laid off. The motion was sustained, to which ruling the plaintiffs excepted. Plaintiffs introduced so much

of the will of L. T. P. Harwell as bore upon the case, being the third and seventh items of the will. The third item stated that testator's son Littleton Manson Harwell being feeble and subject to epileptic fits, in so much that testator mistrusted his mental capacity, testator would give him or for his use more of his property than any of his other children. The item then devised to Thomas B. and Ishmael F. Harwell, in trust to permit said Manson to enjoy the entire use and benefit of the same during Manson's life, certain negro property, mules, stock, etc., which Manson may have been using at testator's death. The item further provided that all the property mentioned in this item was so limited to said trustees, as well as that which the testator should afterwards in his will give to them, for the use of Manson and upon the same trust; that testator directed the trustees, at the death of Manson, if he should leave children, to convey a child's part to Manson's wife during her life, if Manson should so desire by his last will, but if Manson should leave no child, but his wife, surviving him, then one-half, if Manson should so direct, to his wife during life, and the other half to testator's grandchildren per stirpes; that, in the event of Manson leaving children, then the trustees should hold the property in trust to convey to such child or children only so much thereof and in such parts as Manson should direct by his last will, but in default of such will or any appointment, in case of Manson leaving a wife and children, the trustees to divide the property equally, share and share alike, between Manson's wife and the said children; and that if Manson should die without a will, leaving a wife but no children, then the trustees should turn over to her one-half of said property for life, and the other half to testator's grandchildren. The seventh item was: "I direct that my executors shall lay off about my residence, so as to include the same, about 1,000 acres of land, which I wish so done as to make a good plantation, which I give in trust to permit my son Manson to enjoy so long as he shall live, unless the said trustees and my son should think it best and most conducive to his interests to get another place, in which event I wish one-half the proceeds of said thousand acres, which I wish then to be sold, to go to said trustees, upon the same limitations, conditions, and trusts as are more particularly set forth in the third item of this my will. If it should be thought best by the said trustees and my said son that he should remain upon the place,—that is, the plantation to be laid off,—I direct and will that my daughter Mary shall have the privilege of living with my son, without the payment of board, so long as my said son shall live upon the said place and my said daughter shall remain single. At the death of said son, if up to said period he should have lived upon the place, I direct that said land be sold, and half of the

proceeds go as the other property given to the trustees of my said son at his death, and the other half to the trustees of my other children, to be held as hereinbefore directed, and to go as already prescribed in the preceding items. In the event of the sale of the place before the death of my said son, I direct that half of the proceeds go, also, to the trustees of my other children, to be held as hereinbefore set forth for each child." It was admitted that Isham S. Fannin and Ishmael F. Harwell qualified as the executors of the will. Mrs. Elmira Chambers testified: "I heard Mr. Fannin tell Manson Harwell he was ready to put him in possession of his own property, the homestead and one thousand acres of land belonging to Littleton Harwell's estate: 'This property is now yours in peaceable possession.' Fannin then and there said to him: 'There is enough personal property and lands to pay all the debts.' Several persons were present, among them Ishmael Harwell. Manson Harwell refused to enter into possession, alleging that he wanted the estate wound up and all debts paid first. Mr. Fannin said: 'Manson, there will be plenty to pay the debts, and you must take possession.' Thereupon Manson agreed to go into possession, and wanted the land surveyed. Mr. Fannin replied: 'Move in, and take possession of your own property. The land can be surveyed after you move in.' Peterson H. Harwell moved in the overseer's house. Manson moved into the homestead, and took possession of 1,000 acres of land as his own property. He moved in and took possession in November or December, remained there three years, and never was disturbed until after the death of Ishmael, his trustee, who died in the spring of 1867. Then Mr. Fannin commenced proceedings to dispossess him. Littleton Harwell died in the summer of 1864, and it was in the fall of the year after his death that Mr. Fannin began to put Manson in possession of the homestead, counting the residence and 1,000 acres of land as his own property, as stated above. It is not true that Manson was allowed to occupy the homestead and cultivate as much land as he could. On the contrary, Fannin put Manson in possession as his own property, absolutely and unconditionally. I did not see Fannin put Manson in possession. No land was ever surveyed, but Fannin frequently promised to have it surveyed, but, as far as I know and believe, it was never done. I heard Fannin say: 'Manson Harwell, I am ready to put you in possession of 1,000 acres of land, including the residence, as your property.' This was in the presence of Ishmael and several others, was in the fall of the year 1864, and was at the homestead, where Littleton Harwell died." Plaintiffs put in evidence, also, the testimony of Mrs. Davenport, which tended to corroborate the testimony of Mrs. Chambers; also, the tax books of Morgan county for 1865, showing that Manson Harwell returned for

taxation that year, in said county, 1,000 acres of land. Mattie V. Harwell testified: "My father was Littleton Manson Harwell, who died February 19, 1886. I know that he was put in possession of his 1,000 acres of land that was given him under the will of his father, by the executor, Mr. Fannin, in November, 1864. I know that our family moved into the old homestead in the fall of 1864, and occupied the house and grounds around the same for at least three years, moving away in January, 1868. Father employed hands to cultivate the land around the house. There was about 1,800 acres of land in all the tract. I do not know how much of this father cultivated. It was never surveyed or run off,—that is, the 1,000 acres,—that I know of. There were tenant houses all about over this large tract. Father had tenants in some of them; do not know how many. This land has been controlled and managed by Col. Foster and Col. Reese for a long time. We moved away from there after the lands were sold, in 1867, and have none of us ever been in possession since, and no one for us. No land was ever run off to my father under the will. All of plaintiffs are of age except one. I was born in 1856, and others of plaintiffs in 1858, 1861, and 1864. We have lived on land adjoining the land sued for ever since 1868." A witness, who has been county surveyor of Morgan county since 1865, testified: "There are about 1,800 to 2,000 acres in the Harwell place. Defendant controls about 800 acres beyond the house. Reese controls about 1,000 acres around the house. A. G. Foster has owned and claimed and been in the open and notorious possession of all of said lands since 1868, until the division between Foster, executor, and Reese. Reese came in after Foster. I made the survey for the division. There never was any 1,000 acres run off to Manson Harwell, and no survey of any part of the place was ever made for him." Another witness testified that Foster owns none of the land around the house, but the part managed by him as executor, or that portion in cultivation, is about a three-horse farm, worth about \$150 a year rent; that Foster and those who came under him have been in the open, etc., possession of the land since 1868; that plaintiffs live near, etc. Defendant admitted possession of 800 acres, a part of the 1,800.

Mattie V. Harwell et al., children of Littleton Manson Harwell, deceased, and grandchildren of Littleton T. P. Harwell, deceased, and the wife of Littleton Manson Harwell, sued Seaborn Reese for 500 acres of land, a part of 880 acres originally belonging to the estate of Littleton T. P. Harwell, bounded north by lands of Mrs. A. M. Harwell, wife of Littleton Manson Harwell, and children, west by lands of R. M. Thomason, south by lands of F. C. Foster, executor of A. G. Foster, and east by lands of Mrs. Burney and others. Plaintiffs claimed title under the will

of Littleton T. P. Harwell. The evidence introduced by plaintiffs was similar to the evidence introduced by them in the case of the same plaintiffs against Foster, executor (this term). Defendant introduced a bill filed to the September term, 1866, of Morgan superior court, by Isham S. Fannin and Ishmael F. Harwell, executors of L. T. P. Harwell, against A. Jenkins et al., creditors of the estate and legatees of L. T. P. Harwell, to which bill all persons interested in the estate were made parties and were represented in person or by attorney. Manson Harwell, father of the present plaintiffs, was a party defendant. The bill alleged that many of said creditors were suing their claims to judgment, and the estate owed more than \$30,000, its assets consisting mainly in land; that the estate was totally insolvent; that, when the executors took charge of it, the country was in the midst of war; that they sold the perishable property to pay taxes and keep up the estate; that, shortly after they took possession, the Federal army destroyed the personalty, carried off the stock and negroes; that, before the Federal army came, they sold all the personalty on hand for Confederate money, and paid it to creditors as far as the latter would accept it; that L. T. P. Harwell died possessed of 2,000 acres, and by his will gave his son Manson 1,000 acres, to be laid off so as to embrace the homestead; that the executors did not feel authorized to lay off said land until the estate could be properly marshaled, but as Manson was very infirm, with a family and small means, and as the houses were liable to be destroyed if left untenanted, they permitted him to go into the houses and cultivate as much land as he could, until the war should cease and they could wind up the estate; that Manson, taking advantage of this kindness, notified them that he would not surrender possession, but had employed counsel and intended to litigate with them as to whether he should be compelled to surrender the land for sale for the payment of debts due by the estate; and that they (the executors) had no means of paying the indebtedness except by sale of the land. They asked for injunction, and that the estate be distributed under decree of the court. Manson answered this bill, admitting the insolvency of the estate, but denying that he was put in possession of any land for the purpose of taking care of the property of the estate. He set up that he went into possession about December 25, 1865, as devisee under the will, and that Ishmael, one of the executors, assented to the devise, and he understood the other executor to have done so; that a day was appointed for surveying and laying off to him said 1,000 acres, but, when the day arrived, Fannin was absent, and on his return was unwilling, because of the state of the times, to make the survey, and the land was never run off to him. He admitted that the ex-

ecutors were compelled to sell the perishable property to save it from destruction; that the negroes constituted by far the largest and most valuable part of the estate, and, they having been freed, from this and other causes the whole indebtedness of the estate was thrown upon the lands, including not only that which the testator set apart for the payment of his debts, but also that which he intended for said Manson. In his answer he submitted to the court whether the legal title to the land devised to him had not vested in him by the assent of the executors, and whether, under the circumstances of the administration, the right of the creditors to go upon the land bequeathed to him is not so far modified in equity as to restrain them from proceeding against the land until they have made just allowance for the property, which was extinguished by the common government, and was the principal basis of the credit which originated their claims. This answer was sworn to by Manson. The creditors also answered the bill, setting up their various claims, amounting to a large sum. Defendant also introduced in evidence the record on the minutes of the superior court of Morgan county, showing that at the September term, 1867, of said court, Junius A. Wingfield (who prepared and signed the answer of Manson, as his attorney) and N. G. Foster were appointed arbitrators, by consent of parties, by rule taken at that term, which provided that the issues made by the answer of Manson and all other matters involved be submitted to them, and that they make such award as to the issues, and especially as to the sale of the land, as would relieve the executors from responsibility to Manson, and make an award on all the questions raised. Said record showed, further, that the arbitrators met on October 30, 1867, selected an umpire, and, after taking the oath prescribed by statute, proceeded to make their award, which was as follows: (1) That there be conveyed by the surviving executor, Fannin, to the wife of Manson Harwell, 400 acres of land, part of the land known as the "Heard Place" (not a part of the land here in question), to be for the sole use of the wife and children of the said Manson for his life, and then to go to her children gotten, and to be gotten by said Manson; this to be in consideration of all the interests of Manson under the will, and of all promises made by his father to see the wife and children of Manson provided for. (2) That the executor proceed on the first Tuesday of next December, before the courthouse door in Madison, after 30 days' published notice, to sell the entire balance of the land of L. T. P. Harwell, deceased, to the highest bidder for cash, all to be sold in a body; and that he proceed to sell the undivided lands of L. T. P. and Ishmael Harwell, lying in Putnam county on the first Tuesday in February next, after published notice, before the courthouse door in Eatonton; and that he report the same

to the March term of Morgan superior court. The award also provided for the fees of the arbitrators, and also for the fee of Wingfield for his other services in the matter. Defendant introduced, also, the judgment of the court, entered on its minutes at the March term, 1868, making the award of the arbitrators the judgment of the court, it being recited that no objections had been filed, and directing that the clerk enter the same, together with this order, upon the minutes of the court. This judgment, as it appeared on the minutes, was not signed by the judge, nor were the minutes signed by him, but the minutes were signed by the clerk. Defendant introduced, also, a deed from Fannin, executor, to A. G. Foster, dated in December, 1867, covering 1,800 acres of land, being the land of which L. T. P. Harwell died possessed, the deed being made under public sale had in pursuance of said award and judgment, and being properly recorded; also, quitclaim deed from A. G. Foster to Isham S. Fannin to one-half undivided interest in said 1,800 acres, dated January, 1868; also, deed from Fannin conveying his undivided one-half interest to Fannie L. Fannin, dated January 12, 1878. It was admitted that Fannin died in 1878, and that Fannie L. Fannin married Williams. Defendant introduced a deed from her to a one-half interest in the 1,800 acres, made December 17, 1883. On October 20, 1886, Foster, executor, and Reese, partitioned said land between them by mutual consent, and each gave to the other deed to the portion allotted to him. Ishmael F. Harwell, one of the executors, died before the making of the award. The other executor, Fannin, sold the land on the first Tuesday in December, 1867, and A. G. Foster bought it. At the March term, 1869, there remaining still in Fannin's hands some property undisposed of, the other issues made in the bill and the answers of creditors were submitted to arbitrators, under order of court; and in 1870 the return of the arbitrators was made the judgment of the court, their final award winding up the estate. This award found that the statements of the bill as to management of the estate by the executors were true; that Fannin, survivor, had sold all the property of the estate, and had paid the expenses of administration. It found who the creditors were, the amounts due each, the balance in the hands of the executor, and awarded that said balance should be paid pro rata to the note-holding creditors, which payments were made, and amounted to less than 10 per cent. or their respective claims. There was a verdict for the defendant, and, plaintiffs' motion for a new trial being overruled, they excepted.

The motion was upon the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court admitted, over the objection of plaintiffs' counsel, the award and judgment of the court as found upon the minutes thereof, when the

same had not been signed by the judge, nor had the minutes been signed. It was not stated in this ground what objection was made to this evidence when offered. Error in admitting, over objection of plaintiffs, the bill to marshal assets of L. T. P. Harwell, and the award and judgment of the court thereon; the plaintiffs in this case not being parties, either in person or by attorney, to these proceedings. It was not stated in this ground what objection was made to this evidence when offered. Because the court refused to allow plaintiffs' counsel to read in evidence to the jury, after defendant closed his case, the answers of Mrs. Chambers to the fourth direct interrogatory sued out in this case, which was offered to show collusion at the sale of the land in December, 1867, between A. G. Foster, Isham S. Fannin, and E. H. Lawrence. This answer was as follows: "Yes; I heard the agreement—Mr. A. G. Foster and Mr. Fannin with Mr. E. H. Lawrence—about some land belonging to the estate of Littleton Harwell. I heard Mr. A. G. Foster and Mr. Fannin tell E. H. Lawrence that, if he (Lawrence) would not bid against A. G. Foster and Mr. Fannin at the sale of the land, they would let him (E. H. Lawrence) have as much as he wanted at the same price they gave for it. I heard them make the proposition before the land was sold. Manson Harwell carried me to Madison to see Mr. Fannin on some business; and, when I went into Mr. Fannin's office, Mr. A. G. Foster, Mr. Fannin, and E. H. Lawrence were all there talking about the sale of the land, and I sat there until the agreement about the land was finished. Lawrence agreed to let Foster and Fannin bid the land off. I could not speak to Fannin about my business until Foster and Lawrence left. The land was sold in December, 1867; that is, the residence, with 1,000 acres of land." This answer does not appear in the bill of exceptions, but does appear in the record, with pencil marks drawn across it, and the statement upon the margin of the page upon which it appears that it was objected to, and the objection sustained.

E. F. Edwards, George & George, and J. C. Key, for plaintiffs in error. Foster & Butler, for defendants in error.

PER CURIAM. Judgment in both cases affirmed.

(97 Ga. 263)

HITCHCOCK v. LATHAM.

(Supreme Court of Georgia. Aug. 5, 1895.)

EXECUTION FOR TAXES—SIGNATURE OF COLLECTOR
—BRIEF OF EVIDENCE—REVIEW.

1. Where objection was made to the introduction in evidence of a tax execution on the ground, as alleged, that the name thereto, purporting to be that of the tax collector, was "in printing, as it came from the printing office," and therefore the execution did not bear the genuine signature of the tax collector, and there

was nothing to show when, where, or how the name of the tax collector had been affixed to the execution, but it affirmatively appeared that this paper had come into the sheriff's hands; that he had acted upon it as a legal execution, and, in so doing, had levied upon, advertised, and sold land,—it will, in the absence of further proof on the subject, be presumed that the printed signature was authorized by the tax collector, and that he issued the execution as his official act.

2. The question ruled upon in the preceding note being the only one which can be determined by this court without reference to the so-called brief of evidence, and that document not having been prepared in conformity to law, but, to a large extent, consisting of questions and answers, and also containing reports of lengthy colloquies between court and counsel, and other unnecessary, irrelevant, and superfluous matter, this court will not examine it for the purpose of determining whether or not errors were committed either by the court or the jury.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action in ejectment by J. T. Latham against Benjamin Hitchcock. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

Latham sued Hitchcock, in ejectment, for lot No. 949 in the Twentieth district and Twelfth section of Haralson county. The only plea interposed was the general issue. Plaintiff relied for recovery upon an execution issued against the land, for state and county taxes for 1885, by A. Trantham, tax collector; levy of the execution on the land by the sheriff, as wild land, on December 29, 1885; sale of the land by the sheriff to plaintiff, as the highest bidder; and deed from the sheriff to plaintiff for the land, under said sale. There was a verdict for the plaintiff for the premises and \$52.50 mesne profits. Defendant's motion for new trial was overruled, and to this ruling he excepted. The motion was upon the general grounds that the verdict was contrary to law, evidence, etc., and that the finding of \$52.50 mesne profits was excessive, and without any evidence to support it. Also, because the court erred in charging, "You should find for the plaintiff the premises in dispute, and there is nothing for you to decide except the value of the timber." Error in admitting, over defendant's objection, the tax f. fa. issued by A. Trantham, tax collector; the objection being that the name of Trantham, thereto, was in printing, as it came from the printing office, and that the f. fa. did not bear the genuine signature of Trantham. No evidence seems to have been introduced upon the question as to whether the signature was the genuine signature of Trantham. Defendant put in evidence the wild-land tax digest for the year 1885, on which was the following entry: "J. G. W. Brown, Sand Hill, Ga. 40 acres [No. of lot] in the 20th district and 3rd section, \$40." In support of the proposition that said Brown returned the lot in dispute, the defendant offered in evidence three post-

al cards, on which were tax receipts, as follows: "Bremen, Ga., Oct. 10th [the year not on the face of the card, but on the reverse side of the postal card is: "Oct. 10th, 1887"]. Mr. J. G. W. Brown, Sand Hill: Your wild-land tax lot, No. 949-20-3rd, is 40. Please send no stamps. I cannot use them. R. M. Bryant, T. C." Also, tax receipt, to wit: "Bremen, Ga., Haralson County, Ga. Received of J. G. W. Brown 40 cts. tax on wild-land lot 949-20-3. Oct. 28th, 1887. R. M. Bryant, T. C." Also, the following: "Poplar Springs, Ga., May 25, 1888. J. G. W. Brown, Villa Rica, Ga.—Dear Sir: Your tax return for 1888 duly received, and entered on Wild-Land Book, lot 949-20-3rd, \$40.00. Yours, respectfully, J. J. Pope, R. T. R. H. Co." Movant contends that the court erred in rejecting these papers, as they were evidence going to show that the lot given in by Brown, now deceased, was the lot in dispute, as these papers show that Brown continued to give in this same lot. The general tax digests for said county for the years 1881, 1882, 1883, 1884, 1885 were bound in one volume, and the years were designated by a side leather tag attached to the last leaf of each year, and that part which had the tag "1885" also had the figures "1885" on the first or second page. Defendant offered this part, marked "1885," in evidence, to show that Robert A. Sanders returned the lot in dispute on the general digest for 1885. The court rejected this on the ground that it was not proven that this was the digest for the year claimed, and for the further reason that a wild lot could not be returned on the general digest. Movant contends this was error. The defendant proposed to prove by the defendant and by the ordinary, Joe A. Kelley, that at the previous term of this court there was a part of the wild-land digest for the year 1885, on which this lot in dispute was returned as wild land by L. G. W. Phillips. The court rejected this evidence, and movant contends this was error.

W. P. Robinson and Adamson & Jackson, for plaintiff in error. J. M. McBride, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 340)

DAVIS v. JONES et al.

(Supreme Court of Georgia. Aug. 12, 1895.)

INJUNCTION—CONFLICTING EVIDENCE.

Upon the conflicting evidence disclosed by the record, there was no abuse of discretion in denying an injunction.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. L. Hardeman, Judge.

Action by Ruthy Anna Davis against B. L. Jones and another for an injunction. To a judgment for defendant Jones, plaintiff brings error. Affirmed.

The following is the official report:

Ruthy Anna Davis brought her petition for injunction to prevent Jones and the sheriff from dispossessing her of a lot of land in East Macon. The injunction was denied, and she excepted. She alleged the following: In March, 1895, the sheriff sold the land to Jones under justice's court executions in favor of Jones against Warren Davis, the husband of petitioner. While the legal title to the land was in Warren Davis, the equitable title, at the time the suits were brought, judgments obtained, and sale made, was in petitioner. For this land she paid her individual money, acquired by her own labor. Warren Davis paid nothing for it, and never had any interest in it. While he negotiated for the purchase of it from Woolfolk, and in person paid the money therefor, and had a deed made to himself and Lee Gross as tenants in common, none of the money belonged to him, but all to petitioner. She was wholly ignorant of the manner in which the titles were made. She intrusted to her husband the money and the arrangements concerning how the titles should be made, and she believed the property was hers and that the titles were properly made until since the sale by the sheriff, when she was notified by him to deliver possession to Jones. She is informed that her husband became indebted to Jones in 1891 or 1892, and was also indebted to the Central City Loan & Trust Association; that Jones proposed to take up this indebtedness and pay it, provided Warren Davis would transfer to him his deeds to the property, which he did, and gave him 23 or 24 notes, upon which are based the judgments and executions under which the land was sold,—Davis taking from Jones a bond for title. Petitioner was wholly ignorant of the character of the claim held by Jones, the consideration for the notes was in no manner hers, and the transactions, from the taking of the Woolfolk deed to the end, were wholly without her agency and without her consent, and are a fraud on her rights. She is unable to read, had no knowledge that the land was to be sold, did not know it was sold until afterwards so informed by Jones, and was not served with any written notice of the levy. She has, since the purchase of the land, by her own labor and money, made valuable improvements on the same. She charges that Jones and her husband have fraudulently deprived her of any knowledge of the real transaction between them touching her rights. She prays that her husband be declared a trustee in respect of all negotiations relating to the land, that the sheriff's sale be adjudged void, and the deed from him to Jones be canceled, for injunction, etc. Jones answered, denying all the material allegations, and giving the following as the correct history of the matters complained of: In 1887 Lee Gross and Warren Davis, who were brothers, and in whom he had great confidence, applied to him for the loan of \$100 to pay the purchase price of the land in

question, which sum he paid to Woolfolk at their special instance and request. By consent, the deed was left with Jones as surety until each of them should pay their respective shares of \$50, evidenced by their promissory notes, which they afterwards paid, and the Woolfolk deed was returned to them. Subsequently they, as tenants in common, divided the land and executed each to the other a quitclaim deed, and about the same time Warren Davis obtained from Jones a second loan of money, with which he built the three-room house and other improvements on the part of the land falling to him, and subsequently repaid this loan; but afterwards, in 1892, he became indebted to Jones \$65 to \$75 for provisions and supplies, and in November of that year he requested Jones to advance him the balance due of \$48 to take up his loan from the Central City Loan & Trust Association, offering to deed the land to Jones as security for both amounts so due him. In pursuance of this agreement Jones did take up the loan mentioned, and Warren Davis executed to him a deed, dated November 21, 1892, in consideration of the amount due him, and executed 24 promissory notes, falling due each succeeding month until the whole was paid. Jones executed his bond for title conditioned to reconvey the property on payment of each and all of the notes, but Davis never paid but one of the notes, and is wholly in default as to each of the others. After all of them had fallen due, Jones brought suit upon them against Warren Davis, obtained judgments and executions, and, in order to levy the same, filed in the clerk's office his deed reconveying the property to Warren Davis on January 21, 1895, and immediately thereafter the executions were levied, and the property advertised for sale, and it was sold on the first Tuesday in March, 1895, when Jones became the purchaser for \$100, and took the sheriff's deed. On April 6th, Jones and the sheriff demanded possession from the plaintiff, who thereupon begged permission to remain on the lot until the following Monday, by which time she would secure another place and vacate the same. She afterwards refused to do so, and then brought her complaint, which was the first knowledge or intimation Jones ever received that she claimed any title or interest in the property. At the hearing, the petition and answer, both of which were sworn to, were in evidence. Plaintiff introduced, in support of her petition, affidavits of Lee Gross, Thornton Wilbourn, Warren Davis, L. G. Garey, A. O. Bacon, Quinnie Lucas, and C. M. Wiley; also, the record of an exemption under section 2040 of the Code, set apart in June, 1893, by the ordinary on the petition of plaintiff,—her application reciting that she claimed the exemption out of her husband's property, he refusing to take the same, and the attached schedule including certain personalty and, apparently, the land involved in the present case. The ordinary

testified that the application was made on a printed form, the whole of which was not read to the applicant. Among the other statements in the affidavits for plaintiff was the averment that the original purchase money for the land was not borrowed from Jones, as set up in his answer, but was the money of plaintiff, which she had made. Also, that at a time which the witness did not remember, but thought was in July, 1892, plaintiff went to see Jones about a bale of cotton which he had levied on and taken as Warren Davis' cotton, and told Jones the cotton was hers, and he could not take it for her husband's debts, to which Jones replied that it was no more hers than Warren's; that she then stated that she and her children worked and made it, and she would not work on the farm unless she could have what she made, and Jones said he was going to have the cotton, and asked her if the land (referring to the land in dispute) belonged to her, to which she answered that it was her land, that she had paid her money for it, and Jones then said, "I have got the deeds and am going to have the land." Jones introduced, in addition to his answer, the executions and deeds referred to therein; also, the application for loan, made by Warren Davis to the Central City Loan & Trust Association, March 23, 1891, on the land in dispute; one of the statements in this application being that he knew of no claim asserted by any one adverse to the title he offered.

J. W. Preston, for plaintiff in error. R. V. Hardeman & Son, for defendant in error.

PER CURIAM. Judgment affirmed.

(97 Ga. 283)

ATWATER v. RESPESS et al.

(Supreme Court of Georgia. Aug. 12, 1895.)

EXEMPTIONS—VALIDITY.

Where a wife, upon the refusal of her husband so to do, made an application to the ordinary for an exemption of realty out of land belonging to the husband, but not praying therein for any exemption of personalty, the exemption of realty, after being duly set apart and approved by the ordinary, was not, under sections 2003 and 2005 of the Code, void because of the applicant's failure to attach to her application a schedule of personal property belonging to the husband, nor because, in such application, it was incorrectly stated that the husband owned no personal property. The requirements of these sections in relation to the schedule of personalty are applicable only when an exemption in personalty is sought.

(Syllabus by the Court.)

Error from superior court, Calhoun county; J. M. Griggs, Judge.

To property levied on as that of W. T. Respass, Minnie P. Respass and others interposed a claim of ownership. To the judgment rendered, A. E. Atwater brings error. Affirmed.

The following is the official report:

On October 2, 1882, one Hightower obtained judgment in Pike county against W. T. Res-

pass, maker, and Mrs. Atwater, indorser. On March 6, 1886, the execution issued from this judgment was transferred by Hightower to Mrs. Atwater, who is a sister of W. T. Respass; and on May 6, 1891, it was levied on 500 acres of land in Calhoun county, to which a claim was interposed by the wife of Respass, for herself and as agent for his minor children by a former wife,—claimant having applied, April 27, 1891, for a homestead in this land, to the ordinary of Upson county, where the family resided. Her application recites that Respass owns no personal property; that said 500 acres, with 50 acres in Early county, sought to be set apart with the 500 acres, is the only estate owned by Respass; and that he owns no property in Upson county. Under the evidence introduced, the court held that claimant was not bound to attach to her application for homestead a schedule of personal property of her husband, and directed a verdict in her favor. Each of these rulings is assigned as error. The application for homestead was approved by the ordinary of Upson county on July 22, 1891. In evidence appears a deed dated November 1, 1864, conveying the property in dispute to defendant in *fi. fa.* Also, a deed to him from his former wife, dated December 1, 1881, in consideration of \$10 and love and affection for her husband and children, conveying a plantation in Upson county, known as the "Home Place," containing 1,287 acres, with all the stock and implements on said place; also, a plantation of 350 acres, a house and lot of seven-eighths of an acre, in Barnesville, Pike county, and 157 acres of land in Pike county,—in trust for the children named, as well as for the use and benefit of Respass for his life, with power in him to manage and control the property, and to apply the proceeds, and whatever part of the corpus, in his judgment, may be necessary for his support and the support, maintenance, and education of the children, and to make sale of all or any of said property without order of court, or making return of his acts; the property not to be subject to any debt of his, present or future, and at his death to be equally divided among said children, one of whom was named James C. Respass.

W. T. Respass testified: "I employed counsel, as agent for my wife, to obtain homestead. I, as her agent, first spoke to counsel about it. I carried or sent her to Thomaston the day she made application for homestead. She learned from me who my creditors were, and the property I owned. I paid the cost for the homestead to the ordinary. My wife was not present. She inherited the money from her father's estate. She is my second wife. Have been married to her about six years. She owned some money when I married her, spent some of it, and has some of it now. She owned house and lot in Barnesville when homestead was obtained. She knew what property I owned at the time she

made application for homestead, from being generally informed of my business transactions. I don't remember who rendered in schedule of property when homestead was applied for. Counsel looked after obtaining same. I think I carried the money to Thomaston, and gave it to the ordinary to pay for having homestead lands surveyed. Don't remember how long my first wife lived after making the deed of 1881. She had been sick quite a while. We hoped she would get well at the time she made the deed. Physicians did not advise us as to whether she would. Perhaps I owed the debt for which this *f. fa.* is levied at the time the deed was made. I had given the major part of the property included in above deed to my wife in latter part of sixties, or early part of seventies. All the stock, cattle, hogs, implements, and produce on place on July 22, 1891, were derived from handling the property described in above deed made December 1, 1881. If I received any of the above personal property, I invested proceeds in comforts for my family. Said deed was made at instance of my first wife. I did not suggest writing it." J. W. Atwater, plaintiff's husband, testified: "Debt on which *f. fa.* in this case is founded was one which W. T. Respass owed his father, Nathan Respass, years ago, and which his father transferred to plaintiff, as part of her interest in his (her father's) estate. The debt has existed about twenty years. Defendant was owing it at the time, and before, he gave this property in Upson county to his wife, and which is described in the deed of 1881. The two pieces of land in Upson county were worth at least six dollars per acre in July, 1891. Defendant is ordinarily healthy. His life estate or interest in all the property described in said deed was reasonably worth \$1,469 on July 22, 1891. James C. Respass died sixteen or eighteen months before December 11, 1891,—perhaps longer. There has been no administration on his estate. He is the same James C. mentioned in the deed of 1881. W. T. Respass has household and kitchen furniture, and has had it fifteen or twenty years. He had a watch several years ago. I do not know whether he owns it now, or not. He has a gun, and has had ever since I knew him."

L. G. Cartledge and Allen & Sandwich, for plaintiff in error. J. J. Beck and Harrison & Peeples, for defendants in error.

PER CURIAM. Judgment affirmed.

(96 Ga. 254)

GEORGIA SEED CO. et al. v. TALMADGE et al.

(Supreme Court of Georgia. May 15, 1895.)

INSOLVENT BANK—RIGHTS OF DEPOSITARY—APPROPRIATION ON NOTES.

1. Where a bank, having money on deposit with another, failed in business and became insolvent, being at the time indebted to the de-

positary upon promissory notes, the sum total of which exceeded the amount of the deposit, it was the right of the depositary, by way of equitable set-off, to appropriate the money on deposit, as far as it would go, to the satisfaction of such notes, although they had not yet become due.

2. In such case, ordinary checks payable to the order of named persons, drawn upon the depositary by the first bank before its failure, but not made payable specifically out of the fund on deposit, were neither assignments, nor appropriations *pro tanto*, of that fund, so as to bind the drawee to pay the same notwithstanding the drawer's failure.

3. It was the right of the depositary, after crediting the deposit upon the notes it held against the failing bank, to share upon the balance still due, *pro rata* with the depositors of that bank, in a general distribution of its assets in the hands of a receiver who had been appointed to take charge of and administer the same.

(Syllabus by the Court.)

Error from superior court, Bibb county; J. M. Griggs, Judge.

In insolvency proceedings against the Capital Bank of Macon, the Georgia Seed Company and others bring error to review the order of distribution, in relation to the claim of Henry Talmadge & Bro. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

Nottingham & Brunson, for plaintiffs in error. Dessau & Hodges and C. L. Bartlett, for defendants in error.

LUMPKIN, J. The Capital Bank of Macon failed, and its assets were placed in the hands of a receiver. Before the failure occurred, this bank had dealt extensively with Talmadge & Co., a banking firm of New York City. At the time of the failure, the Macon bank was indebted to the New York bankers a considerable sum, upon promissory notes which had not then matured and were partially secured by collaterals. The Macon bank also had to its credit with these bankers, on open account, a considerable sum of money, but less in amount than the aggregate of the notes. Before the failure, this bank had drawn upon the New York bankers a number of ordinary checks, payable to the order of named persons. These checks were general in their nature, and not made payable specifically out of the fund on deposit to the credit of the drawer, or any other particular fund. After the failure of the Macon bank, these checks were presented to the drawees, who declined to pay the same, but, on the contrary, appropriated the entire fund on deposit with them, as far as it would go, to the payment of the notes they held upon the Macon bank, although the notes had not yet become due. Talmadge & Co. accounted fully for all collections made by them upon the collaterals above mentioned, and, in their intervention filed in the present case, offered to surrender to the receiver the collaterals upon which they had been unable to realize. After allowing full credit for all amounts they had received, there still remained a large balance

in favor of Talmadge & Co. upon their notes against the Macon bank, and they prayed to be allowed to share pro rata upon this balance with the depositors of the Macon bank in the distribution of its assets by the receiver. At the trial in the court below, the case turned upon three questions, which will now be briefly stated and discussed.

1. Was it the right of Talmadge & Co. to appropriate the money of the Macon bank on deposit with them, and credit the same upon the notes they held against that bank before their maturity? The doctrine is thus stated in *Waterman on Set-Off* (2d Ed., § 432): "It is deducible from the general scope of the authorities that insolvency has long been recognized as a distinct equitable ground of set-off." The cases there cited abundantly support the text. In *Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank* (Ky.) 13 S. W. 910, it was held that a bank could set off deposits, made by one who subsequently made an assignment for the benefit of creditors, against a debt owing to it by the insolvent, but which had not matured at the time of the assignment. The opinion of Holt, J., in that case, though short, is strong and pointed, and well sustains the conclusion announced. The same rule is laid down in *Nashville Trust Co. v. Fourth Nat. Bank* (Tenn.) 18 S. W. 822, in which case it was decided that insolvency is of itself a sufficient ground for the application of equitable set-off, even where the indebtedness on one side is not due, and that it is immaterial in which party's favor is the unmatured debt. The question is very fully discussed by Pitts, special judge, and the correctness of the decision rendered is amply sustained by numerous and most respectable authorities, among them the case of *Jones v. Robinson*, 26 Barb. 310, which is itself a well-reasoned case, and exactly in point. The doctrine above announced is also recognized in *Schuler v. Israel*, 120 U. S. 506, 7 Sup. Ct. 648. It would be easy to cite numerous, other authorities to the same effect, but we deem it unnecessary. The strong natural justice of the rule stated in the first headnote is so obvious as to almost, if not entirely, carry conviction of its correctness by its mere statement, and there can be little or no doubt that this is one of the many instances in which the law and justice coincide to bring about the right result.

2. The next of the questions above referred to was, did the fact that the Macon bank, before its failure, had drawn checks upon its New York correspondents, bind the latter to pay these checks, notwithstanding the drawer's failure? In that thorough and most admirable work, the *American and English Encyclopædia of Law* (volume 3, p. 226), under the title "Checks," it is stated that there is a conflict of authority whether a check holder may sue a bank upon its refusal to pay a check, the bank having at the time sufficient funds of the drawer for this purpose, but that the weight of authority seems to be against

the check holder's right of action. In *Bank v. Millard*, 10 Wall. 152, it was held that the holder of a bank check could not sue the bank for refusing payment, in the absence of proof that the check was accepted by the bank, or the amount of it charged to the drawer. To the same effect is the case of *Bank v. Whitman*, 94 U. S. 343. It was insisted, however, in the present case, that the checks in question were really assignments or appropriations pro tanto of the funds in the hands of Talmadge & Co., and therefore operated to pass the title to the money into the payees of the checks, and to make it lawfully binding upon Talmadge & Co. to pay the same, notwithstanding the drawer's failure while heavily indebted to them, and the loss they would consequently sustain in parting with the money in settlement of the checks. As already stated, these checks were not made payable specifically out of the fund on deposit with Talmadge & Co., nor out of any other particular fund. They were simply ordinary checks, drawn in the usual form, and payable generally to the order of the persons therein named. This court, in *Baer v. English*, 84 Ga. 403, 11 S. E. 453, has settled the law that a check of this kind, while unaccepted, does not operate as an assignment, legal or equitable, of a debt due by account from the drawee to the drawer thereof; and the decision just cited, as will be seen by reference to the opinion of Chief Justice Bleckley, is fully sustained by numerous authorities. See, also, *Haas v. Bank*, 91 Ga. 307, 18 S. E. 188, and *Jones v. Glover*, 93 Ga. 484, 21 S. E. 50. In the former of the two cases last cited, it was held that, under the particular facts appearing, a jury could legally have inferred an intention to make an equitable assignment in favor of the bank, to whose cashier the bill of exchange was made payable; but it was also distinctly said that, had there been nothing more to indicate such intention than the mere drawing, delivery, and discounting of the bill, no assignment, legal or equitable, of the fund in the hands of the drawee would have resulted. In the present case, no more was done than just above indicated, and consequently the checks referred to were neither assignments nor appropriations of the fund in the hands of Talmadge & Co.

3. The remaining question was, did Talmadge & Co., under the facts stated, have the right to share pro rata, upon the balance due them by the Macon bank, with the depositors of that bank in the distribution of its assets in the hands of the receiver? We think they did. They were, as to this balance, creditors of the Macon bank upon a claim evidenced by promissory notes. In *Belcher v. Willcox*, 40 Ga. 391, the rule was laid down that, when a bank is insolvent, distribution of its assets in the hands of a receiver is to be made in the same order as prescribed in the case of administration, to the extent applicable, except when special preference or postponement is provided by law. And in *Ricks v. Broyles*,

78 Ga. 610, 3 S. E. 772, it was held that a general deposit of money in a bank was a mere loan, and transformed the funds from ready money into a chose in action. In view of these decisions, we see no reason why the claim of Talmadge & Co., for the balance due upon the notes they held against the Macon bank, was not of at least equal dignity with the claims of the depositors of that bank, and we are not aware of any law giving the latter any preference or priority over promissory note creditors. It seems clear, therefore, that the court below was right in holding that Talmadge & Co. were entitled to prorate with these depositors in the distribution by the receiver of the bank's assets.

Judgment affirmed.

(96 Ga. 815)

TALLADEGA MERCANTILE CO. v. ROBINSON, BOYLSTON & McKELDIN CO. et al.

(Supreme Court of Georgia. July 29, 1895.)

ASSIGNMENT—WHAT CONSTITUTES—DRAFT.

1. An ordinary draft drawn by a creditor upon his debtor, and not made payable out of any particular fund, does not, before acceptance, operate as an assignment to the drawee, legal or equitable, of money due by account from the drawee to the drawer of the draft. *Baer v. English*, 11 S. E. 453, 84 Ga. 403; *Haas v. Bank*, 18 S. E. 188, 91 Ga. 307; *Jones v. Glover*, 21 S. E. 50, 93 Ga. 484; *Seed Co. v. Talmadge*, 22 S. E. 1001.

2. The evidence introduced in this case to show acceptance was entirely insufficient for that purpose, and the court therefore erred in adjudging that any part of the fund in controversy should be paid to the payees of the draft.

3. In other respects, no error appears in the judgment rendered by the trial judge, who tried the case without the intervention of a jury.

(Syllabus by the Court.)

Error from city court, Floyd county; W. T. Turnbull, Judge.

Action by the Talladega Mercantile Company against Robinson, Boylston & McKeldin Company and others. There was a judgment in favor of defendants, and plaintiff brings error. Reversed in part.

The following is the substance of the official report:

The Talladega Mercantile Company sued P. T. Pitts & Co. in attachment, and caused summons of garnishment to be served on the Rome Iron Company. The attachment was levied by service of said summons on December 14, 1893. The nature of the answer of the garnishee will sufficiently appear from the report of the evidence hereinafter. The answer was traversed by plaintiff. The Robinson, Boylston & McKeldin Company were made parties to the cause, claiming, on an alleged draft and acceptance, a part or the whole of any sum which might be found due from the garnishee to the defendant. The cause was submitted to the judge below, without a jury. Plaintiff introduced the verdict and judgment in its favor against P. T. Pitts & Co., rendered in the attachment pro-

ceedings, dated June 14, 1894, prior to the present hearing. Claimants Robinson, Boylston & McKeldin Company introduced a draft for \$275, signed P. T. Pitts & Co., addressed to Rome Iron Company, Chattanooga, Tenn., dated Cresswell Station, Ala., November 4, 1893, payable to the order of Robinson, Boylston & McKeldin Company, 30 days after date, for \$275. Also, a letter from claimant to the Rome Iron Company, Chattanooga, Tenn., dated Atlanta, Ga., November 13, 1893, inclosing the draft for acceptance. Also, a letter from the Rome Iron Company to claimant, dated Chattanooga, Tenn., November 15, 1893, returning the draft and stating: "We do not owe Pitts & Company. There may be something due them the ensuing month on charcoal, though we are not sure of this. If there is, they will have to take, according to contract, our three months note in payment." Also, letter from the Rome Iron Company to claimant dated Chattanooga, Tenn., November 18, 1893, stating: "Yours 16th inst. received. We will very gladly hold anything for you on P. T. Pitts & Company account, and make settlement with you at end of month in place of them." Also, evidence of H. M. McKeldin, one of claimant firm: "P. T. Pitts & Co. owed claimants \$257.78, with interest, which was due and unpaid, and claimant received from Pitts & Co. the draft on the Rome Iron Company, and forwarded it to the latter for their acceptance, which draft the latter returned, writing that they made settlement with Pitts & Co. at the end of each month, at which time they would gladly make settlement with claimants as per their contract with Pitts & Co., which was to close account by a 60 or 90 day note. The letter of November 18, 1893, from the Rome Iron Company was not a reply to claimant's letter of November 13, 1893. On November 4, 1893, Pitts & Co. owed claimants \$257.78, and on September 6, 1894, \$257.78 with interest, the debt being in the form of an open account at the latter date." Plaintiff introduced letter of November 16, 1893, from claimants to the Rome Iron Company, which had been obtained by notice to produce. This letter stated: "Yours of 15th, returning P. T. Pitts & Company's drafts, to hand, and we note what you say regarding contract with them. We have written them for B. L. six cars coal recently shipped you by them. We will be glad to accept your note in accordance with your contract with them for amount they are due us, if satisfactory with you." The garnishees introduced four "conductors' bills of lading." One of these was for E. T., V. & G. car No. 20,873, one car "C coal," shipped by Pitts & Co. to the Rome Iron Company at Rome, December 19, 189-. This was indorsed: "Transferred to James L. Anderson. P. T. Pitts & Company." "Transferred to the Rome Chemical Company, Rome, Ga. J. L. Anderson." "Rome Chemical Company, per E. T. McGhee." The second was for E. T., V. & G.

car No. 20,862, one car charcoal, shipped by Pitts & Co. to the Rome Iron Company, Rome, Ga., November 8, 1893. This was similarly indorsed. The third was for E. T., V. & G. car No. 20,874, one car charcoal, shipped by P. T. Pitts & Co. to the Rome Iron Company, Rome, Ga., November 29, 1893. This was similarly indorsed. The fourth was for E. T., V. & G. car No. 20,880, one car charcoal, shipped by P. T. Pitts & Co. to the Rome Iron Company, Rome, Ga., November 11, 1893. This was similarly indorsed. Also, the testimony of J. L. Anderson: "Some time early in November, 1893, I bought of C. N. Pitts the charcoal shipped in E. T. cars Nos. 20,862, 20,880, 20,874, and 20,873. These cars of coal were to pay an indebtedness of Pitts to the Rome Chemical Company, for whom I was acting as agent. I had collected money from the Rome Chemical Company, and loaned Pitts some money to be paid on call. C. N. Pitts is the senior member of P. T. Pitts & Co. The coal was sold to me in Alabama, and delivered on board of cars. Not having a contract with the Rome Iron Company, I had P. T. Pitts & Co. to ship in their name, they having a contract with the Rome Iron Company, and for that reason transferred bills of lading to me as agent for E. T. McGhee & Co., or, in other words, the Rome Chemical Company. It was shipped to the Rome Iron Company, Rome, Ga. I transferred shipping receipt to Rome Chemical Company. Don't know who collected. Suppose they collected. I received satisfaction that they had been paid, and was relieved of any further liability for the coal. In addition to the money borrowed by C. N. Pitts, he owed the Rome Chemical Company in guano notes about \$558. He borrowed only \$200. I cannot give the date of shipping receipts, nor the indorsements. About November 1, 1893, Pitts owed me as agent of McGhee, about \$700. Can't answer accurately as to amounts due at different dates thereafter, but he is due still on guano notes about \$558. He has paid the borrowed money. Don't know whether I got all the shipping receipts at the same time. They will show. Don't know whether I got the coal shipped in either of said cars. The shipping receipts will show. I don't know whether I ever saw this coal. I purchased it to be shipped to the Rome Iron Company by Pitts & Co. before the shipping receipts were made out, and gave credit to Pitts & Co. for each car load as soon as I received statement of receipt of coal. The contract was made with C. N. Pitts, and was verbal. I can't remember what was said. Pitts proposed to pay in that way as the only way he had of paying, and I conferred with McGhee, and he said take the coal. I did not take the bills of lading from Pitts & Co., after the coal had been shipped, as collateral security for a pre-existing debt. The debt against Pitts & Co. does not stand open against them waiting the settlement of this suit." Also, the evidence of L. S. Colyar, president of the

Rome Iron Company: "The iron company agreed to take from Pitts & Co. 10 or 20 car loads of charcoal, to be delivered at their furnace at Rome, Ga., at six cents a bushel, payable in three-months note, dated last of month for charcoal received at furnace during previous month. That is, if charcoal was delivered during, say, the month of June, the iron company was to give its note dated the last of July, payable in three months from date. The contract was verbal. The iron company's furnace is located at Rome, and its business office at Chattanooga, Tenn. I attach to my answers account showing charcoal received, and amounts paid P. T. Pitts & Co. and others, as follows: 'P. T. Pitts & Co., in account with the Rome Iron Co. [showing balance due \$207.18].'" There were also attached to the answer of Colyar notes given in payment for the charcoal, signed by the Rome Iron Company. One of these was dated January 5, 1894, due three months after date, payable to the order of the Rome Chemical Company, for \$153.19. Another was dated February 6, 1894, due three months after date, payable to the order of the Rome Chemical Company, for \$44.31. The third was dated November 2, 1893, due 60 days after date, payable to the order of P. T. Pitts & Co., for \$208.89. All of these notes were marked paid. On the last-mentioned note were the indorsements: "Pay to the order of Caldwell Bradshaw. P. T. Pitts & Co." "Caldwell Bradshaw." Also, an indorsement by a bank in Birmingham, Ala., to a bank in Chattanooga, for collection for account of the Birmingham bank.

Hoskinson & Harris and Halstead Smith, for plaintiff in error. C. A. Thornwell, J. W. Ewing and Fouché & Fouché, for defendants in error.

PER CURIAM. Judgment reversed in part, and in part affirmed.

(36 Ga. 706)

FARMERS' CO-OPERATIVE MANUFACTURING CO. v. DRAKE.

(Supreme Court of Georgia. April 15, 1895.)

RECEIVER—APPLICATION FOR ORDER OF SALE.

1. The pendency in this court of a bill of exceptions, assigning as error the granting of an order authorizing a receiver to sell certain property, there having been no supersedeas as required by law in cases of this kind, was no obstacle to the hearing and determination of a second application to sell presented by the receiver to the judge.

2. Under the facts disclosed by the record, there was no error in refusing to vacate the order of sale which had been granted upon the receiver's second application.

(Syllabus by the Court.)

Error from superior court, Spalding county; J. J. Hunt, Judge.

Petition by the Farmers' Co-operative Manufacturing Company against R. H. Drake, receiver of said company, to set aside an order

of sale. There was a judgment for defendant, and petitioner brings error. Brought forward from the last term. Code, §§ 4271a-4271c. Affirmed.

The following is the official report:

Under a petition in the nature of a creditors' bill, R. H. Drake was appointed receiver of the assets of the Farmers' Co-operative Manufacturing Company, a corporation. The petition was returnable to the February term, 1893, of the superior court. On July 4, 1893, before the trial term, the receiver presented his petition to the judge of the superior court for an order authorizing him to sell the properties of the defendant corporation. Objections were made by defendant, and, after hearing evidence, the judge passed an order for the sale of the property on August 22, 1893. To this order defendant excepted, and filed an affidavit in forma pauperis. The case came to the supreme court, and while it was there pending, on February 3, 1894, the receiver presented to the judge of the superior court his petition showing that the sale contemplated by the previous order or decree did not take place at the time named therein, and the property remained in the hands of the receiver; that he was without means to insure it, and it was in great danger of loss by fire; and praying that the order of July 17, 1893, for the sale of the property, be confirmed and enlarged so as to authorize him to sell the property at such other time and upon such terms, etc., as might seem proper. On the same day that this petition was presented the judge passed another order, whereby it was adjudged and decreed that the former order of sale be ratified, approved, and declared of full force in all respects except as herein modified and changed; and further, that the receiver advertise for bids on the property, to be received up to May 28, 1894, and to be opened by the judge on the following day. On February 13, 1894, the plaintiff in error withdrew the bill of exceptions before mentioned, and the judgment therein complained of was thereby affirmed; and in May thereafter, before the close of the time limited in the order for receiving bids, presented its petition for the setting aside of the said order of sale. To this petition the receiver demurred, and made answer; and, after a hearing of the matter on May 22, 1894, the judge ordered that the application to vacate the order of sale be refused. This is the judgment complained of by the present bill of exceptions.

The grounds of the application to vacate the order of sale are as follows: (1) The receiver gave no notice whatever of his application for the second order of sale, and no service of the same was made on an officer or stockholder or creditor of the petition. (2) The court did not call on petitioner or upon any one to show cause why the application should not be granted, but granted the order asked for without any hearing what-

ever. (3) The second order confirmed the first order at a time when the first order was before the supreme court for review. For this reason the second order was coram non judice, and void, being passed when the matter was without the jurisdiction of the court. A change of time when the sale should be made, and the changes as to the manner of making it, did not meet petitioner's objections made in its bill of exceptions to the former order. (4) Said first order was passed in vacation. (5) Said second order was passed before final determination of the cause, prior to any decree of sale or determination of the indebtedness of petitioner, when its indebtedness was contested, and with no sufficient cause shown for sale as to the real property, machinery, and the like; much less as to its notes, accounts, and the like. (6) After passing the first order of sale, and after the same had been carried to the supreme court, the judge, on petition of the present applicant, after full consideration, appointed J. F. Redding as auditor to hear and determine the Walker mortgage claims against petitioner's property, said claim being for \$17,500, and involved in the original creditors' petition, and which the present petitioner denied owing, declaring that the Walkers were indebted to it in a large sum; thereby recognizing that said claims at least required investigation; and said second order was passed without awaiting an auditor's report. (7) If the Walker claims were decided in favor of petitioner, and the mortgages held by the Walkers, issued by themselves as officers of petitioner to themselves as individuals, were canceled as they should be, and the Walkers found due petitioner a large sum, as its books seem to indicate, then petitioner would be able to pay its debts, and be discharged from the hands of the court, as it believes. (8) If the property is exposed for sale at this unpropitious season, it will be sacrificed and lost to petitioner; and, though a favorable verdict to petitioner should be rendered on the trial of the original creditors' petition, the wrong done could never be recalled or repaired. (9) A sale under said order is contrary to the interest of every unsecured creditor of the company who cannot possibly receive anything upon their claims under said order, but might be paid, where uncontested, if the company is successful in the litigation with the contested mortgage and other debts. (10) The \$8,500 of notes and accounts in the hands of the receiver will simply be wasted by a sale, and no reason exists for their sale, but they should be collected by the receiver. If collected, and the contested debts of petitioner are adjudicated in its favor, and the real property, machinery, and the like, are rented for an amount sufficient to pay current expenses (as petitioner insists can readily be done), the just debts of petitioner can be paid, and its property, or the large portion

thereof, restored to it. (11) Petitioner claims that there are no liens upon the property except the first mortgage bonds of 12,000, running through 12 years yet to come, and that on property worth \$42,500, as this property is, it is possible to place a bond, if necessary, of sufficient additional amount to pay off all the unsecured creditors, if not a dollar of its \$8,500 of notes and accounts is collected. No notice was given of the granting of the second order of sale to petitioner or its creditors, that they might have an opportunity to know of the action of the court, and have the same reviewed by the supreme court if they desired. No service whatever was made of the order, no publication of it made, and no advertisement or circulars issued under it, until the time had expired within which a bill of exceptions could be filed. Although said order was passed on February 3, 1894, on representation that the receiver was without means to insure, and the property in great danger of loss or destruction by fire, and the order recites that speedy sale is essential, advertisement was not required to be made until four weeks before May 28, 1894, and the bids are not to be opened until the day after.

The receiver answered, admitting that there has been no final adjudication in favor of the original petitioners at whose instance he was appointed. He has no information that their demands will be denied or contested. A number of creditors have since been made parties plaintiff, and he has made a detailed statement of their claims, which he will set forth. The order appointing him receiver required plaintiffs in this case to give him all the information they could touching the condition of this property. He has not been notified of any contested claims, except that of the Walkers and that of the Middle Georgia Manufacturing & Improvement Co. Upon the latter claim judgment was rendered against petitioner for \$4,236.12, principal and interest, on September 28, 1893, and was not appealed from. The petition for the second order of sale was read in open court in January, 1894. Hammond & Cleveland, who were attorneys of record for plaintiffs, were present, and made no objection when called upon to know if they had any objection to the granting of the order. In addition to the reasons given in the application for this order, the property does not rent for enough to pay the fixed charges. No insurance can be obtained; no insurance company will accept the risk. The property is in great danger of being destroyed by fire, and is covered by a mortgage which requires that it shall be insured to an amount equal to the amount of the outstanding unpaid bonds for the holders thereof who are secured by the mortgage. The ginney has once caught fire. The buildings are in close proximity to the railroad, and are in great danger from fire. The terms of sale are so liberal, respondent does not know why it should not

sell for as much now as at a future time. It is expressly stated in the order that the court has the right to refuse to sell unless in his judgment the price bid is sufficient to justify the sale; and, if petitioners wanted to be heard when the bids were opened, the court certainly would have heard them in filing any good reason why the bids should be rejected. The order provides that, if a sale is not made, the property shall at a future time be exposed to public sale, and that a sale shall not be consummated without the approval of court. Respondent has exercised all reasonable diligence to collect the notes and accounts due. His success in making collections has not been flattering or encouraging. He has made careful investigation of the process of collection, and is induced to believe that as much money would be realized by the sale as would be by the collections, over and above the expenses of the receiver. All these notes and accounts are hypothecated to Walker and Mrs. Wilson as security for the debt which they claim against the company. Respondent believes it is to the best advantage of all concerned that the sale take place as speedily as possible. He believes the only parties who are objecting to this sale are a few of the stockholders of the petitioning corporation, who were connected with the lease of last year. On the first application for sale W. E. H. Searcy testified in open court that he thought the property would rent for \$2,500 a year, and immediately thereafter he, for himself and others, made a bid for the rent of the property at the rate of \$1,550. This amount is not enough to pay the fixed charges on the property. As there is no way of procuring insurance, and as the property is in daily danger of being consumed by fire, and as the bondholders have no security except the preservation of the building or the sale of the property, the parties who are litigating should be required to give bond for the plant to secure the secured and unsecured creditors such judgment as they may obtain, that these creditors whose claims are not contested shall not be held or delayed by the litigation of Walker or the other matters that they are not interested in. The plaintiff company is indebted in a sum approximating \$35,000, not including the Walker debt, nor the expenses of the receiver or of this litigation. This is more than the plant can be sold for, and, the company being totally insolvent, petitioner cannot expect to pay out or resume control of the business. The rental cannot be increased, and that will not pay the fixed expenses, which, not including the expenses of the receiver, are: Taxes, \$432; interest on bonds, \$960; interest on receivers' certificates, \$432,—making a total of \$1,712; showing a deficit of \$162. This does not provide for the cost of insurance if it could be obtained, which is \$740; nor for the wear and tear of the machinery, and the cost of keeping the building in a condition to be used;

nor for the decrease in the value of the property. Respondent has exercised, in the management of the property, the best care in his power, for the best advantage of all concerned. He has no interest in it except that it be run to the best advantage of the stockholders and the creditors of the company.

The grounds of demurrer to the application are as follows: (1) The petition is not paraphrased as required by law. (2) It is not verified as required by law. (3) There is no prayer for process. (4) No cause of action is set forth, and no legal reason shown why the parties should be heard. (5) Plaintiffs have no standing in court. They have ceased to exist as a corporation. The matters therein have been adjudicated by the superior and supreme courts. (6) No sufficient reason is shown for granting the relief prayed for.

At the hearing the affidavits in behalf of petitioner were as follows: Searcy is president of petitioner. He received no notice of the application of the receiver to sell its property, made on February 3, 1894, and had no opportunity to defend the company in that proceeding, though he desired to do so. He is informed and believes that no notice was given any officer or agent or creditor of the company of the application, or of the passage of the order, and he was thereby denied the right of having the granting of the order reviewed by the supreme court within the statutory time. For a number of months J. J. Elder has rented from the receiver the mill, etc., the property of the petitioning company, paying \$1,550 therefor. From the operation of the mill and machinery he has received very reasonable profits. He would be willing to rent the property for another year from the expiration of his lease in July, 1894, for as much as he is now paying for it. The property is being run and guarded with the utmost care, and is so closely watched that there is but little danger from fire. Elder has been informed that insurance could be obtained on it at \$37 per \$1,000. He is a stockholder and director of the company, and was never notified of the second application by the receiver for an order of sale, until after such order had been passed. Stillwell is secretary of the company, and was never notified of the second order of sale until after it was passed. To the best of his knowledge and belief, none of the officers or directors of the company were so notified. The present condition of the mill, machinery, and real property of the company is good. The property is being carefully watched, to prevent danger from fire, and is being operated with a nice profit to the lessee. Hammond & Cleveland were employed by the company to defend the application made in July, 1893, for the sale of the plant of the company, and to carry the order of sale to the supreme court, and to represent the defense of the company to the foreclosure of the mortgages of the Walkers and Mrs. Wilson before the auditor

only. Their connection with the matter of the first order of sale was at an end when the case was withdrawn from the supreme court by instruction of Searcy, the company's president. The case before the auditor is still pending. They were told by Judge Boynton that he was going to apply for the order to sell the plant, and asked by him to acknowledge service on the application, which they declined to do, because they had no authority. When the application was being heard, the judge sent for them, and asked them what they had to say. They replied they had nothing whatever to do with the matter; they had no authority from the company either to consent or object to the order; which was true.

The affidavits of the receiver and of three persons admitted to be experts as to machinery were as follows: The receiver had printed about 150 circulars, announcing the order of court authorizing the sale, giving the terms thereof; and about the middle of April these were distributed, mailed to creditors, and delivered to every attorney at law known to be interested in the litigation of the company. The receiver is not a contemplated purchaser of the property in any way, directly or indirectly, and will not be interested in any wise in the purchase. The recognized rule for the depreciation of machinery in use is 5 per cent. per year; not in use, unless well cared for, 10 per cent. per year. Depreciation in value of houses, such as mills, is 2 per cent. per year when in use, and 2½ per cent. when not in use. These estimates do not include the decrease that may occur by reason of improvements on machinery, which will decrease the value materially in proportion to the efficiency of the improvement. The property of the plaintiff company is depreciating in value at the rate of from 5 to 10 per cent. per annum.

Harrison & Peeples, for plaintiff in error.
J. S. Boynton and R. T. Daniel, for defendant in error.

PER CURIAM. Judgment affirmed.

(41 S. C. 551)

STATE ex rel. ROSS v. KELLY.

(Supreme Court of South Carolina. April Term, 1894.)

Application by the state, on the relation of Ross, for a mandamus against one Kelly. Rule issued returnable on Tuesday, November 28, 1893. Pending negotiations for a settlement, nothing was done; and on the call of a special docket, on May 7th, no counsel appearing, the case was continued. May 28th counsel for respondent moved for an order vacating the continuance, and asking for immediate hearing. Denied.

Charles Inglesby, for the motion. T. W. Baco, opposed.

PER CURIAM. The court ruled that there could be no hearing until return filed, and that it was within the discretion of the court to vacate the order or refuse its vacation. Motion refused.

